



**INSTITUTE FOR POLICY ANALYSIS OF CONFLICT**

# **JUSTICE AT THE CROSSROADS IN TIMOR-LESTE**

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## I. INTRODUCTION

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Judicial reform in Timor-Leste is at a crossroads, and the path taken will determine whether one of the world's youngest countries can develop an independent, accountable and competent judiciary. The choices it now faces were highlighted by the government's sudden expulsion of international judges in October 2014 that some saw as political intervention and others as a necessary measure to deepen reforms that have been quietly taking place since at least 2013. Judicial reform is part of a larger process of transition from an older generation of leaders steeped in the experience of exile and resistance to a younger generation shaped more by the Indonesian occupation and the first decade of independence. The question now is whether both have the will to undertake the sweeping overhaul of the legal system needed. The detailed recommendations at the end of this report suggest a possible way forward.

The judiciary's problems are rooted in the violent upheaval that took place in 1999 in what was then the Indonesian province of East Timor, after a United Nations-supervised referendum produced an overwhelming vote to separate from Indonesia. The UN assumed temporary responsibility for the country's administration, placing many of the most essential judicial functions in the hands of international judicial officers and advisors. Fifteen years later, the judiciary of independent Timor-Leste was still heavily dependent on Portuguese-speaking international personnel. Then, in October 2014, almost all of the internationals still employed as judges, prosecutors, public defenders and investigators were ordered to leave the country within 48 hours. Trials in which international judges were participating were stopped. The country's national judicial training facility for judges, prosecutors, and public defenders ceased to function. The fate of pending cases of serious crimes against humanity from 1999 was thrown into question. The mechanism for promoting judges, required for key positions in the judiciary including the eventual Supreme Court, ceased to exist.

There were two major interpretations of the expulsions. The first view, widely heard at the time, was that they were politically motivated to increase the government's control over judicial functions and the legal profession. The second view, gradually gaining ground, is that the systemic problems were so severe and the dependence on internationals of dubious competence so great that political intervention was a prerequisite of real reform.

However one interprets the expulsions, there is a broad consensus across the government and political elite that major change is required and that the era of international dominance is over, leaving the Timorese to finally take full responsibility for their judicial institutions. The crucial question now is whether the current government's planned reforms—in legal education, professional training and access to justice—will succeed in providing a judiciary that meets its citizens' needs. The alternative will be "Timorisation" without meaningful reform.

This report is based on three months of primary and secondary source research, including a field visit and court monitoring in Dili, Timor-Leste during February 2015 by the authors, David Cohen and Leigh-Ashley Lipscomb. The authors conducted 39 interviews with representatives of the justice sector, civil society organisations, service providers, government officials, the United Nations and the international donor community. The Court of Appeal and the Judicial System Monitoring Programme (JSMP), an NGO, provided the majority of statistical data analysed in this report.

## II. HISTORICAL CONTEXT

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Until 1999, it was almost impossible for East Timorese to become a magistrate or lawyer and practice in the formal judicial system of what was to become Timor-Leste.<sup>1</sup> Under the Portuguese colonial administration (1702-1975), punishment for crimes and resolution of civil matters between Timorese were mostly relegated to non-formal, oral legal traditions (*lisan*) under the ultimate authority of local chiefs and traditional elders, whose power frequently depended on the patronage of the Portuguese authorities.<sup>2</sup> The formal, statutory justice system was the realm of the native European and mestizo elite (Portuguese-speaking *assimilados*), used when a foreign national was involved or the security of the state or society was perceived to be at risk, as in cases of murder, failure to pay taxes or rebellion.<sup>3</sup> The Portuguese never made tertiary education available within the colony and the government did not provide means for East Timorese to study in universities in Portugal until the 1960s.

For the 24 years of Indonesian rule (1975-1999), East Timorese were effectively banned from serving as prosecutors, public defenders or judges, although they could become civil servants in other areas, pending approval from Indonesian military screening committees. Most ordinary crimes were tried by district courts in East Timor; trials of major political dissidents usually took place in Jakarta or Central Java. Village councils created by the Indonesian government mediated low-level conflicts, while traditional Timorese courts had jurisdiction over civil, criminal and family law cases that the government considered private matters.<sup>4</sup> Members of the clandestine independence movement sometimes referred matters to *justisa popular*, the quasi-military justice system established by Front for the Liberation of Independent Timor-Leste (FRETILIN). A guerrilla commander oversaw arrests and investigations into offences considered treasonous and a panel of civilians decided guilt by majority vote. A senior commissar of FRETILIN's political wing decided the punishment. All "prosecutors" and "judges" were male, as they were in traditional courts. Other crimes, such as petty theft, were sometimes addressed within the clandestine movement through public confession sessions.<sup>5</sup>

In May 1999, a UN-supervised referendum authorised by the Indonesian government set what was then the province of East Timor on the road to independence. The overwhelming vote to separate from Indonesia led to an eruption of violence that destroyed much of the country's infrastructure. Indonesia formally ceded authority to the United Nations in October 1999,

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1 Following rebellions against colonial rule in the late 1880s, a government edict required all formal judicial powers be vested in Portuguese colonial authorities and removed from Timorese kings. See Geoffrey Gunn, "History of Timor", Centro de Estudos sobre África e do Desenvolvimento, Universidade Técnica de Lisboa, 1999, available at [pascal.iseg.utl.pt/~cesa/history\\_of\\_timor.pdf](http://pascal.iseg.utl.pt/~cesa/history_of_timor.pdf). Post-World War II Portuguese administrative systems and the Indonesian regime permitted Timorese to be police but in low-ranking positions. From 1977 to 1983, Indonesian military authorities exercised control over criminal justice. The military continued to influence the courts even after some matters were referred to police, instructing prosecutors, judges and public defenders on the expected outcomes of individual trials. In the 1980s Indonesian authorities expanded access to secondary and tertiary education to allow a limited number of Timorese who passed competitive exams to study law in Indonesian universities outside of East Timor but no independent lawyers practiced. See Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR), *Chega!*, Dili 2005, pp.20-22.

2 The precise dates of colonial administration are debatable. The Portuguese were present and exercised political authority in some parts of what is now Timor-Leste from the 1500s. In 1702 the first Portuguese governor was installed in Oecusse enclave.

3 For further information on the legal system during Portuguese and Indonesian rule, see Tanja Hohe and Rod Nixon, "Reconciling Justice: 'Traditional Law' and the State Judiciary in East Timor – Final Report", United States Institute of Peace, 2003; Laura Adelaide Grenfell, "Legal pluralism and the rule of law in Timor-Leste", *Leiden Journal of International Law*, 2006, 19 (2), pp. 313-314.

4 Hohe and Nixon, *op. cit.*, pp. 27-28. Some issues and crimes that are considered the jurisdiction of formal legal systems were considered private, family matters under Portuguese and Indonesian rule, including divorce, adoption and domestic violence.

5 This system did not remain static throughout the Resistance. For more information see CAVR, *op. cit.*, pp. 12-14. The Museum of Resistance archives in Timor-Leste contain some records of referrals, investigations and decisions by these mechanisms. Several of these documents are available online at <http://amrtimor.org/drt>.

leading to the establishment of the United Nations Transitional Administration in East Timor (UNTAET).<sup>6</sup> In late 1999, to replace all the Indonesian officials who had left, UNTAET installed international judicial personnel to perform the core functions of the justice sector, alongside a cohort of 60 Timorese trainees with degrees in law, mostly from Indonesian universities.<sup>7</sup> Four district courts of first instance, in Dili, Suai, Oecusse and Baucau, were re-established to adjudicate ordinary crimes and an appeals court and mechanism to adjudicate serious crimes, including crimes against humanity and war crimes, was created.<sup>8</sup> In June 2000, Timorese judges began to try cases in the formal courts for the first time, primarily as the minority members on three-person internationalised judicial panels.

The UNTAET-run system was conceptually flawed from the start, making allowances for political intervention and installing a number of individuals who failed to uphold basic judicial standards.<sup>9</sup> The hybrid national-international justice system developed in a way that did not allow either the international personnel or the Timorese to have full control over administration of justice and thus did not require anyone take full responsibility for its failings.

Once Timor-Leste became independent, on 20 May 2002, it was a matter of time before the new government began changing the UNTAET system. From the beginning, the country's new political elite, including several jurists who returned from exile in 1999, was intent on adopting a Portuguese system – even though the majority of the population did not understand Portuguese and was not familiar with its legal system. It was a way of underscoring that Timor-Leste was liberated from everything Indonesian. Among the most active proponents were Mari Alkatiri, Timor-Leste's first prime minister and head of the FRETILIN party, and Ana Pessoa, minister of justice and later prosecutor-general, both of whom had studied law in Mozambique, and Cláudio Ximenes, a judge in Portugal who became the head of the appeals court.<sup>10</sup>

In 2004, senior members of the government, reportedly including Alkatiri, Pessoa and Ximenes, working with the United Nations Development Program (UNDP), decided to retrain the younger Timorese who had been appointed by UNTAET and had been working alongside international jurists as judges and prosecutors.<sup>11</sup> They set up a Legal Training Center (LTC), modeled on the one in Mozambique. The LTC administered a highly politicised exam that determined who graduated and received permanent judicial appointments and which career track they would pursue (judge, prosecutor or public defender).<sup>12</sup> Every Timorese member of the judiciary failed. As a result, despite legal credentials and four years of direct work experience, the younger Timorese were kept on precarious, non-permanent contracts while they underwent a further three years of training in which instruction in Portuguese language and law was afforded precedence over preparation to effectively carry out judicial functions.

6 On 19 October the Indonesian legislature ratified the results of the referendum and repealed the 1976 legislation (Law 7/1976) on the incorporation of East Timor into Indonesia. UNTAET was established by UN Security Council resolution 1272 on 25 October 1999 and took over administration of the territory.

7 Security Council Resolution 1272 (1999), gave UNTAET authority to administer justice in East Timor.

8 The structure of the four regional courts and their locations is the same as the Portuguese colonial era.

9 The best-known example of political intervention involved the arrest warrant issued by an international judge in the Dili District Court against General Wiranto and other senior Indonesian officials for crimes against humanity in 2004. Then President Xanana Gusmão objected, and the arrest warrant was never forwarded to INTERPOL. The UN refused to acknowledge the warrant. For further examples, see David Cohen, "Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future," *Stanford Journal of International Law* 43 Winter 2007 and "Indifference and Accountability: the United Nations and the Politics of International Justice in East Timor", East-West Center Special Reports No.9, June 2006.

10 Manuel Tilman, who had studied and practice law in Macau, was also a proponent of the Portuguese model. Although less politically prominent than the others, Tilman was influential as the leader of the Association of Timorese Heroes (KOTA), a minor political party; a member of parliament (2001-2012); and the head of the Association of Timorese Lawyers from 2012 until 2014.

11 JSMP, "Overview of the Courts in East Timor in 2004" Dili, 17 December 2004.

12 See "Indifference and Accountability", op.cit., on the equally politicised and deeply flawed examination in 2004 that failed every Timorese member of the judiciary and relegated them to a further three years of Portuguese language training.

Some of the younger jurists who failed the exam, or received marks lower than what the graders determined should be the minimum score for judges, were assigned to serve as prosecutors or public defenders, positions the examiners saw as less important. Some resigned; others transitioned to other careers. Since 2007, when the first set of Timorese judges received permanent appointments and elections brought about a change in government, several of these jurists, who have not forgotten the humiliation they endured, have become politically influential as members of what some call the “new generation” (*gerasaun foun*) of political leaders. They include Cirilo de Cristovão, a long-time member of the Superior Council of the Judiciary and defence minister since February 2015; Carmelita Moniz, president of parliament’s Commission A, responsible for law and justice issues; and the current prosecutor-general, José da Costa Ximenes.

In 2014, the resignation of Claudio Ximenes from the appeals court and the appointment of the current chief justice, Guilhermino da Silva, marked a significant transition from the older to the new generation. In virtually all interviews, senior governmental officials, jurists, parliamentarians and civil society members suggested that the time for Timorisation in the justice sector had come. That conviction provides the basis for the current broad political consensus on the need for a reform agenda. Still unclear, however are what form that agenda will take and whether it will be effectively implemented.

### III. THE OCTOBER EXPULSIONS

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On 24 October 2014, in closed session, the parliament passed a resolution calling for the termination of contracts of international personnel working in the courts, the public prosecutor’s office, the public defender’s office, the Anti-Corruption Commission and the Legal Training Centre and an audit of the judiciary. The government immediately issued a resolution that confirmed the termination.<sup>13</sup>

In response, on 28 October, Chief Justice da Silva issued a letter stating that the resolutions were not legally binding, and instructing all judicial personnel to continue working. There was a flurry of international and local civil society advocacy defending the principle of judicial independence but it had no impact.<sup>14</sup>

On 31 October, in a further resolution, the government revoked the visas of five judges, two prosecutors and an investigator working at the Anti-Corruption Commission and gave them 48 hours to leave the country. In the end, seven international judges and four prosecutors from Portuguese-speaking countries departed.<sup>15</sup> In the face of a storm of protest and questions about the legality of the expulsions, Prime Minister Xanana Gusmão on 4 November went on national television for more than an hour, expounding on the weaknesses of the judicial sector, its impact on the economy, and justifying the government’s actions. On 7 November, to document the information and arguments given during the prime minister’s presentation, the government published excerpts of analysis from a professional international legal evaluation of mistakes made by the courts and international prosecutors in litigation involving a petroleum tax.<sup>16</sup>

13 See Parliamentary Resolution 11/2014, 24 October 2014 and Government Resolution 29/2014, 24 October 2014 (unofficial English translations available at [laohamutuk.org](http://laohamutuk.org)).

14 See Associação Sindical dos Juizes Portugueses (ASJP), “UIM Resolution about the Portuguese Judges Working in East Timor,” 11 November 2014; Amnesty International, “Victims’ rights and independence of judiciary threatened by arbitrary removal of judicial officers,” 21 November 2014; Law Council of Australia, “Media Statement: Timor-Leste” 4 December 2014; American Bar Association, “Statement of American Bar Association President William C. Hubbard Re: Judicial Independence in East Timor,” 17 December 2014.

15 See Judicial Systems Monitoring Programme (JSMP), “Dismissal of international officials and advisors in the Timor-Leste judicial sector,” December 2014.

16 See the televised address of 4 November 2014 at <http://www.laohamutuk.org/Justice/2014/14/Judges.htm>. The presentation is available at <http://timor-leste.gov.tl/?cat=32&lang=en>. See also Asia Foundation, “Legal Note on Government Resolution N° 32/2014, 31 October 2014,” 4 November 2014, available at [www.laohamutuk.org](http://www.laohamutuk.org).



Speculation about links between the dismissal of the international personnel and pending corruption cases against Timorese political leaders was rampant.<sup>17</sup> The events coincided with the prime minister's written appeal to the president of parliament on 22 October to refrain from removing the immunity from prosecution enjoyed by members of the government. The letter mentioned no names but media reports suggested it could have been prompted by judicial corruption investigations into the finance minister and president of parliament, even though the removal of immunities is not required in all cases to detain, arrest or proceed to trial.<sup>18</sup> The timing of this letter combined with the swift passage of the government resolution on 24 October led to suspicions that the prime minister had engineered the parliament's resolution to oust the internationals serving directly in the judiciary. One of those expelled, José Brito, a former Portuguese police officer working at the Anti-Corruption Commission, intimated that members of Xanana's family were under investigation for corruption.<sup>19</sup> His media appearance and those by Gloria Alves, a Portuguese prosecutor, and Pedro Raposo Figueiredo, a judge, fed conspiracy theories that their expulsion was part of Xanana's strategy to avoid prosecutions.<sup>20</sup>

No information to date can definitively tie the expulsions or the call for a judicial audit to corruption cases, however. Trials and convictions of high-level public officials continued without significant disruption despite the removal of international personnel.<sup>21</sup>

A report published in a leading Portuguese newspaper, *Público*, in November 2014, gave a different version of events. The report claimed that Xanana had written an eleven-page letter to members of parliament outlining accusations against the judiciary. He reportedly charged that there had been contacts between private interests and the Superior Council of Magistrates in an attempt to influence the judges who would be assigned to litigation cases involving the major oil companies, which the council allegedly neither reported nor denounced. According to *Público*, Xanana also contacted Portuguese Prime Minister Pedro Passos Coelho in October to inform him that he had proof of contact between judicial actors in Dili and Conoco Philips, one of the oil companies engaged in litigation against the state.<sup>22</sup> These allegations remain entirely

17 See for example Alistair Wyvill, "Report on relations between the Judiciary and the Government in Timor-Leste following investigations in country between Sunday 16 November 2014 and Tuesday 18 November 2014", 20 November 2014, available at [www.laohamutuk.org](http://www.laohamutuk.org); and Tom Allard, "Exclusive: Timor PM protecting 'corrupt' Cabinet members", Sydney Morning Herald, 26 November 2014.

18 An alleged copy of the letter from Xanana to parliament is available at <http://www.laohamutuk.org/Justice/2014/XLetter-Immunity22Oct14pt.gif>. For further information on the judicial investigation of the former finance minister see, "Graft case rocks East Timor's Prime Minister Xanana Gusmao," The Australian, 2 August 2014 and articles on the case in the archives of Suara Timor Lorosae newspaper (<http://suara-timor-lorosae.com/tag/kazu-emilia/>). Re parliamentary immunities see JSMP, "Parliamentary privilege and immunity in Timor-Leste: How to Ensure Equality Before the Law," June 2012.

19 Micael Pereira and Rui Gustavo, "Oficial da PSP expulso de Timor acusa Xanana da corrupção," Expresso online, 8 November 2015. His remarks appeared to be a breach of professional standards to maintain confidentiality regarding investigations prior to indictment.

20 The interview with Alves and Figueiredo can be viewed on You Tube. "Timor Leste - Procuradora fala em interferência de Xanana Gusmão nos tribunais," 8 November 2014, at [www.youtube.com/watch?v=5W1qWIUfmaI](http://www.youtube.com/watch?v=5W1qWIUfmaI). Despite Gloria Alves' claims that she was not associated with the petroleum tax litigation, there is documentation that she was part of the prosecution team in at least one case. See "TDD Halaó Primeiru Julgamentu ba Kazu Kompania Conoco Philips ho Estadu TL," 18 March 2014, [www.mj.gov.tl](http://www.mj.gov.tl). However, she also successfully prosecuted key corruption cases involving senior Timorese diplomats and the national police of Timor-Leste (PNTL) criminal investigations chief in August 2015, which could have been factors in her expulsion. See "Dili District Court sentences defendant to 1 year in prison, suspended for two years, in case of passive corruption and falsification of documents," East Timor Law and Justice Bulletin, 19 August 2014; "Dili District Court sentences former commander of criminal investigations to 9 years prison for assisting 4 Indonesians and another flee Timor-Leste to avoid drug charges," East Timor Law and Justice Bulletin, 15 August 2014.

21 The prosecution of the former finance minister and former vice-minister of health was delayed by the routine filing of appeals by the defence team. On 20 July 2015, the former minister of education and the former director of finance at the ministry of education were convicted of corruption-related crimes under Article 299 of the Criminal Code. See JSMP, "Komunikadu Imprensa: Tribunál Distritál Dili kondena eis Ministru Edukasaun João Cancio tinan 7 prizaun no Diretór Finansa Tarcisio do Carmo tinan 3 fulan 6 prizaun," 22 July 2015.

22 See Barbara Reis and Ana Henriques, "Xanana informou Passos sobre suspeitas de corrupção na justiça de Timor," *Público*, 8 November 2014.

unsubstantiated, though three senior officials interviewed were convinced they were true and suggested they had helped fast-track nationalization of the justice sector.<sup>23</sup>

Of the UN agencies, only the Office of the High Commissioner for Human Rights released a statement on the expulsions.<sup>24</sup> UNDP, whose Justice Sector Programme (JSP) supported the international judges, prosecutors, and Legal Training Centre staff, was silent.<sup>25</sup> Following the expulsions, the majority of its Justice Sector projects were suspended and UN headquarters in New York and the Bangkok regional headquarters sent a mission to Dili in February 2015 to assess and revise the program.<sup>26</sup>

For the Timorese judges who took over full control of the judicial system for the first time, the expulsion and audit represented an attack on judicial independence. They were also worried about their own job security. If Portuguese judges could be removed by parliamentary fiat, then why not Timorese judges as well? The potential impact of that fear was made clear by Chief Justice da Silva, who said there were now sixteen cases pending at the appeals court in which the State of Timor-Leste was a party. Noting that previously some judges had been criticised for not being sufficiently patriotic in their decisions, he said that the judges in the future might feel even more anxious about the political impact their decisions would have.

In his case, those fears appear to have been well founded. On 24 February 2015, the parliament began to debate the legitimacy of his appointment one year earlier.<sup>27</sup> The debate hinged on whether parliamentary ratification was required.<sup>28</sup> The country's ruling party, Conselho Nacional de Reconstrução de Timor (CNRT), questioned the validity of his appointment without such ratification. FRETILIN members were reportedly free to vote either for or against ratifying it. The minority PD party, part of the governing coalition, threatened a walkout in protest against holding debate at all and urged parliament to support da Silva's appointment to avoid further disruptions to the work of the justice sector.<sup>29</sup> Then as suddenly as it had arisen, the issue seemed to vanish. Debate was postponed indefinitely without resolution. The message left behind was that the parliament had the leverage to challenge and possibly remove the chief judicial officer of the country.

23 The allegations may have taken on added weight in the wake of the prosecution in the United States of a former international advisor on petroleum tax law to the finance ministry, Bobby Boye, for the embezzlement of more than \$3.5 million from Timor-Leste. For further information and documentation on the Bobby Boye case, see [www.laohamutuk.org](http://www.laohamutuk.org).

24 See Office of the High Commissioner for Human Rights, "UN Human Rights Expert Urges Timor-Leste to Reconsider Dismissal of International Judges and Prosecutors," 25 November 2014.

25 According to the UNDP Country Representative, the expelled personnel were not on UN contracts. IPAC interview with Knut Ostby, UNDP Country Representative, Dili, 27 February 2015. See UNDP, "Timor-Leste Justice Sector Programme, Third Quarterly Progress Report, July – September 2014," pp. 9-10. IPAC confirmed that until 2013, UNDP was party to the Memorandum of Understanding between the Superior Council of Judiciary and international personnel contracted by it. UNDP also supported recruitment of the international personnel.

26 IPAC interview, UNDP assessment team, Dili, 27 February 2015.

27 The debate was initially scheduled for 18 February 2015 but was postponed until 24 February at the request of one member from each of the four parties in parliament. A requirement of ratification by a legislative body is not per se an infringement of judicial independence but can be part of a system checks and balances. In the case of Judge da Silva, concern arose from the fact that he had been in office for most of a year before parliament thought to initiate a confirmation process together with the October expulsions.

28 The Constitution contains provisions for parliament to ratify the appointment of the head of the Supreme Court (Section 95(3)a), but the Supreme Court has not been established. The law allows the Court of Appeal, for which no ratification of appointments is needed, to act on a provisional basis in the interim. The question is whether or not the interim role should require parliamentary confirmation.

29 "PD Ameasa Walk Out, Fretilin Kontra CNRT", Timor Post, 24 February 2015; "Parlamento volta a adiar debate sobre presidente do Tribunal Recurso", Suara Timor Lorasae, 25 February 2015; "Tinan Ida Ona, PN Foin Hanoin Halo Ratifikasaun ba Prezidente TR", Independente, 24 February 2015.



#### IV. SYSTEMIC AND INSTITUTIONAL WEAKNESSES

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If the October expulsions have opened new opportunities for reform, it is vital that would-be reformers be clear about needs, goals, and strategies in order to avoid the enormous waste of time and resources that has too often characterised past efforts. In particular, the systemic weaknesses of the judicial system need to be thoroughly understood and addressed. They include too few qualified personnel; a training center and professional regulation and disciplinary regime that does not address the legal profession's needs; insufficient transparency; ongoing problems with fair trials and respect for the rights of the accused, as well the rights of witnesses and victims; and problems with the prosecution of sexual violence and violence against children.

##### A. *Human Resources and Access to Justice*

There is widespread agreement that there are not enough judges and not enough courts, but little effort has been made to develop a growth strategy accordingly. A 2009 independent evaluation, endorsed by the justice ministry, recommended a comprehensive assessment of human resource needs “to inform ongoing recruitment and educational planning”.<sup>30</sup> Based on this, the government in 2010 adopted a twenty-year strategic plan. Among other things, the plan acknowledged:

The Timorese justice system is currently too small to serve the entire population, to meet the growing demand and to fulfil its constitutional mandate of applying the law and ensuring the respect for the Rule of Law.<sup>31</sup>

The plan cited several challenges, including the need to strengthen the corps of judges, recruit and train administrative staff, and ensure “the progressive establishment of more judicial districts, based on an effective assessment of needs.” It concluded with ambitious goals for the justice sector and suggested steps to take to get there. The government's endorsement of the plan was a clear acknowledgement of judicial deficiencies, but implementation has been slow and there is some disagreement over how to proceed.<sup>32</sup>

Some of the discord may result from the strategic plan's disjointed approach to resolving the shortage of qualified judicial actors. It sought to add more judges and supporting staff, infrastructure and technology but suggested that the number of prosecutors and public defenders was sufficient; they needed training, however, to equip them to handle the complex cases they would bring before specialised courts to be established in the future.<sup>33</sup> Prosecutors and public defenders thus would be equipped for higher-level prosecutions but judges would not, because there was no suggestion in the strategy that the courts would also need advanced training and specialised personnel to deal with more complex cases. Judges would also outnumber prosecutors, unlike most judicial systems. The timelines in the plan demonstrated the conflict between quantitative and qualitative approaches: all judicial positions are expected to be filled by qualified Timorese within five years, but the goal for ensuring all judicial personnel possess the “competencies, skills and knowledge including on applicable ethical standards to adequately perform their functions” is not until 2030 – fifteen years later.<sup>34</sup>

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30 See “The Justice System of Timor-Leste: An Independent Comprehensive Needs Assessment”, expert report commissioned by the United Nations Integrated Mission in Timor-Leste, 13 October 2009, p. 75.

31 Timor-Leste Ministry of Justice, “Justice Sector Strategic Plan for Timor-Leste (2011-2030)”, 12 February 2010, p.10, available at [www.mj.gov.tl/files/JSSP\\_ENGLISH.pdf](http://www.mj.gov.tl/files/JSSP_ENGLISH.pdf).

32 See also findings of the 2012 Independent Evaluation of the Justice Sector Support Facility, <http://dfat.gov.au/about-us/publications/Pages/independent-evaluation-of-the-timor-leste-justice-sector-support-facility.aspx>.

33 “Justice Sector Strategic Plan”, op.cit., p. 16.

34 Ibid., p. 38.

Timor-Leste now has courts of first instance in only four of its thirteen districts. Does it need one in all thirteen? Arão Nôe de Amaral, vice-president of parliament's Commission A, says yes, to "bring justice close to the people".<sup>35</sup> Chief Justice da Silva wants more district courts in general but says there are not enough judges and court officials to staff them.<sup>36</sup> The public defender's office acknowledges the desirability of expanding into all thirteen districts but says that it would have to be done slowly, because of the lack of human resources – raising the question of which districts should be given priority.<sup>37</sup> The prosecutor general, however, argues that there may not be a need to establish a court in every district because the crime rates differ.<sup>38</sup> The responses underscore the need for a baseline study to understand current needs. Without such an assessment, it is difficult to make projections about how many prosecutors, judges, public defenders and support staff will be required.<sup>39</sup>

Since 2008, mobile courts have been filling the gaps in areas without district courts, using existing personnel.<sup>40</sup> There are serious questions, however, about the quality of the justice delivered. The opportunity costs of removing judicial personnel from their normal duties has also not figured into analysis of the benefits.<sup>41</sup> If mobile courts continue to substitute for permanent courts and are to avoid undermining them, they will need more judges, prosecutors and public defenders.

How many judges should Timor-Leste have? The answer depends in part on how many courts the country will have, but that is not the only consideration. Even with current arrangements, judges are stretched thin. Increasing quantity without quality will not resolve the problems. Chief Justice da Silva said in February 2015 that by the end of the year, there would be a total of 34 judges in the country but when asked if there was a target number identified in order to meet identified needs, he said no.

The departure of the internationals did not by itself affect the numbers issue. Timorese judges had been hearing the majority of cases for years, particularly those that did not require a collective panel, so the expulsions did not dramatically reduce the functioning of the courts.<sup>42</sup> But they did raise questions about how the country was going to fill some of the specialised functions that internationals had played.

For one thing, they brought to a halt the mechanism that determines promotions and salaries for judicial personnel. Timor-Leste has three classes of judges. Under the judicial system adopted in 2002 and modeled on the Portuguese system, performance evaluations, on which promotions depend, are carried out by inspectors-general, who must themselves be Class 1 judges. No Timorese has ever been promoted to Class 1, and all inspectors-general thus far have been

35 IPAC interview with Amaral, Committee A vice-chair, Dili, 24 February 2015.

36 IPAC interview with Chief Justice da Silva, Dili, 23 February 2015. Although he has been quiet on the issue of the judiciary since October 2014, on 5 June 2015 at a ceremony to celebrate the anniversary of the founding of the public prosecution service, President Ruak spoke of bringing justice closer to communities. "Taur Konsidera Justisa T-L Kontinua Infrenta Problema", Suara Timor Lorasae (Notisias Online), 5 June 2015. See also Timor-Leste Ministry of Justice, "Justice Sector Strategic Plan (2011-2030)", *op.cit.*, pp. 14-15.

37 IPAC interview with Sérgio Hornay, public defender, Dili, 27 February 2015.

38 IPAC interview with José da Costa Ximenes, prosecutor-general, Dili, 27 February 2015.

39 UNDP has reportedly been working on a human resource plan for the judiciary since 2013 when it budgeted more than \$78,000 for it. In September 2014 an international consultant began a human resource assessment by devising methods and holding consultations with stakeholders. The project was not completed as of March 2015. According to one UNDP staff member, the courts had "not been open" to the assessment and preferred to conduct their own assessment. IPAC interview with UNDP, Dili, 27 February 2015. See also UNDP, "Timor-Leste Justice Sector Programme Annual Work Plan, 2013"; UNDP, "Justice Sector Programme, Third Quarterly Progress Report", p. 9.

40 There was ad-hoc experimentation with mobile courts earlier for example when the Special Panels for Serious Crimes held several hearings outside of Dili.

41 Opportunity costs included the number of cases that could have been processed if they were not traveling and the costs of witnesses to travel to permanent courts. For more information and analysis of the mobile courts, see UNDP quarterly progress reports for 2014.

42 IPAC interview with judge, Dili, February 2014.

internationals. An inspection for judges, the first since 2011, was due in June 2014, which would have created the opportunity for the five most senior Timorese judges to be promoted to Class 1. Recruitment for a Portuguese judge to perform the inspection was in progress, but due to the cancelling of bilateral programs with Portugal after October 2014, Timorese judicial personnel are stuck in professional limbo. Class 3 judges, who are the majority, have never received an evaluation, critical not only to their own professional development but also to improving the courts. Any consideration of human resource needs thus has to factor in how to fill the function of inspector-general.

Likewise, current law requires internationals to sit on panels hearing serious crimes cases from the 1999 violence. While it was considered an essential provision at the time to ensure impartiality in highly charged cases, it clearly did not envision the nationalisation of the judiciary. Filling the human resource gaps in these areas will require creative and fast-tracked legal solutions.

The Supreme Court and military courts, which are required by the constitution but have not been established, will also need more judges with significant years of experience and specific expertise. Currently, the Court of Appeal, which is not mentioned in the constitution but was created by UNTAET, fills the appellate function.<sup>43</sup> Movement is underway towards the creation of a supreme court but the exact state of its development remains unclear. Chief Justice da Silva said it would come into being in 2016 but noted that the parliament has not yet acted on a proposal to create it – although the construction of the building has reportedly begun.<sup>44</sup> The vice-president of Commission A said the legal basis for the Supreme Court has to come first: more judges will have to be promoted to Class 1, and as noted above, this cannot take place until the position of inspector-general is filled. The creation of military courts was not raised as a concern by anyone interviewed.

Similar issues of recruitment and training arise with prosecutors. The prosecutor-general indicated that the total of 24 prosecutors employed as of mid-2015, with eleven probationary prosecutors taking up positions later in the year, was insufficient to meet demands, especially as there was an increasing need to assign prosecutors to specialised departments, such as for Corruption and Organized Crime.<sup>45</sup> He also raised issues about training, noting that none of the LTC instructors had prior experience training prosecutors.

There is also the issue of support staff. The Public Defender noted that while his office needs more than the 30 defenders now employed, there is also a need for more staff and administrative resources. He said of the 31 clerks in his office, only about half have sufficient knowledge for the job. He also pointed out the discrepancies in funding, with the courts receiving a disproportionate share of the budget available for judicial institutions. In 2014 the courts were allocated approximately \$8.1 million, the prosecution service \$3.7 million and public defenders only \$917,000.<sup>46</sup>

Any assessment of human resource needs should also examine caseloads. While the issue of case backlog has been consistently monitored and reported on by UNDP, JSMP and the prosecutor-general's office, it is worth underscoring the severity of the problem. Caseloads directly affect the time it takes to process cases from investigation to verdict as well as provide an ad-

43 There is no avenue to appeal Court of Appeal decisions, and since the constitution does not provide for it, there is confusion about the procedures that apply. The problems created by the failure to establish a supreme court were highlighted in the appeals made by the defence representing Lucia Lobato in 2013, the former justice minister, and were at the core of the debate over da Silva's confirmation.

44 IPAC interview, Chief Justice da Silva, Dili, 23 February 2015.

45 IPAC interview, Jose da Costa Ximenes, prosecutor-general, Dili, 27 February 2015.

46 This information is based on a joint report from UNDP and Timor-Leste Ministry of Justice, "Avaliação: Relatório Final 2014," pp. 75-81, on file with the authors. It is consistent with the finance ministry budget and budget execution reports published for 2014.

equate defence. Without an accurate workload assessment and target, it will be impossible to determine how many districts require a court, how many judges are required in each district, or how to best allocate resources for the public prosecution and defence services. Only provisional estimates can be compiled, but these data demonstrate how the limited number of judicial actors generates huge caseloads, diminishing the quality of justice provided.

### Approximate Caseload<sup>47</sup>

(Number of Cases / Number of Judicial Personnel)

Personnel	2012	2013	2014
Judges	---	---	129 cases per judge
Prosecutors	345	289	196 cases per prosecutor
Public Defenders	90	60	48 cases per public defender

In sum, all agree that the judicial system is hampered by major human resource problems, but there is no consensus as to how these should be best addressed.

#### *B. The Legal Training Center (LTC)*

Timor-Leste's ability to produce competent judicial personnel depends on the Legal Training Center (LTC), set up in 2003 and funded in large part by UNDP. It has fallen short in almost all aspects and needs a total overhaul if it is to contribute to judicial reform. From the selection process and curriculum to the assessment of qualifications and preparation for professional careers, the LTC has failed to develop a training regime that can produce competent legal professionals and has emphasised Portuguese language over professional preparation. It has employed instructors of questionable experience and qualifications to teach a curriculum that is essentially remedial. Judicial reform will fail unless judicial training and legal education needs are adequately addressed.

The LTC has been in operation for twelve years. A core group of 29 probationary judges, prosecutors, and public defenders spent six years in training before receiving permanent appointments in 2007. Subsequent cohorts have now graduated, and from LTC statistics, might appear to be better qualified than their predecessors. In 2004, as noted, every Timorese taking the "minimum competency" exam failed. In 2015, 32 out of 34 candidates passed. The high pass rate, however, did not signify a dramatic rise in judicial competency but rather increased acceptance of Portuguese language instruction.<sup>48</sup>

The core of LTC is a one-year program that does not distinguish among future judges, prosecutors, and public defenders, in part because neither the participants nor the trainers know what position they will hold. This is a critical failing in the structure of the professional training scheme and one that sets it apart from the systems employed in most civil law countries where

<sup>47</sup> The number of cases for the courts and the public prosecutors was calculated by adding the number of pending cases from the previous year to the number of new cases registered during the year. The caseload from the Public Defenders Office was taken from secondary sources and appears incomplete; it is likely that the number of cases received and overall caseload is higher. The actual caseload will be higher for all professions because the number of personnel used to calculate the ratio included probationary judges and international personnel who do not manage cases alone. For 2012 and 2013, no data was available from the Court of Appeal, but in 2014, with changes in leadership and public information policy, the number of cases pending and received was made public.

<sup>48</sup> In 2005 an LTC administrator suggested that the trainees had failed because they had been reluctant to learn Portuguese and that this was the only way to force them to do so. See "Indifference and Accountability", op.cit., for a detailed account of the examination and its aftermath.

assignment to a professional track is part of the national examination and selection process. In Timor-Leste, on the other hand, all trainees, regardless of where they will wind up, participate as a group in the basic program, which consists of one year of coursework; a practicum, which only involves visiting the various offices of the justice institutions; followed by a selection process that leads to a probationary period in the institution to which they have been assigned. Very little of the time spent in the training program is tailored to exercising the specific function of judge, prosecutor, or public defender.

The course work covers five core topics: the civil code and penal code, the codes of civil and criminal procedure, and Portuguese language. A Portuguese language course takes up 50 per cent of classroom time, and all teaching is in Portuguese.<sup>49</sup> Several features of this program stand out.

The entrance examination to the LTC may be taken in one of the two official languages, Tetum, the national *lingua franca* (sometimes written Tetun) or Portuguese. There is no Portuguese language competency test for admission. This means that participants in the program are receiving instruction in law given in Portuguese at the same time they are learning the language. A year of half-time language instruction in Portuguese is in any event hardly enough to prepare legal professionals to exercise their professional functions in that language. The fact that the courts now operate orally in Tetum makes this arrangement harder to justify.

The four other subjects that make up the core curriculum are also the basic areas covered in the first years of tertiary legal education. Every trainee at the LTC is required to have a law degree and must also pass an entrance examination that focuses on these same subjects. More time would be available for subjects critical to professional practice if half of the instruction time was not devoted to language.

The LTC program includes no practical training in core functions such as brief or judgment writing, case analysis, legal advocacy, and trial management for judges, or similar activities for public defenders and prosecutors, because the trainees have not been separated into different tracks. These are precisely the skills, however, that many legal professionals lack. The problem could be solved by assigning trainees to separate professional tracks from the beginning with a curriculum centered on the knowledge and analytical, writing, and advocacy skills by each track.

The value of the one-year practicum is questionable because it is not oriented towards the professional track that a trainee will follow. Following the practice of most civil law systems, this year of practical training should be spent in an apprenticeship in the institution to which the trainee, if successful, will later belong. This will also enable the final examination to be based on qualifications and competence for the chosen profession as judge, prosecutor, or public defender.

The failure to set trainees on professional tracks at the outset also affects the process of selection. All those interviewed, except the LTC director, said that those who received the highest scores on the examination were assigned to be judges, while the next highest group became prosecutors, and those who scored lowest were assigned to be public defenders. Decisions as to professional assignment are made by Portuguese-speaking LTC instructors and it appears that the higher a trainee's Portuguese proficiency, the better the chance of becoming a judge.

The question of language competence also affects law faculties. Like the LTC, the law faculty of the University of Timor-Leste (UNTL) conducts all of its courses in Portuguese, unlike the rest of the university, which operates in Tetum and Indonesian. According to the dean, this is not a problem, because all its students attended Portuguese-language secondary schools. Although all of the laws are promulgated only in Portuguese, none of the accredited law schools in other Timorese universities teach in Portuguese, providing a chaotic mix of language and legal competency upon entrance to the LTC. As one USAID-funded report concluded, the use of Por-

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49 IPAC interview, Marcelina Tilman da Silva, LTC director, Dili, 23 February 2015.



tuguese “has resulted in there being a much smaller pool of candidates for judicial appointment than there would be if Tetum was also used.”<sup>50</sup>

Public defenders have the lowest priority at the LTC, despite the vital role of defense counsel in ensuring the fairness of judicial proceedings. JSMP reports indicate that LTC training is inadequate, perhaps because the instructors have no experience with the public defender role.<sup>51</sup> The Public Defender wondered aloud in an interview why the LTC did not use Brazilian rather than Portuguese trainers, since Brazil has an independent public defender institution while Portugal does not.<sup>52</sup> These criticisms again point up the need for more function-specific training that can produce a competent pool of judicial actors.

### C. Regulation of the Legal Profession

Timor-Leste needs an independent bar association to enhance the quality and quantity of legal professionals and to deepen judicial independence. In 2008, the parliament passed Law 11/2008 on the Regime for Private Lawyers and the Training of Lawyers, which was amended in 2012 and again in 2013.<sup>53</sup> Stating that a self-regulating legal profession would be “premature”, the legislation regulated the practice of law without creating a bar association, ignoring a 2005 recommendation from civil society.<sup>54</sup> Together they created a short-term provisional mechanism for the registration of Timorese private lawyers, setting strict timelines for them to complete the LTC curriculum or lose their ability to practice. A separate regime was established for foreign lawyers who were licensed in another country and had practiced for at least five years. Magistrates, public prosecutors and defenders who had practiced for more than five years in Timor-Leste were also exempted from the training regime, although they were mandated to go through the LTC by other laws and policies.

When the provisional timeline for training and registration of private lawyers was about to expire in 2012, civil society, international donors and the United Nations mission raised concerns that the private legal profession was facing impending extinction. Most Timorese lawyers could not meet the law’s registration requirements. The registration system was adopted in 2008 and the clock started ticking, but LTC did not begin to conduct the mandatory training course until 2010.<sup>55</sup>

This problem was exacerbated by the limited number of slots available for trainees, with the first class at the LTC capped at sixteen persons.<sup>56</sup> With the number of lawyers allowed to practice severely restricted by the delays in the law’s implementation, access to legal aid and to lawyers who could pursue civil suits was seriously curtailed. In response to concerted national and international advocacy efforts, the parliament hastily passed legislation in 2012 and 2013 that extended the deadline for Timorese and international lawyers to register to practice. Most Timorese lawyers

50 Ba Distrito, “Access to Justice Brief: Court Functionality in Timor-Leste: Functional Assessment of Oecusse and Baucau District Courts”, Dili, September 2014, p. 3.

51 For the best recent example, see JSMP Press Release, “No difference between the final argument presented by public defenders for defendants who totally accepted the legal facts and a defendant who partially accepted legal facts,” 19 June 2015. JSMP regularly documents public defenders asking the court for specific sentencing options when their clients have not plead guilty. For another example, see JSMP, “Case Summaries: Gender Based Violence,” May 2015 (Case #038513 DIM-CR).

52 Interview, public defender, Dili, 27 February 2015.

53 Two laws were promulgated – a decree law by the Government in July 2012 and a law by the National Parliament in December 2012. The parliamentary law passed following public debate over whether the Government had acted within its powers by passing a decree law in this area. The current law in force is Law 1/2013. For further information see, JSMP, “Overview of the Justice Sector,” 2012, p. 13. The second law was passed in December 2012, but was amended in January to correct a typographical error in the registration date (IPAC interview with AATL, Dili, 24 February 2015).

54 See JSMP, “Overview of Justice Sector, 2005”, Dili, January 2006, p. 8.

55 Ibid.

56 JSMP, Overview of Justice Sector, 2008, pp.9-10.

who registered by a March 2013 deadline and met other criteria received an extension until 31 December 2015, without having to attend the LTC. However, because the law had been passed in closed parliamentary session without public consultation, and the content was only published one month before the deadline and then only in Portuguese, most lawyers only found out about it after the deadline. One law graduate said that many are waiting for 31 December, in hopes that legislative changes will give them a new opportunity to qualify to practice.

The problem is that the number of spaces opened at the LTC since 2013 to allow more private lawyers to meet the 2015 deadline has not increased significantly, with less than 40 lawyers entering per year.<sup>57</sup> In contrast, the UNTL law faculty has more than 250 students currently enrolled and an intake of 45 to 50 new students per year for a five-year program, meaning at least another 250 students will graduate within the next five years.<sup>58</sup> But UNTL is not the only source of students, and even if the current LTC intake levels are marginally increased to admit five to ten more students annually, it will not be enough. Four other government-recognised law schools operating in Dili will graduate hundreds more. Additionally, there are significant numbers of Indonesian university law graduates who completed their studies after independence and have returned to Timor-Leste.

The NGO frequently referred to as the precursor to the bar association, the Association of Lawyers in Timor-Leste (AATL) had a membership of approximately 500 persons in Dili as of July 2015, with an estimated 60 per cent having graduated from law schools in Indonesia and 40 per cent from law schools in Timor-Leste.<sup>59</sup> While bar associations normally serve the function of controlling entry to the profession in order to ensure high professional standards, the current system has so severely limited access to practice law that as of February 2015, there were only 84 lawyers registered in Timor-Leste. This represents approximately 6 per cent of the current members of the AATL. More than half of the 84 were practicing foreign lawyers from Portuguese-speaking jurisdictions reportedly not resident in Timor-Leste, who are subject to different criteria for registration that do not include attendance at the LTC. In other words, by early 2015 only approximately 30 Timorese had been admitted to practice.

In addition to requiring Timorese lawyers to attend the LTC, the government controls who enters and leaves the profession and sets standards for professional conduct through the Legal Profession Management and Discipline Council that operates within the LTC. The Council manages the registry of lawyers and can take disciplinary measures, including suspension of a license to practice law. Under Law 11/2008, the council consisted of five members, three appointed by the LTC and two from civil society, with one of these seats reserved for the AATL. As amended in 2013, the law gives the ministry of justice authority to appoint three members directly rather than indirectly through the LTC; one of these three can serve as council president.<sup>60</sup> It also gives AATL the authority to appoint both of the civil society seats, eliminating the possibility that other justice sector NGOs or legal associations can serve on the council. The changes further ensured government control over the council and hence over the qualification to practice law.

The current system has generated disillusionment and feelings of exclusion among the younger generation of Timorese law graduates. Several cited the laws that regulate the registration and training of lawyers as the primary challenge facing the legal system.<sup>61</sup> As one explained, “The laws closed the door for us to practice.”<sup>62</sup> Another said, “Because of our history, we want to fight for justice. It is because of that that we want to work as lawyers.” But he did not think he and his

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57 In June 2015, the justice ministry advertised 45 vacancies for the next course for private lawyers.

58 IPAC interview, UNTL law professor, Dili, 25 February 2015.

59 IPAC interview, AATL member, Dili, 24 February 2015.

60 Law 1/2013, Regime Jurídico da Advocacia Privada e da Formação dos Advogados, Article 57.

61 IPAC interview with AATL, 24 February 2015.

62 Ibid.

colleagues would have the opportunity.<sup>63</sup>

Change may be coming. The 31 December 2015 deadline has helped push the government to give priority to a new draft law on regulation of the legal profession as part of its legal reform agenda.<sup>64</sup> One version of the draft, posted on the ministry of justice website in Portuguese, contains provisions for an independent bar association, with all the registration and disciplinary powers now held by the Legal Profession Management and Discipline Council. It creates procedures for disciplining members of the profession that provide greater checks and balances than at present, and envisions the creation of a continuing education regime, managed by the bar association, which would significantly enhance the quality of legal practice. It also creates democratic governance structures for the organisation. However, it also keeps entry of the profession tied to the completion of the fifteen-month training program at the LTC under the direction and approval of the ministry of justice.<sup>65</sup> It also stipulates that the bar association must favor international exchanges with bar associations of Portuguese-speaking countries and set up systems of reciprocal recognition and registration to practice.<sup>66</sup> The bar association would be funded from monthly dues paid by its members.

If this draft is adopted, the bar association would take on a number of training and regulation duties that are now the responsibility of the government, while the government would continue to control the fundamental content of the LTC program that is the gateway to the profession. Unless the government also changes the curriculum and the intake levels at the LTC, it is unlikely that the practice of law will be significantly improved.

If, however, the current draft is amended to correct these shortcomings, the new law could set the direction for the rest of the country's legal reforms. If it is passed on time in December 2015 and if it authorises the creation of a truly independent, self-regulating body for the legal profession, it could be a major step on the way to adherence to international standards and judicial independence.

#### *D. Transparency and Access to Court Documents*

The 2010 strategic plan set a goal to make significant improvements in public confidence in the judiciary every five years. Transparency is the usual cure for distrust and corruption, but it will take significant and sustained reforms to address the culture of secrecy that has been instilled in the justice sector, particularly after the October expulsions. Better access to court documents is critical.

The opaque nature of the Timorese justice system can benefit both political and judicial actors: the first because it allows them to become the interpreters and guardians of the legal system, the second because there are few statistics, judgments or policies to show that judicial standards are not being upheld. Although there has been considerable international investment in database and case management systems and the creation of a corps of judicial administration officers, critical information gaps remain.

JSMP has documented the absence of public information from the courts, particularly Dili District Court, for years.<sup>67</sup> Even in 2015, the Dili court could not provide basic information to the Court of Appeal about the number of pending cases, number of sessions conducted, or the

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63 Ibid.

64 In June 2015, after the circulation of multiple drafts, the Council of Ministers referred a draft to parliament for consideration.

65 See Arts. 145-147 on the requirements for the probationary period of legal practice. The draft law is available on the justice ministry website.

66 Ibid, Art. 135.

67 JSMP, "Justice in Practice: Human Rights in Court Administration," 2001, pp. 17-20; "Justice in the Districts", Dili, 2003; and "Justice Update: Recent Developments in the Courts", Dili,, October-November 2005.

number of trials that result in convictions or acquittals, although it was explained as a technical problem due to the installation of a new case management system. The Court of Appeal does a better job, maintaining a website with selected decisions, but not all decisions are posted.<sup>68</sup> There are no annual public reporting requirements for the courts, such as those for the prosecutor-general's office, and JSMP is the sole source of statistical information on the courts and the public defender's office.<sup>69</sup> The prosecutor general and public defender established and trained "public outreach focal points for their offices" in 2014, but there are no dedicated outreach officers or public communication standards of procedure for the courts.<sup>70</sup> Consequently, in surveys conducted in 2008 and 2013 by the Asia Foundation, there was no improvement in the percentage of citizens who had knowledge of a formal court; it remained at 59 per cent.<sup>71</sup> Knowledge of and trust in the judiciary is also limited by the fact that laws, decrees and all of the judgments promulgated by the four district courts and by the appeals court are only available in Portuguese.

In early 2015, three different NGOs in Dili reported difficulties in obtaining decisions of public interest from the courts – which do not have to provide reasons for denying requests. One NGO director acknowledged defeat. "We've given up trying to get judgments", she said.<sup>72</sup> IPAC consultants requested eight decisions in writing in accordance with the procedure recommended by the court clerk's office. All had reached the stage of final decision. Although the head of the Dili District Court was cooperative and approved the request within two weeks of its submission, only three decisions were produced after more than three months of regular, in-person follow-up. During oral presentations of decisions, no copies of the decisions or summaries are provided to observers to ensure accurate reporting. One journalist in Dili reported media access to court documents relied on personal relationships with judges.<sup>73</sup>

Cláudio Ximenes, former head of the appeals court, instituted the practice of restricting access to judgments. In 2005, without consultation, he issued a directive whereby anyone who was not a direct party to a legal case would have to demonstrate a "legitimate interest" before being granted access to public records in case files.<sup>74</sup> "Legitimacy" is evaluated by a judge handling the case or the judge administrator and is not subject to appeal. The directive was adopted in 2006 as Article 77 of the Criminal Procedure Code, and to date, there is no common understanding of what constitutes a "legitimate" interest.

Some Timorese judges interpret the policy, still enforced today, as a measure to protect fair trial rights, because it places a responsibility on the presiding judge to ensure outside parties do not have access to information about a case before indictment, or protect a victim or witness. But there are no guidelines or formal procedures to ensure those are the only criteria used to restrict or delay access to court documents. Most of these reasons do not apply once the court

68 For example, some of the controversial rulings in the Lucia Lobato case from 2012 relevant to the constitutional right to appeal had not been posted on the website as of May 2015. For further explanation of the Lobato case see JSMP, "Overview of Justice Sector 2012", pp. 4-8.

69 The Organic Law for the Prosecution Service (Parliamentary Law 14/2005), Article 11 (d) stipulates a requirement for the Prosecutor General to report on annual basis to parliament. This article was not changed when the law was amended in 2011. The Organic Law for the Ministry of Justice (Decree Law 12/2008) Article 9 (h) requires the National Directorate for Legal and Legislation Advisory Services gather and publish statistical information on Justice and Law.

70 In the first quarter of 2013, the prosecutor-general requested UNDP to support the preparation of a communications plan for the public prosecution service, In response, UNDP supported the production of a multi-media outreach programme to explain the role of the prosecution service to the general public. The prosecutor-general and public defender then established "communications focal points" in their offices staffed by people trained in a UNDP workshop in 2014. See UNDP quarterly progress reports for 2013 and 2014.

71 Asia Foundation, "Timor-Leste Law and Justice Survey 2013," p. 28. See also Ba Distrito project, "Baseline Survey 2014: Local Governance and Access to Justice in Timor-Leste," pp. 62-64.

72 IPAC interview with, NGO staff member, Dili, 26 February 2015, Dili.

73 IPAC interview with journalist, Dili, 17 February 2015.

74 Directive 6/2005. According to JSMP, "parties" to a case were confined to legal representatives of the persons involved in the case (i.e. prosecutors, public defenders, private lawyers representing a complainant or accused).



of first instance renders a final decision. International standards, including the International Covenant on Civil and Political Rights (ICCPR) to which Timor-Leste is a party, stipulate that judicial decisions must be accessible beyond the parties in order to guarantee the respect for human rights in the administration of justice.<sup>75</sup>

Ironically, other court practices do not demonstrate concern with restricting public access to information, even in cases that pose risks for the protection of victims or witnesses -- such as listing, on a court calendar posted in a public place, the full names of all alleged child victims of sexual violence and victims of domestic violence in cases due to appear before the Dili District Court, a practice observed in February 2015. The appeals court website contains unredacted judgments that reveal the full identifying details of victims of sexual violence and domestic violence, including children and persons with disabilities.<sup>76</sup> Restrictions on access to judgments thus appear designed less to protect the vulnerable than to limit the public's ability to assess the courts' performance.

There are reasons to be concerned about that performance. A review of five recent decisions of district courts shows that there were significant differences in some of the facts reported in oral readings of sentencing decisions, as documented by JSMP, and those that appear in the written decision. It is also significant that the sample of written decisions did not contain specific information on the procedural background of the cases, which have a bearing on the exercise of due process and sentencing. For example, in one case the written decision failed to document that the trial was conducted entirely in the absence of the defendant, who was convicted and given a suspended sentence although he was abroad.<sup>77</sup> Court decisions often comply in form, not substance, with the Criminal Procedure Code adopted in 2005, which stipulates what information must be contained in a decision.<sup>78</sup> No specific information was included in the five decisions reviewed which provided a basis to evaluate if all the necessary legal formalities had been observed as the case proceeded to trial.

More concerning are limitations on access to documents by persons accused. In 2014, the Court of Appeal ruled that an international defendant and her representative were not allowed access to documents relevant to her arrest and appeal because she had allegedly changed her address and lawyer without adequately notifying the court.<sup>79</sup> The court, however, had successfully delivered other documents to the lawyer and to that address, and the decision, written by an international judge and agreed to by the two Timorese judges who served on the panel, appeared to violate core human rights and fair trial standards.<sup>80</sup>

Chief Justice da Silva who has tried to increase transparency in other aspects of the judiciary's work, affirmed in an interview that the presiding judge of the panel has sole discretion over whether to grant a request for documents. He did not seem to appreciate why documents such as judgments that are part of the public record should be available.

While efforts have been made to improve transparency of other governmental sectors, such as finance, the opacity in the judicial sector has obstructed its development, enabled political intervention, restricted due process and limited access to justice. In particular, it has hampered

75 International Covenant on Civil and Political Rights, Article 14(1). The only exceptions envisaged are for protection of the best interests of children or matrimonial disputes.

76 See [www.tribunais.tl](http://www.tribunais.tl).

77 The failure to record important facts related to the arrest and detention of defendants has antecedents in the practice of some international judges during UNTAET and UNMISSET times. See *State vs. Joao Fernandes* (Case # 1-2000); *State vs. Pedro Geger* (Case #1/2001) at Berkeley War Crimes Studies Center website (<http://wcsc.berkeley.edu/east-timor/east-timor-2/>).

78 A number of articles are applicable but for decisions regarding sentencing the information that must be contained in the decision are stipulated in Arts. 281-282.

79 IPAC interviews on 26 February 2015; 27 February 2015; 1 March 2015 with sources requesting anonymity, verified by viewing court decision Proc. No: 129/CO/2014/TR.

80 IPAC personal communication with legal representative of accused, 1 March 2015, Dili.



the quest for judicial accountability.

### E. Language

The core challenge to transparency is language.<sup>81</sup> Laws, court decisions and the majority of administrative documents are generated almost exclusively in Portuguese without translation to another language.<sup>82</sup> Portuguese speakers comprise less than 10 per cent of the population. In comparison, 87 per cent of the population speaks Tetum, also an official language.<sup>83</sup> Consequently, 30 per cent of respondents to a 2013 survey who had been in court reported they had not understood the legal proceedings.<sup>84</sup> Only a handful of laws have been translated into Tetum, and the most important of those by Claudio Ximenes, whose legal translation errors in other important contexts have been documented.<sup>85</sup>

The removal of Portuguese-speaking advisors is reportedly fueling change. Two weeks of court monitoring in Dili in February 2015 showed that all court proceedings were conducted in Tetum. This had been the practice before only when no Portuguese judicial personnel were present in the courtroom.<sup>86</sup> The Council of Ministers reportedly considers draft laws and policies almost exclusively in Tetum because the ministers can analyse them better.<sup>87</sup> It is also the language used in meetings of the Coordinating Council of the Judiciary, where the judicial reform agenda has been under discussion. On 27 February 2015 at a private meeting of key justice sector actors at the justice ministry, an agenda and structure for reform was discussed entirely in Tetum: no one provided translation to the Portuguese legal advisor who did not understand Tetum and was tasked to take notes.<sup>88</sup>

Chief Justice da Silva supports use of Tetum in the courts. So does the prosecutor-general, Jose da Costa Ximenes, who for the past two years has chosen to address parliament and published his annual report in Tetum. (He has also introduced English language training courses and has set the goal of English competency for all prosecutors and administrative staff so that they can benefit more from international trainings and meetings.<sup>89</sup>)

Language reform efforts reportedly now enjoy support from influential older jurists, among them Ana Pessoa, who previously promoted the use of Portuguese. She is reportedly responsible for pushing international donors and NGOs to create more outreach and training materials in Tetum, particularly to educate the public on the 2010 Law Against Domestic Violence and the implementation of a medical-forensic protocol.<sup>90</sup> In mid-2015, she was volunteering to train

81 The problems associated with the language policies and practices in Timorese courts have been well documented since its inception. See “Indifference and Accountability”, *op.cit.* pp. 20-21 and 26-29. and JSMP Annual Reports since 2001.

82 The Constitution designates two official languages, Tetum and Portuguese, and two working languages, English and Indonesian. UNTAET Regulation 2001/25, Sect.36 stipulates the courts operate with the two official languages and two working languages.

83 Asia Foundation Survey 2013, *op. cit.*, p. 34.

84 *Ibid.*

85 See “Indifference and Accountability”, Appendix 1 for detailed documentation. Tetum versions of laws, published with UN support and attributed to Claudio Ximenes include the penal code, criminal procedure code and civil procedure code. They are available on the ministry of justice website, although they do not appear as official translations. They use Tetum orthography but rely heavily on Portuguese juridical vocabulary instead of equivalent Tetum words.

86 While some argue the Tetum language does not have the capacity to express legal concepts, court judgments have been written since 2000 in Tetum. In 2009 and 2011, USAID and Asia Foundation published legal glossaries for Tetum to promote consistent usage of equivalent legal vocabulary in Portuguese and Tetum. The Dili Institute of Technology also created a curriculum to teach Tetum to justice sector actors. The following draft laws are already available in Tetum for public consultation: Draft Law on the Creation of the Order of Lawyers in Timor-Leste (Bar Association); Draft Law on the Prevention of and Combating Human Trafficking; Draft Law on Amnesties and Pardons; Civil Registry Code. Information about the draft traditional justice law is also published in Tetum. See justice ministry website.

87 IPAC telephone interview with legal expert, 15 May 2015.

88 IPAC interview, legal expert, Dili, 1 March 2015.

89 IPAC interview, Chief Justice da Silva, Dili, 23 February 2015.

90 Personal communication with service provider, 7 May 2015.

young lawyers in Tetum at the AATL.<sup>91</sup> Most importantly, the country's Prime Minister Rui de Araújo said during a presentation to parliament in March 2015 that he intended to make the legal system bilingual.<sup>92</sup>

Fully implementing the use of Tetum in the justice sector will not resolve all language problems: the linguistic diversity of the country will continue to require translation from local languages to official ones. In an example from the Oecusse district court:

All court documents are written in Portuguese, and proceedings in the court are conducted in Tetun. However, almost everyone in Oecusse speaks only the local language (Baekeno). On Portuguese-Tetun interpreter is employed as a permanent civil servant, but a Baekeno-Tetun interpreter is contracted for only three months at a time. No permanent budget exists for his services and he can leave at any time [...].<sup>93</sup>

The 2015 budget gave only \$5,000 to the ministry of justice for translation but it is reportedly considering the creation of a full-time legal translation unit.

A bilingual Portuguese-Tetum system could significantly expand the pool of judicial personnel, although it will require fundamental changes to the modes of mentoring, advising, teaching and curriculum at the LTC and in other capacity building programs. If entry to the legal profession is no longer restricted to those who pass lengthy training programs and exams in Portuguese, hundreds of young law graduates who reside in Dili could become eligible to practice. Such a system would require translation of existing laws and codes into Tetum, but such translations are long overdue. A bilingual legal system will likely eventually give way to a monolingual Tetum system, with increasing attention to other local languages. This could increase public use of the formal justice sector -- making the problem of human resources more urgent to resolve.

#### *F. Fair Trials and Respect for the Rights of the Accused*

The fairness of trials in Timor-Leste remains a serious concern. Defendants frequently are not adequately informed of their rights and do not receive proper counseling from qualified defense lawyers. There are serious doubts as to whether defendants fully understand what they are doing, have been well-advised by counsel, or have been adequately instructed by the judge. Deficiencies in the judgments, the lack of ready access of verbatim transcripts or audio recordings, as well as the difficulty in accessing final judgments all exacerbate the problem. These problems go back to the very beginning of the UNTAET legal regime. It is striking that after so many years of capacity building they still persist to such a significant degree.

The country's mobile courts are increasingly seen as a means of providing greater access to justice and dealing with the backlog of criminal cases. It is not clear, however, whether they are meeting fair trial standards in their speedy processing of cases. The overwhelming majority of cases heard by the courts are criminal (86 per cent in Baucau in 2013, 89 per cent in Oecusse) and the institutional impetus for defendants to confess in court may account for the ability of these courts to process large numbers of cases in a short period, reportedly as many as 40 cases per day. It may also account for the 143 per cent case clearance record at in Oecusse. While these courts have been lauded for providing more access to women and children including to address domestic violence, their open communal formats may pose more risks than protection to many

91 IPAC interview, legal expert, Dili, 14 February 2015, confirmed by authors' observations of teaching schedule at AATL in Dili, February 2015.

92 Dr Rui Maria de Araújo, 24 March 2015, Dili, [www.timor-leste.gov.tl](http://www.timor-leste.gov.tl).

93 Ba Distrito, "Access to Justice Brief: Legal Assistance in Timor-Leste," September 2014, p.12

victims.<sup>94</sup> The mobile courts are not supposed to hear the most serious offenses, although there have been instances reported of them hearing rape cases.<sup>95</sup> They can impose a maximum penalty of five years, but that is still a serious deprivation of liberty. In using these courts to deal with the case backlog, two problems can occur. One is that in the rush to get the backlog cleared, the mobile courts, with a single judge, take on serious cases which should be heard by the district courts. The second is that the quality of justice dispensed is open to question, both because of the competency of the judges selected, especially since the mobile court assignment may not be seen as desirable, and the packed schedule. JSMP noted in one report that 47 cases were scheduled to be heard in a three-day period, and the court processed 31.<sup>96</sup>

Lack of an adequate defence, a problem since the early days of the Special Panels for Serious Crimes, may be a factor in the undue speed in processing cases. The prevalence of guilty pleas in domestic violence and other cases raises concerns about the extent to which fair trial rights are being effectively implemented. As one assessment concluded,

Defenders are so busy, we have been told, that they seldom have time to meet their clients before the hearing day in court. The implication of this is to raise doubt that public defenders have time to carefully assess the charges made in domestic violence cases or the validity of any confession the defendant is claimed to have made.<sup>97</sup>

The lack of an adequate defense and the disposition of judges to unquestioningly accept confessions in court also means that there is little incentive for prosecutors to adequately prepare cases or to call witnesses and introduce the kind of evidence required to prove guilt beyond a reasonable doubt. The nature of the training they receive at the LTC would suggest that they are ill-equipped to do so. All of this is made worse by the low quality of defense preparation for trial and representation in the courtroom, with the defense frequently calling no witnesses.<sup>98</sup> The essential function of the defense to provide a check on the quality of the prosecutor's case is not being filled and has not meaningfully changed since independence. As one report notes:

If a prosecutor elects to use an inappropriate charge and the defendant confesses to it, then the judge has little incentive to review the appropriateness of the charge. On the other hand, if the defendant refuses to confess to an inappropriate charge, the prosecutor is put to the burden of proving the charge or preferring other charges.<sup>99</sup>

With regard to the domestic violence cases that make up some 25 per cent of the workload of the judiciary and more than half of the workload of the mobile courts, there is a persistent pattern of the prosecution charging the lightest possible offense, to which the accused then confesses.<sup>100</sup> In such cases the judge typically hands down a minimum sentence, then suspends it. It may be the case that traditional justice mechanisms have brought about a *de facto* arrangement before the case comes to the court, resulting in the extremely lenient sentencing patterns documented by JSMP in its extensive monitoring of domestic violence cases. The 2010 law mandating

94 IPAC interview with Knut Ostby, UNDP Country Representative, Dili, 27 February 2015.

95 JSMP, "Overview of Justice Sector 2013", Dili, 2013, pp. 21-22.

96 JSMP, "Annual Report: Overview of Justice Sector 2014", Dili, 2014, p.22.

97 "Access to Justice Brief: Legal Assistance in Timor-Leste," *op.cit.*, September 2014, p. 13..

98 Lack of defense witnesses was a problem both during UNTAET and during trials conducted during the period of Indonesian rule. See CAVR, Chega!, *op.cit.*, "Political Trials" chapter.

99 "Access to Justice Brief: Legal Assistance in Timor-Leste," *op.cit.*, p. 13.

100 By September 2014 gender-based violence cases comprised 67 per cent of those heard by the mobile courts. UNDP, Third Quarterly Progress report, Dili, p. 23 For examples of JSMP critiques of the mobile courts, see "Overview of Justice Sector 2013," pp. 21-22 and "Overview of Justice Sector 2014," pp. 20-23.

compulsory prosecution of domestic violence cases is not working as was intended.<sup>101</sup> Instead more than 25 per cent of the courts' time is being taken up by cases that in fact do not receive adequate judicial scrutiny and for which suspended sentences are handed down as a matter of routine. This is not only a waste of resources that could be devoted to other criminal and civil cases but may also indicate that neither victims nor accused persons are receiving due process.

*G. Rights of Witnesses and Victims: the Prosecution of Sexual Violence and Violence against Children*

The lack of sufficient safeguards for the rights of defendants, victims, and witnesses extends to a disturbing degree to cases involving child abuse and sexual violence, which made up approximately some 6 to 7 per cent of the caseload of the judiciary in 2014.<sup>102</sup>

The lack of protection for victims is apparent throughout the phases of investigation and trial, beginning with police response. For example, in 2014, there were still instances of sexual violence victims from remote areas being transported by police with the perpetrators in the same vehicle, facing each other for hours, to reach a regional court.<sup>103</sup> In one example of apparent institutional failure to protect victims and witnesses, primary documents and corroborated interviews provide compelling evidence of the involvement of a police commander in returning a victim of physical and mental violence to the custody of a perpetrator. The perpetrator in question was a fellow officer under investigation for child abuse and domestic violence against the victim. This intervention seems to have occurred without judicial authority, and against advice of child protection personnel. The alleged perpetrator has not yet been prosecuted, although the child was eventually removed from his custody.

The courts have also failed to protect victims and witnesses of these crimes. As JSMP reports,

[I]n some trials the police who are providing security fail to protect victims of sexual abuse from the public who are watching the trial because the police let them take photos, laugh and clap.<sup>104</sup>

The court has the power to prohibit activities and movements that interrupt the court process. The fact that judges allow such conduct testifies both to inadequate training at the LTC as well as to the lack of seriousness in treating cases of sexual violence and incest. Only Oecusse and Suai courts have mechanisms in place to separate victims/witnesses and perpetrators when they are present to provide testimony.<sup>105</sup>

The courts also afford no protection to expert witnesses when they testify against perpetrators. One NGO reported that it has instituted a mandatory policy of sending security accompaniment to support staff members providing forensic evidence at court, following an incident where a staff member felt intimidated after sitting outside the courtroom for hours next to the man against whom she was testifying, who had a history of physical violence.<sup>106</sup>

The failure to institute basic protection mechanisms such as ensuring the separation of vic-

101 JSMP, "Law Against Domestic Violence: Obstacles to Implementation Three Years On", Dili, 2013.

102 This statistic was calculated based on information provided by the Court of Appeals and confirmed in an interview with the Prosecutor General.

103 IPAC Interview, Alfela staff members, Dili, 23 February 2015.

104 JSMP, "Overview of Justice Sector 2014", op.cit., p.22. See also JSMP press release, "Victim of Sexual Assault dissatisfied with the mobile court trial that was open to the public", 3 October 2013.

105 Interview, Alfela, 23 February 2015, Dili. Service providers also reported cases of child victims being forced to sit in the same waiting room with as their perpetrators at the prosecutor's office, when they were called to make statements during the investigation stage.

106 IPAC phone interview with international adviser to NGO providing services to survivors of gender-based violence, 8 May 2015.

tims and perpetrators has had disastrous consequences. In one case in 2012, a fourteen-year-old victim of incest spent approximately eight hours on the same bench as her perpetrator/father while she waited to give testimony at Dili District court.<sup>107</sup> Despite her anxiety, the court did not allow her to be accompanied by the caretaker, service provider or government child protection officer. When she was called to testify alone, she was afraid to give evidence. Unfortunately, the case hinged on her testimony, since the prosecution reportedly had not done an adequate investigation. The perpetrator was not only acquitted but later awarded custody of the child born of the act of incest.

Significant civil society attention has been devoted to reforming the legal framework to criminalise incest.<sup>108</sup> This reform measure has received backing from the women's caucus in the parliament and the public endorsement of the former and current ministers of justice. However, as in the case of the domestic violence law, unless the new legislation is backed by appropriate training at the LTC, a clear understanding of protection principles and commitment and resources for the implementation of basic witness protection measures, it is likely to simply increase caseloads, rather than improve the judiciary's ability to adequately protect the rights of victims and accused.

## V. ANALYSIS OF A COURT OF APPEAL JUDGMENT

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The quality of decisions of the Court of reflects the capacity of the judges who are supposed to be the most qualified in the country. The court's chief justice is also the highest judicial officer in the country and plays a key role in the country's judicial administration. His duties include leading the Superior Council for the Judiciary and representing the courts on the Coordinating Council of the Judiciary and the committees that govern the curriculum and administration of the LTC. In his presiding role over the Superior Council, he leads and coordinates judicial inspection, meaning he will play the key role in choosing the next Inspector General for the Judiciary, who will evaluate the performance and decide promotions of judges. A decision written in February 2015 by Chief Justice da Silva, however, underscores the need for improved analytical skills, even at the highest level.

The case was extremely straightforward, in which Judge Jacinta da Costa, a judge who distinguished herself during Claudio Ximenes' tenure by dissenting from some of his most flawed opinions, requested to be allowed to recuse herself because of a familial relationship to a witness in the proceedings. The extremely brief decision of the Court of Appeal denied her request for recusal in a way that reflects a lack of even the most basic skills of statutory interpretation and legal reasoning. It is also open to question as to why the request for recusal by a judge who wants to avoid the appearance of a conflict of interest should be denied.

Da Costa requested recusal on the grounds that she was related to a witness in two ways, which she characterised as "sister-in-law" in her petition. In the words of the Court of Appeal decision,

The witness Juvita Siqueira, i.e., Zita, is the wife of [da Costa's] husband's first cousin and Zita's father-in-law is the brother of her mother-in-law.

Judge da Costa cited Article 39c and Article 40 of the Criminal Procedure Code as the basis for her request. Article 39c provides that there are grounds for recusal when

<sup>107</sup> IPAC, interview, Casa Vida, Dili, 26 February 2015.

<sup>108</sup> See JSMP, "Incest: An Unrecognized Crime in Timor-Leste", August 2012; and JSMP, "Children's Access to Formal Justice in Timor-Leste: A Status Report", May 2014.



A spouse or anyone related by blood or affinity up to the third degree, or a person living or that has lived in a relationship similar to that of spouses, is taking part in the proceedings, in any capacity.

The request to be recused would thus seem to turn upon two straightforward considerations: (1) Is the person in question related in the third degree to Judge da Costa? (2) Even if not so related may there be an appearance of conflict of interest so as to call into question the impartiality of the judge? The Court of Appeal's decision does not consider either of these points.

The substantive part of the decision consists of three quotations from what the court presumably regarded as relevant legal authorities. These quotations are given one after the other with no analysis or discussion as to their relevance. The quotations are followed by a single concluding paragraph:

Of the legal requirements and following considerations, no reason for suspicion is found and such reason should only be considered regarding the accused or the victim. The family relationship of the judge with a witness does not constitute grounds for suspicion. Accordingly, nothing impedes the intervention of the Honourable Judge in these proceedings.<sup>109</sup>

The striking feature of the three quotations that are intended to support this conclusion is that to the extent they are relevant, they directly contradict the court's finding. The first quotation is from the Spanish translation of a German work on judicial ethics:

The right of the party to challenge a judge does not necessarily depend on the possibility or probability that he or she is actually likely to undermine it; it is enough that a legal cause justifies the suspicion of his or her impartiality, for what is ultimately at stake is the trust in the justice system (Karl Larenz, in "Derecho Justo – Fundamentos de Ética Jurídica", Madrid, 1993, p. 18).

This quotation applies to challenges by parties to the participation of a judge in a case and is thus not even directly relevant. What it does indicate, however, is an underlying principle that the appearance of a lack of impartiality can undermine public trust in the judiciary. It would thus indicate that Judge da Costa's request should be approved because her relation to the witness might arouse suspicion of partiality.

The second quotation is from a 1959 Italian treatise on civil procedure concerning the obligation of judges to preserve the appearance of judicial independence. For this reason, according to the quotation, "the legal system lays down his or her obligation to refrain from judging when certain circumstances are present." The quotation does not specify what those circumstances are, which would have been the more relevant part of the treatise to cite, but again the quotation supports the position taken by Judge da Costa and contradicts the conclusion for which it is cited by the Court.

The third quotation is equally puzzling as support for the proposition for which it is cited. Its first sentence provides,

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<sup>109</sup> Court of Appeal, Proc. No. 154/CO/2014/TR, decision of 6 February 2015.

A judge must be regarded as a person for whom there are necessary guarantees to exclude the slightest doubt, as to his or her capacity to decide impartially.

This would again support the petition of Judge da Costa rather than the court's decision. The second and final sentence of the quotation is even more curious because it is irrelevant to the present case:

A simple and normal friendship with one of the parties involved is not a serious and grave reason for suspicion that justifies dismissal or excuse.

The case at hand does not involve a “simple and normal friendship” but rather a familial relationship.

The conclusion reached by the Court not only contradicts the authorities it cites but also misstates the law and refers to the incorrect section of the applicable statute. The decision states that reason for recusal “should only be considered regarding the accused or the victim. The family relationship of the judge with a witness does not constitute grounds for suspicion.” Judge da Costa cited Article 39c of the Criminal Procedure Code, which applies to “anyone related by blood or affinity to the third degree ... and is taking part in the proceedings in any capacity”. This would clearly apply to witnesses.

The provision referred to by the decision is Article 39a, which applies to relation to the accused or the victim. This is not the section of the law cited by Judge da Costa in her request and is irrelevant to the case at hand. The decision does not consider whether the degree of relation in question falls under the statutory requirements.

This decision by the highest judicial actor of the highest court in the country confirms what was indicated by several interviewees, that neither the LTC nor university law faculties provide training in the analytical and practical skills essential for fulfilling one of the core roles of a judge, which is writing a reasoned final decision explaining the grounds of the decision and justifying its findings.

## VI. LOOKING AHEAD: EVALUATING THE JUSTICE SECTOR

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The October resolutions requested a comprehensive audit to review the courts, public prosecution and public defence services, the Anti-Corruption Commission and the legal framework. While the framework initially proposed appeared to favour political interests, there are some positive indicators that the audit will be placed in the hands of Timorese jurists dedicated to reforms that will enhance the overall performance of the sector.

In addition to general evaluations of the major justice institutions, the resolutions called for examination of specific issues:

- an articulation of the roles and relationship between the public prosecution and the police;
- human resources and the “trend” towards Timorisation of the justice sector;
- the economic efficiency of the justice sector, including an assessment of the need for “external help”; and
- the linkages between the formal and informal justice system, with a view towards strengthening traditional justice mechanisms.

Resolution 29 further specified that the audit should be conducted with national and international experts. It called for the findings to be presented to the parliament and public by the beginning of 2015 (just over two months after the expulsions), an impossible task given the complexity and scope of the topics requested.

Two possible conclusions flow from the short time frame and complex content: either the audit was never meant to be a serious endeavor or the leadership did not understand the depth of the problems and the investments required to produce a thorough assessment. Either way, the deadline was ignored, and the formulation of the audit only began in early 2015.

By January 2015, it was apparent that the audit might conflict with some ministry of justice programs. The ministry had started a legal sector reform project on 15 April 2013, when it set up the “Group for the Study and Debate of the Reform of the Justice Sector”. None of the justice sector actors interviewed could provide a clear account of its membership or accomplishments. The ministry was concerned that any audit could delay a draft law on traditional justice that was close to completion. It was also concerned that the audit could overlap or conflict with the review and completion of the implementation matrix for the strategic plan.<sup>110</sup> Overall, the audit had the potential to delay or significantly shift the focus of the work of the justice ministry or even raise questions about its competency.

In February 2015—within two weeks after the new government took power—a proposal began to circulate within the government and among judicial actors on how to implement the audit. Rather than narrowing its scope, the proposal suggested adding the following areas:

- legislative measures to re-organise and expand the judiciary;
- plans for the establishment of the judicial institutions required by the Constitution: the Supreme Court, military tribunals and the administrative and fiscal courts;
- measures to address access to justice; and
- concrete proposals for the implementation of the strategic matrices of the Strategic Plan for the Justice Sector.

They proposed nine months to complete this ambitious project but built in a clause that would allow the commission’s mandate to be renewed. The initial proposal envisioned something that was neither a “social audit” model, where civil society and the populace would be fully integrated to provide a community-based assessment, nor a fully technical audit, which would be able to deeply analyse specific needs and propose new roadmaps that do not already exist.

Its proposed membership was huge.<sup>111</sup> One influential jurist in Dili warned us that if there were too many members, they will never be able to convene in a meaningful way, citing the ex-

110 Concerns were also raised in various sectors as to whether the audit would conflict with the internal mechanisms that regulate the judicial institutions and threaten judicial independence. A third party audit, which would still be conducted by judicial actors and experts, in itself should not conflict with the statutes and powers of the institutions, as long as the audit is cognisant of these structures and is conducted in accordance with the constitutional guarantees of judicial independence.

111 It would include three jurists of “recognised merit” (one Timorese and two internationals, one from a common law country and one from a civil law country) and one person each from the Superior Council of the Judiciary, the Superior Council of the Prosecution; the Anti-Corruption Commission; the newly established judicial or “forensic” police; the national police (PNTL); and the ministry of finance. It would also include two jurists representing the institutions of higher education, at least one of them from UNTL’s law faculty; two representatives of religious communities, one of them from the Catholic church; two representatives of civil society; and one “specialist” from the justice ministry’s national directorate for judicial advisory and legislative services. The government would appoint the chair. Of two coordinators, one would be appointed by the ministry and the other would be elected by the members of the commission.

ample of the committee that drafted the civil code from 2003 to 2009.<sup>112</sup> The process took longer than it should have because there were often too few members to constitute a quorum.

There were other potential problems. Most of the members would be national actors from the institutions that would be under review, and some critical agencies, such as the public defenders' office, were not represented. The commission would also be expensive. The commission would be expensive, almost certainly requiring more than the \$450,000 allocated by parliament in the 2015 budget, given that commission coordinators and members would be paid. The two official languages, Portuguese and Tetum, would be used, with allowances for translation between these two, but no provisions for the use of the two official working languages (English and Indonesian), which would be important to obtain highly qualified internationals. It was not clear how the audit would be different in content from the many other assessments previously conducted and funded by the UN and other international donors.<sup>113</sup>

Since May 2015, however, the structure and content of the commission reportedly have been refined. It is no longer referred to as an audit, because of the negative connotations of interference in the judiciary. There is growing consensus that the aim should be to create an authentic Timorese legal system. Some commission members have already been chosen, with significant representation of influential political players and jurists from the younger generation. The prosecutor general is said to be playing a leadership role in refining the concept and focus of the commission. Adérito Soares, the well-regarded former head of the Anti-Corruption Commission who has technical training and experience related to justice sector review and regulation, has been asked to join. Jose Teixeira, an Australian-trained Timorese lawyer, reported in late May that he would be working on the commission and it was moving forward in a positive direction.

The commission will still face entrenched institutional and political interests. It has the potential to set a reform agenda that can correct the mistakes of the past and provide the country with the essential elements for the establishment of the rule of law. Its credibility, however, will depend not just on its independence and professionalism but in its ability to keep the public informed of its activities, so that its performance can be judged in relation to its stated goals.

## VII. CONCLUSION AND RECOMMENDATIONS

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The "Timorisation" of the judiciary is a precondition to reform rather than a solution in itself to the manifold ills of the justice sector. Despite fourteen years of international assistance, and in some cases because of it, Timor-Leste's justice sector is still in dire straits. While there is now a new self-confidence and stronger leadership in some areas, notably the offices of the prosecutor-general and the public defender, the failings of both legal education and the national professional training institution have left all branches of the justice system without the competent professionals they need.

Increasing the capacity of the judicial personnel, however, is only one part of the problem. Improved justice also requires a significant expansion of the court system, but it is critical that plans for expansion flow from analysis of concrete data rather than pre-determined conclusions. The shortcomings of previous planning efforts also point up the need for an adequately empowered and independent bar association to provide a consultative counterweight to government planning and decision-making for the justice sector. The review of the judiciary that is now un-

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112 IPAC interview with legal expert, Dili, 24 February 2015.

113 The most relevant of these plans and assessments are described in UNDP Project Document, "Consolidating Democratic Rule of Law and Peace through a Strong Justice System in Timor-Leste (Revised Justice System Programme) 2014-2018."

derway represents an opportunity to correct systemic weaknesses. It will only succeed if there is the political will for radical overhaul.

The following recommendations address the systemic and human resource problems detailed in the report:

*A. Human Resources and Access to Justice*

- The commission reviewing the judiciary should undertake a needs assessment to determine whether each of the country's thirteen districts require a court or whether in some cases needs can be met by mobile courts. This needs assessment should include an analysis that will set standard caseload expectations for the personnel of each of the three branches of the justice system. Without projections of needs based on hard data, it will be impossible to accurately predict the number of new judges, prosecutors, public defenders and staff required.
- The audit of the judiciary should evaluate the performance of the mobile courts and determine how and where they should be used based upon: (1) a cost-benefit analysis of the advantages and disadvantages of mobile courts in relation to establishing new courthouses; (2) an evaluation of the quality and fairness of the abbreviated proceedings at these courts and the reasons for their high case turnover rates; (3) the extent to which they are effective in replacing traditional justice mechanisms.
- The audit should consider whether the institution of the inspector-general is the best means for deciding upon advancement of judicial actors. In light of the current impasse, as well as issues of qualifications and concentration of power, it may be advisable to have a broader based and more transparent process for evaluating performance.
- The budgetary imbalance between the three branches of the justice system needs to be redressed to increase the capacity of the underfunded office of the public defender and ensure that the fair trial rights of the accused are respected. Salaries for public defenders should be equivalent to those of prosecutors so as to attract highly qualified applicants. An independent inquiry should be established into the reasons for the failure of the judiciary to process civil cases and should include a plan to address the existing case backlog.
- All Timorese laws and legislation should be promulgated in both of the two national languages, Tetum and Portuguese. All law codes should be authoritatively translated into Tetum so as to make them accessible to the vast majority of the population.

*B. Reorganisation of the Legal Training Center (LTC)*

- There should be independent training tracks within the LTC for judges, prosecutors, and public defenders to ensure that training is geared to the requirements of each branch. Each of these should have its own curriculum and trainers drawn from the respective professions. The classroom curriculum, practical program, standards, and final examination for each track should be under the oversight of the respective justice institution.
- The training of private lawyers should be taken out from the LTC and placed under an independent bar association.



- The language of instruction at the LTC should be Tetum. While reading knowledge of Portuguese may be required for judicial actors this requirement should be met through incorporation of classes on legal Portuguese into standardised university curricula rather than devoting the LTC's resources to language instruction.
- The curriculum for each of the three classes of judicial actors should reflect the requirements of practice as well as knowledge of substantive areas of the law. In particular, curricula should emphasise acquiring the analytical, writing, and advocacy skills required in each profession, e.g., judgment and decision writing for judges, indictment drafting for prosecutors and trial and appellate advocacy for public defenders. Curricula for all tracks should include substantial components on rule of law, fair trial rights, the rights of witnesses and victims, human rights law, and domestic violence and gender based violence, each geared to the needs and perspective of the respective judicial function.
- The LTC should also function as an institution for continuing education of judges, prosecutors, public defenders and courts staff. Regular completion of continuing education courses should be made a requirement for all judicial professionals so as correct for the shortcomings of the current training regime and to update their professional knowledge and skills in regard to new legislation, jurisprudence, and increasing IT resources.

### C. *Legal Education*

Reform of the LTC will not be effective in increasing the capacity of judicial actors without concomitant changes in legal education.

- The disparities in languages of instruction and curricula among the accredited law faculties needs to be addressed so as to better prepare candidates desiring entrance either to the LTC or to the bar. As Tetum is now the language of the courts it should be the primary language of instruction in all law faculties. A standard core of required courses for all Timorese legal professionals should be decided upon by a joint committee of the bar association and the justice sector institutions, as well as general requirements for obtaining a law degree.
- A new mechanism for the education and qualification of law faculty also needs to be developed to produce a common minimum standard of legal education at all Timorese universities. The development of a faculty capable of teaching practice-oriented and analytical skills of the kind required in legal practice should be given priority. Through consultation with an international committee of qualified academic experts on legal education, a list of internationally-recognised universities should be prepared where aspiring Timorese legal academics should be required to do at least a Master of Law degree prior to a university appointment. Quality of instruction and professional training should be given priority over considerations of language in the selection of such universities.

### D. *Creation of an Independent Bar Association*

The creation of a bar association is an integral part of the current reform process. The critical issue will be to ensure that it is genuinely independent and self-governing.

- The process of preparing and accrediting law graduates for entry into legal practice should be entirely independent of the government-run LTC. The bar association should institute a system of continuing education that is required of all those practicing law in Timor-Leste.

### *E. Transparency of Judicial Administration*

Increasing public confidence in the judiciary will require substantial reforms in the administration of the justice sector

- Unrestricted access should be allowed to all public court documents except where proceedings have been closed to protect minors, victims of sexual violence and the like.
- Annual reporting requirements should be instituted for the courts, office of the prosecutor general, and office of the public defender. These reports should be published and contain basic statistical information about staffing, budgets, caseload, etc. The Superior Council of the Judiciary should provide in its report information as to numbers of pending cases, disposition of cases, case backlog, and other critical data.
- An online judicial database should be established to make final decisions readily accessible.
- Processes for judicial appointment and advancement should be based on uniform and transparent standards and selection criteria. If the position of inspector general is maintained, it should be subject to clear standards of demonstrated competence and should be filled through a transparent process with an opportunity for input from civil society and the Bar Association.

### *F. Reform of Criminal Law and Practice*

Given that the cases brought to trial in Timor-Leste are almost 90 per cent criminal and that there are serious concerns as to whether fair trial rights of accused persons are being adequately implemented, reform of the criminal justice system should be a major priority of the current reform initiative.

- The Criminal Code and Code of Criminal Procedure need urgent revision to bring them into conformity with international standards and best practices and to consider whether they are adequate to the present needs of the justice system.
- An independent commission should be appointed to report on the conduct of criminal cases, especially in regard to respect for the rights of the accused and of victims and witnesses. Areas of particular concern to be examined include: (1) the current practice by which the majority of cases are disposed of by in-court confessions so as to determine whether these confessions are informed by an awareness of the rights of the accused, by competent and appropriate advice by the public defender assigned to the case, and are properly handled by the presiding judge; (2) the adequacy of the defense function at trial; (3) prosecution practices in charging offenses, particularly in domestic violence and gender based violence cases, and sentencing practices in these cases; (4) lack of effective witness and victim protection measures, particularly in regard to domestic violence and gender based violence cases; (5) respect for fair trial rights in the mobile courts.
- Clear and detailed guidelines should be adopted for written judicial decisions to ensure that they consistently, accurately and adequately reflect the procedural elements of a case which determine the degree to which fair trial standards are met, as well as substantively explain and justify the court's reasoning with regard to the weighing of evidence and determination of guilt and sentences.

## INSTITUTE FOR POLICY ANALYSIS OF CONFLICT (IPAC)

The Institute for Policy Analysis of Conflict (IPAC) was founded in 2013 on the principle that accurate analysis is a critical first step toward preventing violent conflict. Our mission is to explain the dynamics of conflict—why it started, how it changed, what drives it, who benefits—and get that information quickly to people who can use it to bring about positive change.

In areas wracked by violence, accurate analysis of conflict is essential not only to peaceful settlement but also to formulating effective policies on everything from good governance to poverty alleviation. We look at six kinds of conflict: communal, land and resource, electoral, vigilante, extremist and insurgent, understanding that one dispute can take several forms or progress from one form to another. We send experienced analysts with long-established contacts in the area to the site to meet with all parties, review primary written documentation where available, check secondary sources and produce in-depth reports, with policy recommendations or examples of best practices where appropriate.

We are registered with the Ministry of Social Affairs in Jakarta as the Foundation for Preventing International Crises (Yayasan Penanggulangan Krisis Internasional); our website is [www.understandingconflict.org](http://www.understandingconflict.org). This report was funded in part by a grant from the Foundation to Promote Open Society.