



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAM PEMANTAUAN SISTEM YUDISIAL

Report on Statute of Judicial Magistrates

Law No. 8/2002 of 20 September 2002

Dili, East Timor
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The Judicial System Monitoring Programme (JSMP) was set up as an East Timorese NGO in early 2001. Through court monitoring, the provision of legal analysis and thematic reports on the development of the judicial system, and outreach and information dissemination, JSMP is committed to the ongoing evaluation and building of the justice system in East Timor. JSMP staff consists of international lawyers from both common and civil law backgrounds and East Timorese lawyers.

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1. EXECUTIVE SUMMARY

The Statute of Judicial Magistrates (No 8/2002) is a specialised piece of legislation designed to regulate the judiciary in East Timor. JSMP notes that many of the ideas and principles behind this law are positive but concludes that it is not a suitable law for East Timor at a time when the justice system in this country is already struggling. The law, as drafted, appears designed and better-suited to a country where there are more judges, with more resources and greater experience than is the case in East Timor. JSMP has also identified a number of concerns with the law relating to processes for the assessment and dismissal of judges.

Proposed by the Government to the National Parliament on 2 July 2002, with a request for it to be dealt with as a matter of urgency, the law was promulgated on 20 September 2002. The law establishes a new body, the Superior Council of the Judiciary, to oversee the judiciary and in particular to control the appointment, promotion, discipline and dismissal of judges. It is noted, however, that the law appears to state that it shall not apply to East Timor's judges until they complete their "probation period". This means the law, technically, may not be valid, nor take effect until January 2004.¹

A law of this type is an important step in the development of East Timor's legal system. As such, JSMP commends the Government's efforts to establish the framework for a skilled, accountable and independent judiciary. In particular, JSMP welcomes the introduction of a system where the career progression of judges is based on an independent review of their skills and merits.

Despite this, there are aspects of the law that raise concerns about its operation in an East Timorese context, and possible implications the law might have for the independence of the judiciary and the rule of law. As set out later in this report, JSMP is also concerned that some aspects of the law may not be consistent with the Constitution of East Timor.

The Judicial Magistrates law establishes a complex system of regulation that requires many judges with lengthy experience. This is not suited to a new and developing nation with a very small and still largely inexperienced group of judicial personnel. Almost all of East Timor's 22 judges only began practicing their legal profession when East Timor's judicial system was recreated in 1999.

Further, the law provides for a number of magistrates and judges to be appointed to administrative positions carrying out executive functions, rather than, or in addition to, carrying out judicial functions in court. Even assuming the judges are sufficiently experienced, as prescribed by the law, to hold these various positions, JSMP is concerned that the responsibilities of these positions will distract judicial officers from their core work of hearing cases and consequently, have a negative effect on the judicial system and delivery of justice in this country. East Timor's judicial system is already overburdened and there are already insufficient legally trained personnel to deal with the current caseload.

¹ Chapter IV Career of judicial magistrates Section 25 Requirements to enter the judiciary:

"2. The pre-entrance probationary period, which shall last 2 to 3 years, shall be regulated in a separate legal instrument.

3. Trainee judges are not members of the judicial career."

Chapter VIII Transitional provisions Section 112 Probationary period:

"The probationary period applicable on the date of entry into force of this law shall now have duration of 3 to 4 years so that a specific complementary training may be given."

East Timor's current local (as opposed to international judges) were appointed in January 2000, which would mean that a three to four year probation period would finish at some time between January 2003 and January 2004. It is to be noted that according to section 25 (Requirements to enter the judiciary) the current probationary judges must also pass "specific exams" to be appointed as judicial magistrates.

The law also establishes procedures for judicial review to ensure judicial accountability. However, there is no clarity on the criteria against which a judge shall be assessed. During the public consultation process, JSMP had recommended that clear and objective criteria be put in place so that all judges are assessed in the same way against clear and uniform standards. JSMP further recommends that the reviews are extensive enough to *properly evaluate* the performance of all judges, and that the reviews are conducted in a fair and transparent manner.

JSMP is concerned that these recommendations have not been adequately addressed by the new law. For example, under the law as it is presently drafted, it may be a number of years before any person can take up the crucial office of Judicial Inspector. Further, the law appears to exempt the most senior judges, including the judges of the proposed Supreme Court of Justice and foreign judges from any form of performance review or inspection whatsoever. The procedures regarding the inspection and discipline of judges also fail to make clear whether it is the Superior Council that is responsible for hearing and evaluating evidence presented against a judge, or whether this task is to be performed by the Judicial Inspector. The law also fails to make clear who can make complaints against judges, and what is the mechanism for lodging such a complaint or grievance.

Finally, while the law grants security of tenure, it also provides for dismissal of judicial officers by the Superior Council following the conduct of disciplinary proceedings. JSMP is concerned that the grounds on which such judicial officers may be dismissed are not made clear by the law, and that there is resultant uncertainty about this process. This is especially important because the Superior Council, although independent, has a majority of members appointed by the President, Government or Parliament, and as such, the potential exists for improper political influence, or political considerations to play a role in such proceedings. JSMP recommends that a code of ethics be established so that judges clearly know their responsibilities and duties in advance, and that the law be amended to provide clear criteria as to the grounds upon which disciplinary proceedings may be brought, and the basis upon which judges may be censured or removed from office. JSMP is also concerned that the remuneration of judges is not properly secured by the present legislation.

2. SUMMARY OF RECOMMENDATIONS

Recommendations that were made to Parliamentary Commission A during the 2002 consultation process for the draft law:

- *Guidelines should be developed, possibly by the Superior Council itself, on how to perform judicial reviews, and identify measurable benchmarks for rating. Previous review systems, such as the Judicial System Assessment Program in Bosnia and Herzegovina, have spent both time and resources on developing such a framework, including disclosure forms, evaluation forms from the court administrators, and a methodology for receiving complaints on judges from the public.*
- *International judges and Counsellor Judges should also clearly be subject to review.*
- *The law should make provision for the publication of a Code of Judicial Ethics that would form the basis of any disciplinary proceedings.*
- *The law should state clearly that Judicial Magistrates can only be removed from their job in circumstances where very serious misconduct has been proven against them.*

- *Members of the judiciary should continue to enjoy freedom of expression, belief, association and assembly, subject only to their duty to protect the dignity, impartiality and independence of the judiciary. In particular judges should be free to establish and join an association of judges.*
- *The law should ensure that the defendant magistrate has the opportunity for a full hearing before the Superior Council. Disciplining judges is one of the most important functions of the Superior Council of the Judiciary and it should not be effectively delegated to one person.*
- *The law should establish a procedure for making and processing complaints against the judiciary. This procedure should set out what role, if any, the Parliament or Executive or the public might play in initiating disciplinary proceedings.*
- *Members of the Superior Council of the Judiciary should not be exempt from disciplinary proceedings.*
- *A provision should be included stating that judges' salaries cannot be lower than they were the previous year.*
- *The section on judges' liability should simply state that judges cannot be held liable for their decisions. It should not contain any exception to that rule.*
- *The law should contain a definition section where key terms are defined. Words should be used consistently throughout the law.*
- *Judges should not be able to practice law, whether for themselves or their family members, with the exception of representing themselves in criminal proceedings.*

3. THE JUDICIAL SYSTEM MONITORING PROGRAMME

The Judicial System Monitoring Programme (JSMP) is an independent non-governmental organization based in Dili, East Timor. JSMP was created in April 2001 in response to the need identified by bcal and international observers for a consistent and credible monitoring presence to contribute to the developing legal culture within East Timor, and to the international justice community, by providing information and analysis of issues arising from the ongoing process of re-establishing East Timor's judicial system.

In its activities, JSMP focuses on three main areas: trial observation, legal analysis and public outreach activities. JSMP has been the only independent organization constantly present during the trials held in East Timor's Special Panels for Serious Crimes, monitoring a process that is important to the development of the new justice system of East Timor and international justice in general. Since November 2002 JSMP has also monitored the District Courts.. In addition, JSMP provides legal analysis reports on draft legislation regarding justice related matters.

4. THE CONSULTATION PROCESS

A draft for the Statute of Judicial Magistrates was submitted to the National Parliament on 2 July 2002 with a government request that it be considered as a matter of urgency. It was debated in plenary session on 9 July 2002 and then transferred to the Parliament's Commission A (on the Constitution, Rights, Liberties and Guarantees) for specialized study.

During the specialized study in Commission A, various organizations and individuals were invited to give their comments and recommendations on the bill, including East Timor's General Prosecutor; the national judges; the Vice-Minister of Justice; the United Nations Mission of Support in East Timor's Human Rights Unit; Dr. João Nataf, Advisor to the Minister of Justice; Professor Cheryl Saunders, Consultant to The Asia Foundation; and the UN Special Rapporteur on the Independence of the Judiciary, Dato' Param Cumaraswamy.

JSMP was also called to give a presentation to the Commission. JSMP had similar concerns and recommendations to those submitted by the other individuals and organizations participating in the consultation process. JSMP's principal concerns about the draft included its focus on discipline and censure of judges in the absence of a detailed code of ethics against which their conduct might be judged. Insufficient provisions outlining in what circumstances a judge may be subject to discipline or dismissal and the lack of clarity on procedures to be followed place the independence of the judiciary in a vulnerable position.

JSMP had further discussion with members of the Commission during a media forum on the law, at which JSMP repeated its concerns and recommendations.

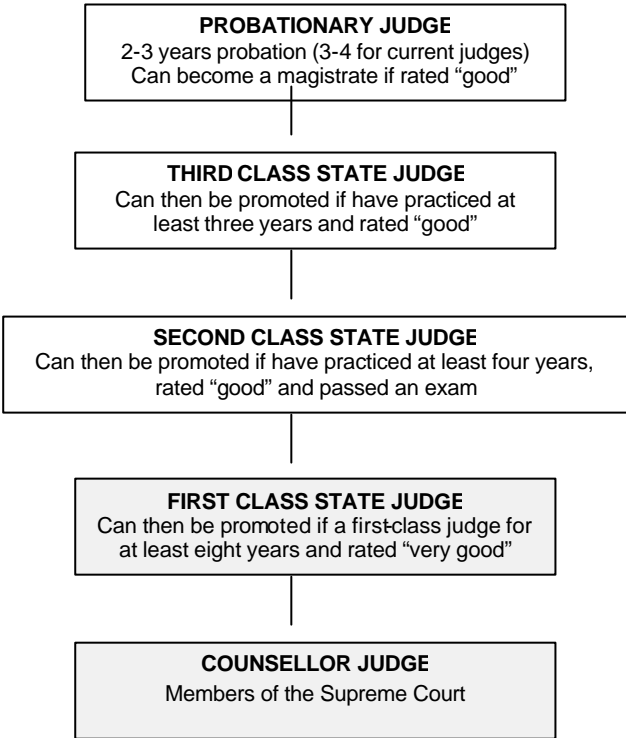
It is clear, however, that despite the consultation process, no substantial changes were made to the proposed law before being presented to Parliament. The changes to the draft were largely textual and did not take into account the concerns expressed by a range of commentators.

The proposed law was passed on 3 September 2002 and was promulgated by the President of the Republic in the same month.

5 THE STATUTE OF JUDICIAL MAGISTRATES

5.1 Operation of the law in East Timor

The Statute of Judicial Magistrates sets out the following career path for judges in East Timor²:



The law establishes that in order to be appointed as a Judicial Magistrate or “career” judge, a judge shall have gone through the probationary period for two to three years with a good rating. Under the statute’s transitional provisions, it appears the probationary period has been increased to three to four years for Timor’s judges in office at the time the statute came into force in September last year.³ Currently in East Timor, none of the country’s approximately 20 national judges (as opposed to foreign or “international” judges) have more than three years experience in the judiciary, as almost all of them began practicing their legal profession when East Timor’s judicial system was recreated in 1999. Therefore, even if their time spent as judges under the United Nations Transitional Administration in East Timor regime is included in their career progression (and the law does not clarify whether it is), there are currently no local judges in East Timor more senior than the level of Probationary Judge.⁴

Section 25 subsection 2 of the Statute states in part that “the pre-entrance probationary period...shall be regulated in a separate legal instrument”. This raises the question of which “separate legal instrument” governs East Timor’s national judges until the “three to four year”

² Section 28 (Promotion vacancy) item 1: “Promotion to the next class shall always be conditional upon vacancy availability”.

³ Section 112

⁴ The new President of the Court of Appeal, Timor-born Claudio Ximenes, has previous experience as a judge in Portugal and would presumably be classified as beyond probationary status. One of the transitional provisions, section 110, allows for the appointment of probationary judges to the nation’s Court of Appeal until that court is replaced by the proposed Supreme Court.

probation period of the current judges ends. Presumably this will be some time before January 2004 – four years since their appointment by UNTAET.

It appears that East Timor’s Parliament has not passed a subsequent law on this issue. Therefore, the magistrates law arguably leaves room for the continued application of UNTAET Regulation 1999/3 (establishment of a Transitional Judicial Service Commission) despite transitional provisions in the Judicial Magistrates law that purport to repeal previous laws.⁵ This is problematic as, in reality, the Transitional Judicial Service Commission is no longer functioning.

The Statute of Judicial Magistrates establishes a system that will require judges to fill a number of new positions, once they have accrued sufficient years of practice to be eligible to do so. For example:

- Once the application of transitional provisions has ended, the President of the Superior Council of the Judiciary (the President of the Supreme Court) must be a Counsellor Judge - a judge with at least eight years as a first class judge, not merely eight years experience;⁶ and
- There must be at least one First Class State Judge (the most senior rank of judge below Counsellor Judge) to act as a Judicial Inspector (s 22(4)). The law does not include any transitional provisions to alter this requirement.

For transitional purposes, Section 109 states that the President of East Timor’s (already-in-existence) Court of Appeal will be the President of the Superior Council of the Judiciary until the (proposed) Supreme Court of Justice is established and it is then possible to appoint career Judicial Magistrates.⁷ The section further provides that, as a transitional mechanism, three “Jurists” and a “Trainee Judge” can fill the other four positions on the Supreme Council of the Judiciary. These individuals were appointed in recent months.⁸ The transitional provisions thereby avoid the problem that there are presently no Timorese judges with the required years of experience and grading to meet the eventual requirements for seats on the Superior Council of the Judiciary.

⁵ Section 113 (Repeals) states in part (emphasis added): “Legislation *contrary* to this law is hereby repealed, specially relevant legal *provisions* contained in Regulations...1999/3...”. This phrasing appears to therefore only repeal individual provisions that are inconsistent with the new law, instead of declaring the entire Regulation repealed. Section 163 (Transitional judicial organization) item 2 of East Timor’s Constitution broadly provides that “The judicial organization existing in East Timor on the day the present Constitution enters into force shall remain operational until such time as the new judicial system is established and starts its functions”.

⁶ This is once the Supreme Court of Justice is established and career magistrates are appointed (see Section 109). As it appears that, under the Statute of Judicial Magistrates (s 29), arguably the first five Supreme Court judges are envisaged to be Counsellor Judges, and as the President of the Supreme Court shall be chosen from among them, then it is presumed that the President of the Supreme Court must be a Counsellor Judge. It is not known if Claudio Ximenes, the proposed new President of East Timor’s Court of Appeal and therefore a likely candidate to be the President of the future Supreme Court, satisfies the requirements of a Counsellor Judge, although it is believed that he has had considerable experience in Portugal. Apart from two possible exceptions, it appears that under the Statute it will take in East Timor at least 15 years to become a Counsellor Judge. Section 29 (Counsellor Judges) states “The National Parliament shall elect one Counsellor Judge from among magistrates and jurists”, which appears to allow the appointment of a Counsellor Judge who may not necessarily have satisfied the normal requirements of becoming a Counsellor Judge, and who may not even need to have previously been a judge. In Chapter VIII Transitional Provisions, Section 110 (Court of Appeal) item 4 reads: “Where it is not possible, through the judiciary, to fill existing vacancies, Counsellor Judges may be appointed, up to a maximum of two, from among magistrates from the Public Prosecution Service assigned to the Supreme Court, or public defenders of recognized merit holding a University degree in law and at least 10 years’ experience of forensic practice, or University lecturers in law with at least 10 years’ teaching experience”. The term “magistrate from the Public Prosecution Service” presumably means Supreme Court public prosecutors in general.

⁷ perhaps when some undefined decision maker, possibly the Supreme Council of the Judiciary, decides that the probation period of the current judges has ended, sometime before January 2004

⁸ Once s109 no longer applies, the “jurists” on the Council will have to have at least five years of relevant professional experience, and the member of the judiciary elected by his or her peers will need to be a qualified Judicial Magistrate.

A further issue is that there are presently no judges in East Timor declared to be First Class State Judges and it is unclear when any will have satisfied the requirements to have received that grade. Depending on how the relevant sections are read and applied, it is possible that it could take at least 7 years from the end of a judge's probationary period, and the passing of an exam, to become a First Class Judge.⁹

Although transitional provisions¹⁰ appear to provide for the case where there are no First Class Judges available to staff the Council's Secretariat, it is unclear whether this same provision covers the crucial position of Judicial Inspector. The "Judicial Inspector" is the Judicial Magistrate responsible under Chapter III (Judicial Inspection) for gathering information on the deficiencies of the judicial services and individual Judicial Magistrates and officers. If the above interpretation is correct, then this means that, under the Statute, no one can presently be legally appointed to this position. It is also possible that no one can be appointed to this position for at least 7 years. It is unclear, therefore, whether, and if so, when, East Timor can validly appoint a dedicated officer responsible for investigating complaints against judges and evaluating and rating the performance of the judges.

In the absence of a Judicial Inspector to carry out promotion assessments, arguably none of the current judges (when they end their probationary periods and fall within the application of the Statute) can progress up the career ladder. Alternatively, it may mean all of the judges must progress automatically because there is no one to assess them. This would mean that the law would have no real operation.¹¹ Even if there were transitional provisions to appoint Judicial Inspectors, it would be inconsistent with the development of a judiciary based on merit and skill to have inexperienced inspectors evaluating other judges. Furthermore, even if some of the 22 judges were sufficiently experienced to hold the various positions prescribed by the statute, it would have a negative effect on the judicial system if a significant percentage of East Timor's judges were occupied with the new positions and the duties that go with those positions, rather than focussing on the core work of judges, namely, to hear and determine cases before the courts. East Timor's judicial system is already overburdened and there are insufficient legally trained personnel to deal with the current caseload in the general court system. As such, JSMP questions the suitability of the model outlined in the law to East Timor's current stage of development.

Many of the ideas and principles behind this law are positive. However, in JSMP's assessment, it is not a suitable law for East Timor at a time when the current system is already struggling. This law is designed and better-suited to a developed country which has more judges and a better-resourced and more experienced judiciary. Apart from limited transitional provisions that only ameliorate some of the problems, it will be many years before much of this law can be any more than words on paper. At this point in time key aspects of the law, such as the provisions relating to the appointment of Judicial Inspectors and conduct of

⁹ Section 27 (Promotion of Judges) reads:

"1. Third-Class State Judges with at least three years' practice and 'Good' rating shall be promoted to Second-Class State Judges.

2. Second-Class State Judges with at least four years' practice, 'Good' rating and who have sat and passed specific exams shall be promoted to First-Class State Judges."

It is submitted that it is not completely clear whether this means a minimum of four years practice (including probation) to become a First Class Judge, or seven years practice (three plus four years) since probation – although the second scenario is more likely the intention of the drafters.

In contrast, Section 29 regarding Counsellor Judges

¹⁰ Section 109

¹¹ Section 15 (Competencies of the Superior Council of the Judiciary) does broadly give powers of assessment to the Superior Council of the Judiciary, and Section 55 (Evaluation of Judicial Magistrates) provides that state judges shall be evaluated by the Superior Council of the Judiciary. Yet Chapter III (Judicial Inspection) appears to clearly place the responsibility of carrying out judicial inspection on the Judicial Inspectors. Section 22 (Structure) creates a body, which includes judicial inspectors, called Judicial Inspection. Section 23 (Competencies) subsection 1 states "It shall be incumbent upon Judicial Inspection to inform the Superior Council of the Judiciary on the status, needs and deficiencies of judicial services so that the Council may take required action."

judicial inspections, cannot operate in practice, nor in compliance with the requirements of the law.

5.2. Procedures for review of judicial performance

Chapter III of the law establishes a process for inspecting and reviewing the status of judicial services, including the “service, merits and professional integrity of Judicial Magistrates.” Judicial Magistrates are further to be reviewed under Chapter V and rated according to their performance. These ratings are to be used to determine their eligibility to practice as judges, for promotions, and for suspension of duties.

General comments

Detailed and structured reviews of judges are a relatively recent phenomenon seen in some domestic jurisdictions, the most extensive being the review of judges in Germany after the fall of the Berlin Wall and the second being that which was organized by the UN in Bosnia and Herzegovina. Periodic reviews have also been implemented in other places, such as seven-year reviews in several states in the United States of America.

While reviewing judges may be a good way of ensuring high quality performance and public accountability for judges, it has to be done as part of a fair process that respects both the independence and the dignity of the judiciary.

Concerns

Although not entirely clear from the legislation, it appears that Judicial Inspectors appointed pursuant to Chapter III will be responsible for conducting not only general judicial review, but will also produce reports on the personal rating of the judges under Chapter V.

JSMP’s observations about these judicial performances review processes are:

- Although it is positive that the appointment and promotion of judges is to be based upon a system highlighting qualifications, it is important that the process of rating judges be further detailed in the form of clear assessment criteria that would ensure conformity and equal treatment of all candidates. This would also ensure that the review process could not be used to discredit a judge arbitrarily. Further, any assessment criteria should focus on evaluating the most important judicial functions and not simply an analysis of the volume of cases a judge has dealt with or performance on a written exam alone. Effective judicial review requires the commitment of significant time and resources to the assessment and review process because the nature of the position means that it is difficult to measure the standard of performance without close monitoring of a subject’s ability in managing cases in court, applying the relevant law correctly, and delivering considered decisions or judgements within a reasonable period of time.
- JSMP considers it important that the Judicial Inspectors appointed be judges with significant judicial experience and that they be given specialised training in the practice of conducting judicial performance reviews. JSMP is concerned that to appoint inexperienced or untrained judges to these positions may affect their ability to conduct reviews fairly and competently – and hence undermine public faith in the credibility of the judicial assessment system.

- According to Section 23(3) of the Act, Judicial Inspectors cannot investigate judges of an equal or higher position than themselves. This creates problems because Judicial Inspectors are to be appointed from the ranks of “First Class State Judges”, whereas the Supreme Court is to be composed of at least five, more senior “Counsellor Judges”: This anomaly suggests that the Judges of the Supreme Court will be exempt from inspection from any source. JSMP considers that, in the interests of transparent governance and public accountability, all judicial officers in East Timor should be subject to review, irrespective of their position or seniority. As such, JSMP recommends that Section 23(3) of the Act be amended to rectify this current failing.
- JSMP further considers that it is symbolically important for the law to explicitly state that international judges are to be subject to the same reviews as East Timorese judges. As it presently stands, the law merely states that the law in general will apply to international judges “on a transitional basis”.¹² One uncertainty about this, however, is that it may be Parliament does not have the power to make international judges subject to such review. This is because the Judicial Magistrates law fails to make clear whether it properly and exhaustively overrides previous UNTAET law on the issue.

As JSMP previously recommended during the public consultation sessions, guidelines should be developed as soon as possible, possibly by the Superior Council itself, on how to perform judicial reviews, and the benchmarks for rating which are to be applied. Previous review systems, such as the Judicial System Assessment Program (JSAP) in Bosnia and Herzegovina, have spent both time and resources on developing such a framework, including disclosure forms, evaluation forms for the court administrators, and a methodology for receiving complaints on judges from the public. Further, as stated above, JSMP firmly believes that both International Judges and Counsellor Judges should also be subject to such review.

5.3 Grounds for dismissal of Judicial Magistrates

Section 6 of the Statute of Judicial Magistrates guarantees that judges cannot be dismissed, demoted or suspended except according to the procedures specifically set out in the law. The procedures set out in Chapter VI of the law allow a Judicial Magistrate to be disciplined, which includes being suspended or dismissed, by the Superior Council of the Judiciary if they are found guilty in disciplinary proceedings.

General Comments

Security of tenure is a vital element of judicial independence. However, mechanisms must also be available to dismiss judges for serious misconduct that undermines the community’s belief or confidence in the judicial system. The best way to find a balance between these two competing demands is to ensure that all disciplinary, suspension or removal proceedings are determined in accordance with *established standards of judicial conduct*. Also, JSMP considers that alternates to dismissal (such as official censure and warning, or a direction that a judge undertake remedial education) should also exist, so that dismissal should be limited only to those cases where the conduct of the judge in question is so serious that it makes him or her *unfit to be a judge*.

¹² See Transitional Provision 111(1).

Specific Concerns

JSMP's comments and observation about this aspect of the legislation can be summarized in the following points:

- The kind of judicial misconduct that would justify dismissal is not set out clearly. Section 70 includes such imprecise terms as “dishonesty”, “immoral or dishonoured conduct” and “professional incompetence” as reasons for dismissal. However, none of these terms are defined in the legislation and could be interpreted in any number of ways. In particular, JSMP is concerned that the activities of a judge in his or her private life, and which do not necessarily have any relationship to his or her capacity as a judge, could be used to justify disciplinary proceedings and dismissal from office.
- The duties of a Judicial Magistrate are set out in section 37 of the law and are stated very broadly. For example, section 37 states that judicial magistrates must discharge their duties with “honesty, neutrality, impartiality and dignity”. Whilst expressing sound ethical statements, there is a difficulty because, in practice, these words mean different things to different people, and the words are so vague as to be meaningless. A judge would not know with any certainty what sort of conduct might result in disciplinary action, and potentially, dismissal. Further, it is not difficult to foresee a circumstance in which this lack of certainty might adversely influence a judge’s exercise of their independence and discretion, and thereby prevent him or her from properly performing their functions in accordance with their oath of office.
- Pursuant to the Constitution, four out of five positions on the Superior Council are appointed by the President, the Government and the Parliament. Only one of the members is elected by the judiciary itself. Further, it is possible that only two of the five members will themselves be judges. In JSMP’s view, this opens the door to the possibility of excessive political influence in the make-up and operation of the Council and raises serious concerns about the future *de facto* independence of the Council. These concerns underline a particular need to ensure the Council can only dismiss or suspend a judge in very specific circumstances that are set out clearly in advance.
- In JSMP’s view, the legislation is lacking in that it does not limit dismissal to those cases where the conduct of a judge is so serious that it makes him or her *unfit to be a judge*. Although section 72 provides that the type of penalty will depend on due consideration of the seriousness of the judicial misconduct and the culpability of the person concerned, it does not expressly confine dismissal to only the most serious cases of misconduct. JSMP believes the law should be amended to provide better certainty and clarity on this issue.
- The law provides in section 35 that a judge should not take a political position or make public statements of a political nature. While it is of course essential that judges are not actively involved in *party politics*, section 35 is so broad in scope that it also covers all sorts of activities that judges might be legitimately involved in. For example, section 35 of the Act could be employed to prohibit a judge from making a speech about human rights or publishing a paper about the independence of the judiciary in East Timor. JSMP is concerned that the law might be used in such a way that if any of a judge’s public or private behaviour shows a political persuasion of any sort, on any matter, and in particular one that is not consistent with the ideals of the particular government in power, then they could be subjected to disciplinary proceedings and the threat of dismissal.

- A further issue (and one which is not addressed by the Act) is the question of judges' entitlement to form a professional association. In JSMP's view, the right of judges to form such an association to represent the common interests of their members, and to comment, where appropriate, on matters of public interest affecting the justice sector, is an important one. That such an association (possibly including other actors in the justice sector, such as Prosecutors, Public Defenders and the private legal profession) be created, and become an active participant in justice sector debate, is also probably essential to the continued reform and development of the justice system and the future of judicial independence in this country.

JSMP considers that the law should have made provision for the publication of a Code of Judicial Ethics. This would form the basis of any disciplinary proceedings. In addition, it should have clearly stated that Judicial Magistrates can only be removed from their job in circumstances where very serious misconduct has been proven against them, and that such misconduct renders them unfit to hold judicial office. Finally, JSMP believes that members of the judiciary should continue to enjoy freedom of expression, belief, association and assembly, subject only to their duty to protect the dignity, impartiality and independence of the judiciary. In particular judges should be free to establish and join an association of judges, or alternatively an East Timorese law or bar association, should such institutions be created..

5.4. Disciplinary proceedings against judicial magistrates

Chapter VI of the law sets out the procedure for disciplinary proceedings. Disciplinary proceedings will be conducted by investigating Judicial Magistrates under the umbrella of the Superior Council of the Judiciary. The procedure provided for by the law allows for a Judicial Investigator to investigate the case and then, if there is sufficient evidence, to lodge a charge setting out all the relevant evidence. It is not stated in the legislation, and as such, is not clear with whom this charge is lodged, or to whom the report is to be made. Presumably, it is to the Superior Council of the Judiciary functioning as a disciplinary panel. The defendant must then be notified of the charge and given time to lodge a defence. During this time the defendant Judicial Magistrate has a right to inspect the case against him or her and "indicate witnesses, gather documents or request actions". Again, it is not clear who has responsible for assessing and responding to these requests for actions. Once a defence has been lodged and the evidence is finalised, the Judicial Investigator must file, within 15 days, a report (once again presumably with the Superior Council of the Judiciary) that sets out "the facts, the existence of which are considered proven, its qualification and the applicable penalty". A copy of the final decision along with a copy of the report of the investigating magistrate must be given to the defendant magistrate.

General Comments

The law sets strict timelines for disciplinary proceeding, which is positive. It is also positive that the law provides for disciplinary proceedings to be conducted by the Superior Council and not by the government. There is some provision in the law for the defendant magistrate to present a defence but the procedures are not entirely clear. This is a major concern as it appears to afford only limited procedural fairness to the accused.

Specific Concerns

- The law does not clearly set out who is to make the decision after the Judicial Investigator makes his or her report. Will it require a majority vote of the Superior Council of the Judiciary? What is the standard of proof? Is it the civil standard, or will the relevant decision-makers have to be satisfied beyond reasonable doubt? Will they

have to publish reasons for their decision? In JSMP's opinion, all of these matters should have been considered and clearly stated in the new legislation.

- It is possible, depending on how the law is interpreted, that the defendant magistrate will not have an opportunity to put evidence, cross examine witnesses and make submissions directly before the Superior Council. This is despite the fact that it is (presumably) the Council that will ultimately make the decision about guilt or innocence, and if guilty, the penalty to be imposed.¹³ If this is so, the law would not really provide for a fair hearing. If it is the Judicial Investigator who conducts the investigation, and then presents the entire case and his conclusions to the Superior Council, then this may mean, in practice, that it is the Judicial Investigator (and not the Superior Council) that becomes the main arbiter of fact, determines what is relevant and what is not, and determines what defences or explanations for the conduct in issue are valid, and which aren't. JSMP considers that the failure of the legislation to expressly provide for the procedures and rules to be followed in the conduct and determination of such disciplinary hearings does not provide an adequate safeguard for the rights and interests of the accused in what is a very serious matter.
- The law does not clearly set out what would trigger a disciplinary proceeding or what the process is for making a complaint. Does it have to be a written complaint? Can it be an anonymous complaint? The procedure for handling and processing complaints is an important one. This should have been set out with more clarity to ensure two things: (1) that people are not able to make allegations, and particularly anonymous allegations, against a Judicial Magistrate -(hence triggering an investigation - without first providing evidence, or establishing a firm foundation believe the complaint may be true, and (2) that legitimate complaints are not just ignored because no one is obliged to investigate them. The law does not clarify what role, if any, the legislature or executive might play in initiating disciplinary proceedings. The law is silent on all these matters.
- The law does not set out how disciplinary proceedings against a judge, who is also a member of the Superior Council of the Judiciary, might be brought. Likewise, because a Judicial Investigator cannot, under the legislation as it now stands, investigate a judge in an equal or higher position to them, the Judicial Magistrates Law seems to render it impossible to bring disciplinary proceedings against a Supreme Court Judge.

JSMP believes that the law should have clearly provided that the defendant magistrate has the opportunity for a full hearing before the Superior Council. Disciplining judges is one of the most important functions of the Superior Council of the Judiciary and it should not be effectively delegated to one person. Secondly, the law fails to establish a clear procedure for making and processing complaints against the judiciary. This procedure should set out what role, if any, the Parliament or Executive or the public might play in initiating disciplinary proceedings. Finally, in JSMP's view it is important that all judicial officers are treated equally under the law. For this reason, members of the Superior Council of the Judiciary or Supreme Court should not be exempt from complaint and disciplinary proceedings.

¹³ Section 58 (Elements to be considered for evaluation) item 3 reads "It shall be mandatory to hear the judicial magistrate on the inspection report and he or she may provide elements as he or she may consider convenient", but this section and others do not make it clear whether such a hearing and other aspects of the investigatory and disciplinary procedure are held before the Judicial Inspector or the Superior Council of the Judiciary. ("Elements" are referred to in Section 58, item 1: "Elements to be considered for evaluation shall be results of previous inspections, inquiries, investigations or disciplinary cases, time of service, published works in the area of law, annual reports and any other additional elements in the possession of the Superior Council of the Judiciary.")

5.5. Constitutionality of the law

JSMP has concerns also about the constitutionality of some aspects of the law.

In particular:

- the provision in Section 40 (Rights and Benefits) which provides a Judicial Magistrate shall be entitled to “Special Benefits” in criminal and civil proceedings arising from the exercise of their functions,¹⁴ and
- Section 43 of the law says that judicial magistrates cannot be arrested or detained without being charged, except if they are caught committing an offence that carries a penalty of more than three years.

Section 16, Article 1 of the Constitution of the Democratic Republic of Timor-Leste states that everyone is equal before the law and that all people have the same rights and duties. Sections 40 and 43 as presently drafted and noted above, are not clear in their meaning and do not appear to be consistent with Section 16, Article 1 of the Constitution. JSMP is of the view that, for the purposes of clarity, these sections of the Act should be redrafted.

5.6. Miscellaneous

Section 5 of the law provides that judges cannot be held responsible or liable for their judgments and decisions *except as provided for by law*. This reflects Section 121, Article 4 of the Constitution. In many countries, judges cannot be sued at all for decisions they make in court. This allows judges to make the best decision in accordance with the law without worrying about whether they might be later sued by the parties to the case. JSMP believes that this section should have been simpler by stating that judges cannot be held liable for their decision and should not contain any exception to that rule.

Alternatively, should the legislature wish to place some restriction or caveat on this immunity, JSMP is of the view that the wording of Section 31 of UNTAET Regulation 2000/11 provides more clarity and certainty than the present legislation, and consideration should be given to amending the law, and adopting the phraseology of the UNTAET law in its place.¹⁵

Another problem is that throughout the law many different terms are used such as *judicial officer*, *jurist*, *judge* and *judicial magistrate*. It is not always clear what these terms mean and how they are different from one another. The law lacks a definition section where those terms would have been defined. Further, words should be used consistently throughout the law.

Finally, Section 36 of the law states that Judicial Magistrates should not practice law except in cases concerning themselves, or in representing their spouse, their ancestors or descendants. JSMP is of the view that this (even limited) right of appearance is unnecessary and may give rise to allegations of bias by fellow judges presiding in such cases. Again, to avoid the possibility of actual bias, or the appearance of bias, occurring in this regard, JSMP considers that the law should be amended to provide Judicial Magistrates are not able to practice law, *except* where they wish to represent themselves in criminal proceedings.

¹⁴ Section 40 (Rights and benefits) of the magistrates law also states:

“1. A Judicial Magistrate in full exercise of his or her functions shall be entitled to the following benefits:

(b) Special treatment in cases where he or she is the defendant and in proceedings of civil liability for acts committed in the exercise of his or her functions or as a result thereof;”

¹⁵ The applicable UNTAET law 2000/11 as amended by 2001/25 stated in Section 31 (Privileges and immunities) item 2: In particular, judges shall not be liable or otherwise responsible for any adverse effects or any damage caused by any of their acts or omissions committed in the course of the discharge of their functions, except where such effects or damage are caused by intentional and wrongful conduct”.

6. CONCLUSION

The new Judicial Magistrates Law is a progressive piece of legislation designed to regulate the judiciary in East Timor. It establishes a new body, the Superior Council of the Judiciary, to oversee the Judiciary and to control the appointment, promotion, discipline and dismissal of judges. A law of this type is an important step in the development of East Timor's legal system. In particular JSMP welcomes the introduction of a system where the career progression of judges is based on an independent review of their skill and merit. As such, JSMP commends the Government and National Parliament upon their commitment to establishing the framework for a skilled, accountable and independent judiciary.

JSMP is disappointed, however, that no significant or substantive changes were made to the draft legislation before it passed into law. This is despite broad consultation. While the willingness of the National Parliament to invite comments and recommendations on the draft from interested parties, such as national and international jurists is strongly commended, JSMP notes that the changes made were largely textual and have not taken into consideration many of the concerns and proposed amendments expressed by a range of commentators.

There are some aspects of the law that raise concerns about how the law might operate in an East Timorese context and the possible implications the law might have for the independence of the Judiciary and the Rule of Law in East Timor. Issues specifically addressed in this report are that the law is more suited to a mature and fully developed justice state, and is not compatible with East Timor's current stage of development.. JSMP believes that a simpler model would have been more appropriate for East Timor's nascent judicial system.

Further, while the establishment of an independent body like the Superior Council of the Judiciary is positive, JSMP believes that it is imperative to have more members of the judiciary on the Council, and that appointments should be made by members of the judiciary themselves, rather than parliamentarians. Given the important function of the Superior Council, these measures would ensure that the body is truly independent and protected from improper influence by the Government and the Executive.

Finally, JSMP believes that there is an urgent need for the development of guidelines, possibly drafted by the Superior Council itself, identifying measurable benchmarks for performance assessment and eligibility for promotion, and providing guidance as to the manner in which performance assessments are to be conducted. Further, a Judicial Code of Ethics should be developed, which would provide a benchmark for proper judicial conduct, and provide a framework against which disciplinary proceedings might be brought.

JSMP encourages the Judiciary, the Government and other interested parties to consider closely the views and recommendations outlined in this report, and submits that the new law remains in need of further revision.