



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAM PEMANTAUAN SISTEM YUDISIAL

**The Impact of the Language Directive on the Courts in East
Timor**

Dili, East Timor
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The Judicial System Monitoring Programme (JSMP) was set up in early 2001 in Dili, East Timor. Through court monitoring, the provision of legal analysis and thematic reports on the development of the judicial system, JSMP aims to contribute to the ongoing evaluation and building of the justice system in East Timor. For further information see www.jsmp.minihub.org

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1. EXECUTIVE SUMMARY

In the month of February 2004, the Superior Council of Judicial Magistrates (CSMJ) adopted the Directive on the Use of Official Languages in the Judicial System (hereinafter the Language Directive). This Directive establishes a period of approximately seven months for all court documents to be written in the country's official languages – Tetum and Portuguese. Indirectly, this Directive prohibits the use of the Indonesian language in Court documents.

This Directive has been met with strong reactions from different actors in the judicial system. Many actors were surprised by the decision on the use of language as set forth in the Directive. JSMP understands the reasons for this reaction from court actors, as the Directive obliges them to use a language which, until today, has not been used by most actors. In addition, the Directive also establishes an extremely short period for the implementation of the official languages in the Courts in East Timor.

JSMP is aware that it is important to have regard to two different aspects of the Language Directive when analysing its implementation. Firstly, the formal obligation regarding the use of the official languages as set out by the Language Directive. Secondly, the substantial problems encountered in the administration of justice due to the demands for a change in language. These two factors are important given the current situation that most court actors have greater capacity to use the Indonesian language rather than Portuguese or Tetum.

One of the main justifications given by the CSMJ for its decision on the use of the official languages was the need for Courts to follow the development in other institutional areas in East Timor, such as the public administration and ministries. The argument that Courts have to immediately follow the position of other organs and institutions should not represent the main reason for rapid changes in the use of language in the judicial system. JSMP is of the opinion that the main question to be looked at is the provision of an efficient justice administration and the guarantee that people can effectively receive justice.

In this report, JSMP has identified that the necessary conditions for the effective implementation of the Language Directive, for the Courts to receive the two official languages as working languages, do not yet exist. This vacuum creates difficulties for all court actors as well as obstacles for the proper administration of justice. This report considers that the Language Directive cannot be effectively implemented without encountering many problems because there are not sufficient conditions in place to provide the basic support necessary to implement the use of the official languages in the Courts.

JSMP recognises that today Indonesian does not have the status of an official language in East Timor, consequently, the two official languages are to have a more important role in

the country. JSMP also acknowledges that, as a consequence of the norms established by the Constitution, the judicial system also has to change the languages used, to those having the status of an official language in East Timor. The reality is that in the beginning there will always be challenges in a process such as the process of changing languages. There is also the need to attempt to start this process as soon as possible in order to guarantee that there is enough time to develop the two official languages as the languages to be used in the judicial system. The process that should be adopted should not impose an obligation upon court actors to use the official languages too quickly or without suitable preparations.

JSMP is of the opinion that in order for court actors to use the official languages in Courts, they should have the opportunity to start from a process in which they have access to the facilities needed to implement the official languages without jeopardising the delivery of justice.

JSMP believes that the process established by the Language Directive is a process which does not reflect the language capacity of court actors. Seven months do not represent a realistic period in order to guarantee that actors are able to comply with the Language Directive and to use effectively the official languages without negatively impacting on their work.

Currently initiatives are in place to develop a legal dictionary in Tetum, to train translators and interpreters and consequently establish a basis from which it is possible to translate laws to Tetum. JSMP believes that a decision similar to the decision of the CSMJ in the Language Directive should have been made only after minimum conditions - such as the listed above - for its implementation were in place. JSMP believes that the intention to establish a process with a speed similar to what has been established by the Language Directive does not bring great advantages; on the other hand, it has the potential of bringing many negative results. The Courts, which today already face great difficulties, end up having increased difficulties, as court actors are not easily able to use the official languages. It also results in negative reactions from court actors because of their lack of involvement in the decision making process. Lastly and unfortunately it can result in injustices in cases before the Courts.

In this report, JSMP undertakes an analysis of the constitutionality of the Language Directive. JSMP questions whether the Language Directive is in conflict with the Constitution, arguing that the Superior Council of Judicial Magistrates' competency is limited to regulate the judge's profession, discipline of judges and court staff. In summary, the regulation of language use in Courts goes beyond the competency of the CSMJ.

JSMP identifies that the process used when the CSMJ adopted the Language Directive was not satisfactory. Currently, there is not a strong foundation to implement the use of the official languages in Courts, and only in 2005 will there be the possible completion of two important initiatives: legal dictionary in Tetum and translation of Laws to Tetum. JSMP believes that these factors, together with the factor that the Language Directive

lacks legality in terms of the Constitution, provides a suitable opportunity for Parliamentary involvement in order to guarantee that the process to implement the use of official languages in Courts indeed reflects the conditions found in reality.

In relation to the issues included in this report and summarising what has been stated above, JSMP recommends that:

- 1) *The judicial system has to guarantee that conditions – along the lines of a legal dictionary, laws written in Tetum and language training courses – must be in place before changing the languages. Following JSMP's recommendations, the development of these conditions is a pre-condition in order to continue the process of changing the language used in Courts. JSMP also recommends that the process must include mechanisms which can guarantee the involvement and participation of court actors.*
- 2) *The Language Directive should be suspended because of the lack of necessary conditions for change do not currently exist in the Courts, or legal questions raised on the constitutionality of the Language Directive.*
- 3) *Mechanism are established for training court actors on writing skills in Tetum. The Portuguese language training should continue but it is important to evaluate the language courses given so far and how they can guarantee that the course reflects the needs of court actors as well as their availability. Language trainings must also include court actors working in the districts.*
- 4) *The Parliament should develop a law which includes the process for the change of languages in the Courts of East Timor. JSMP also recommends that this law-making process should start as soon as possible in order to guarantee that the use of official languages in Courts is developed with a proper legal basis. This development has to be based on dialogue and consultation with court actors.*

2. GENERAL INFORMATION

2.1 Language in East Timor

Today, East Timor has many languages which are used by communities and the media. Geographic factors can also be considered as relevant when looking at the differences of languages between different communities in East Timor. Despite this, Tetum is the language which has the central position in East Timor because it is used as a mechanism for communication between various communities in East Timor even though each community may have their own language.

Portuguese and Indonesian languages are also languages used in East Timor. Statistics concerning the use of language show, more or less, the following break-up: 60 to 80% of people use Tetum, 40% to 20% Indonesian, 5% Portuguese and English 3%¹.

In order to understand the complexity of the issue of languages in East Timor, JSMP believes it is important to look briefly at the issue of language use during important historical periods in East Timor. This report does not purport to comment on the political aspect of languages in East Timor during the Portuguese and Indonesian periods. However, it looks more closely at the issue of language during the UNTAET period and the period following independence.

During Portuguese rule in East Timor, the Portuguese language was formally recognised as the official language in the administration of East Timor. This situation changed with the Indonesian occupation. During the Indonesian occupation, the Indonesian language had the status of the official language in East Timor. The situation in relation to official languages and the languages used changed once again during the period of administration by the United Nations (UNTAET) as well as after East Timor's independence.

2.1.1 UNTAET Period

The responsibility and competency to establish the administration after Indonesia left East Timor was in the hands of the United Nations (UN) and its presence as the Transitional Administration Authority in East Timor (UNTAET). During this period, English had a strong influence in the work of the UNTAET administration because of the large international presence in East Timor.

This situation also had an impact on the area of language, in the general administration as well as the judicial system. UNTAET Regulation 2000/11 (as amended by UNTAET

¹ To JSMP's knowledge there are between 15 and 35 local languages in East Timor. JSMP is aware that at the time of writing of this report no official statistics was available on the issue of the number of languages in East Timor as well as the percentage of their usage. On this lack is based the current national census of East Timor. The statistics included in this report was based on the Report by Government of East Timor and donor partners through the Poverty Assessment Steering Committee, titled: Poverty in a New Nation: Analysis for Action, p 106.

Regulation 2001/ 25) – article 35- provides that Tetum, Portuguese, Indonesian and English can be used in the justice sector².

During the UNTAET period, regulations were written in English with translation to other languages for use by Timorese officials³. The initiative to provide translations to Indonesian was positive because Timorese were familiar with the Indonesian language and therefore Indonesian language had an important role to play within the judicial sector. Court actors in the district courts (judges, prosecutors, lawyers and others) usually used Indonesian as the language during trial hearings, and for administrative purposes related to the judiciary including written documents.

2.1.2 Period after Independence

East Timor's independence occurred in 2002, the same year in which the Constitution was promulgated in East Timor. The language issue is regulated by the Constitution of the Democratic Republic of East Timor. In Article 13(1) of the Constitution it is provided that Tetum and Portuguese are the official languages in East Timor. The Constitution also recognises Indonesian and English as working languages – together with the official languages – in the public administration until such time as needed⁴.

Currently it can be observed that at government level and in the work of administration the official languages (Tetum and Portuguese) are already being used, even though the majority of government members can speak and write another language. This phenomenon has also consequences for public documents – such as decree-laws and decrees – of which the majority are written in Portuguese⁵.

At Parliament a similar to the situation for government, described above, exists. When JSMP observed Parliamentary debates it noted that usually Parliament makes use of one or both of the official languages. However, to date, official documents, including the Laws, have been written in Portuguese. To JSMP's knowledge, the Government Gazette (*Jornal da Republica*) had only published, until the time of writing of this report, one Law which was translated to Tetum⁶.

In the area of education, the use of languages is related to the level of the institution within the educational system. To JSMP's knowledge, at primary schools Portuguese is considered as the priority language in the curriculum and in these schools there is a daily attempt by teachers to use Portuguese. At the secondary school level, the students learn Portuguese more or less like a second language. Teachers use more Tetum and

² The working languages of the Courts in East Timor, during the transitional period, shall be, as appropriate, Tetum, Portuguese, Indonesian and English.

³ During UNTAET period, UNTAET has adopted 78 regulations which were originally written in English. All Regulations were translated to Portuguese. UNTAET made translation of 63 of the 78 Regulations to Indonesian. In relation to translation to Tetum, there are only 9 Regulations translated: these 9 Regulations do not include Regulations 2000/30, 2000/11, 2000/15 and 2001/25 (the last amended Regulation 2000/30 and 2000/11) which are the main Regulations directly related with the Courts.

⁴ Article 159 of of the Constitution of East Timor.

⁵ The issue of the Language in the Laws in East Timor is discussed below in *Chapter 4.3*.

⁶ The issue of the Language in the Laws in East Timor is discussed below in *Chapter 4.3*.

Indonesian languages. This situation reflects the reality that the majority of teachers are Timorese and have a better knowledge of Tetum and Indonesian than Portuguese⁷. At the University level, even though the process of changing the language of education into one of the official language has started in state-run universities⁸, the reality is that the majority of lecturers have higher abilities in Indonesian language than one of the official languages as the majority of lecturers studied in Universities in Indonesia.

2.2 Language use in the Courts (prior to the 5th of April).

JSMP believes that it is of the utmost importance to consider the use of languages in East Timorese Courts in order to determine the impact of the Language Directive and how the court actors can implement this directive. In this report JSMP will examine language use in the Court of Appeal and the District Courts.

Although until now, the Courts, in accordance with the law, have been able to use four languages (two official languages and two working languages), JSMP feels that it is crucial to consider the languages used by the courts, as JSMP is aware that normally a court would use one or two languages, if prescribed by law.

Although the Language Directive only relates to written language, JSMP believes that it is also crucial to consider the written and spoken language used by the court actors during hearings.

2.2.1 The Court of Appeal

Language use in the Court of Appeal is unique in the context of East Timor; the situation in the Court of Appeal is different to that found in the other courts, therefore JSMP has chosen the Court of Appeal as a case study for this report.

When considering language use in the Court of Appeal the following three factors must be examined: the ability of the Judges of the Court of Appeal, the language used by the other court actors and the language understood by the audience.

The composition of the Court of Appeal is prescribed by Article 15 UNTAET Regulation 2000/11 and Article 22.2 UNTAET Regulation 2000/15. From June 2003 until June 2004 there were three judges in the Court of Appeal: two Portuguese judges (one of the Judges also has East Timorese nationality) and one East Timorese judge⁹.

⁷ Lately, the Minister of Education has been receiving a great amount of assistance from teachers from Brazil and Portugal, however, to JSMP's knowledge, the educational system currently does not possess enough of international teachers in order to teach every pupil in schools in East Timor.

⁸ Mainly the University of Dili, which is a state-run university, has to make use of the official languages of East Timor.

⁹ This composition has been in place since June 2003. During the UNTAET period, The Court of Appeal consisted of two of the aforementioned judges and one judge from Uganda. For a short period the Timorese judge was replaced by two other East Timorese judges respectively.

During JSMP's monitoring period of the Court of Appeal, JSMP was able to identify the languages understood and used by the judges. JSMP observed that the East Timorese judge can speak and write in Indonesian and Tetum. The East Timorese judge also has some comprehension of English and Portuguese, however JSMP believes that this comprehension is limited and the judge herself acknowledges that it is not easy for her to write a decision in Portuguese or English. The Portuguese Judge, in JSMP's opinion, does not understand Tetum or Indonesian. JSMP is also aware that the Portuguese judge's comprehension of English is quite limited. The president of the Court of Appeal – who has joint nationality, namely East Timorese and Portuguese – is able to speak and write in Tetum and Portuguese. Based on information received by JSMP, this judge does not understand Indonesian¹⁰. JSMP believes that the President of the Court of Appeal is able to use English, but JSMP does not know if he is fluent.

In 2003, JSMP observed that two of the judges always wrote decisions from the Court of Appeal in Portuguese. The other judge – (the East Timorese judge) – always wrote in Indonesian. During this period, there were 47 decisions, 42 of which were in Portuguese, none in Tetum and 22 decisions¹¹ were in Indonesian.

During 2003, based on JSMP's observations, it was apparent that decisions were written only in Portuguese and Indonesian. However, in 2004, up until the 5 April 2004, JSMP observed that two decisions were issued in Tetum¹². In an interview between JSMP and the East Timorese judge working in the Court of Appeal, the aforementioned judge said that from 2004 onwards, she would like to start trying to write decisions in Tetum.

The Court of Appeal in East Timor receives appeals from the District Courts. The languages commonly used in the District Courts are discussed in another section specifically about the current use of languages in these Courts. That section discusses the District Courts and the Special Panel for Serious Crimes separately, as these two Courts generally don't use the same languages.

Whilst monitoring the Court of Appeal, JSMP observed that during appeal hearings originating from the District Courts (Dili, Suai and Baucau District Courts¹³), the court actors – lawyers (public defenders or private lawyers) and prosecutors generally used Tetum when they spoke. During the monitoring period in 2003 up until April 2004, JSMP did not see a single case from the District Courts in which the court actors spoke Portuguese in hearings. JSMP noticed that in a number of cases the Timorese judge had to interpret into Indonesian the discussions that took place during the hearings, to guarantee that the accused could understand the Court of Appeal process.

¹⁰ This is based on observations of hearings that took place during 2003, whenever the court actors spoke in Indonesian, the East Timorese judge was the only judge who spoke for the duration of the hearings. And also when questioning the accused, in cases where the accused could not understand Tetum, the East Timorese judge would interpret.

¹¹ This total includes a decision issued by an individual judge as a dissenting opinion. In 2003 there were 17 decisions in which the main decisions were written in Portuguese and the one dissenting opinion was written in Indonesian.

¹² Decisions in the cases of 4/2004 and 7/2004.

¹³ During JSMP's monitoring period, the Court of Appeal did not receive any appeals from the Oecussi District Court.

Appeal statements¹⁴ up until April 2004 were always written in Indonesian. JSMP noticed that a small number of documents, predominantly from the Public Defenders – were in Portuguese. However there is no doubt that Indonesian is the main language used by the court actors when writing submissions. Based on the observations of JSMP, the majority of documents in cases handled by the District Courts were written in Indonesian¹⁵. JSMP also observed that when documents were written in Indonesian, the Court of Appeal had to have them translated into Portuguese because two of the judges did not understand Indonesian¹⁶.

The appeal process for cases originating from the Special Panel for Serious Crimes did not experience the same language problems. The Special Panel for Serious Crimes used English as its main language. Consequently, appeal statements were normally written in English by the prosecution or defence. In these hearings, the Court of Appeal Judges, defence and prosecution always used English.

The ability of the community (including the accused) to understand the trial process at the Court of Appeal is also an important factor when considering the issue of language use in the courts. JSMP considers this to be a crucial factor, because JSMP sees the need for the community to have faith in the judicial system to guarantee the rights of the community to participate in the judicial process and the right to obtain information in a language that they understand. The languages understood by the community are based on the general statistics on language competency in East Timor, and therefore when the Court of Appeal uses a language it must ensure that the community can understand the process; due to the fact that only a small number understand Portuguese, it is important for the Court of Appeal to use Tetum or Portuguese accompanied by a system of interpretation.

2.2.2 District Courts

During 2003 up until April 2004, what occurred in the District Courts (Dili, Baucau, Suai and Oecussi) was different to that experienced in the Court of Appeal. When JSMP compared the capacity of the court actors in the District Courts to use Portuguese, Tetum and Indonesian, JSMP observed that Judges, lawyers and prosecutors had the same level of language competence. The court actors – who are all East Timorese – have obtained legal qualifications from Indonesian Universities. Considering that these court actors have graduated from Indonesian Universities, they consequently are able to write and speak competently in Indonesian.

JSMP believes that the court actors possess a similar level of competence in the Portuguese language. The majority of court actors do not possess a strong command of Portuguese, although it must be acknowledged that some of the court actors speak a little Portuguese, their competence is not of such a level to enable them to use it in practice

¹⁴ *Appeal Submissions and Responses* were in Indonesian.

¹⁵ Refer below to *Chapter 2.2.2 District Courts*.

¹⁶ Refer to the JSMP Statistical Report for information about the number of cases requiring translation. The report can be found at <http://www.jsmp.minihub.org>.

within the judicial sector. Although some of the court actors are able to speak Portuguese and possess a good understanding of some Portuguese terms, this does not mean that they have the required competence in the context of official judicial duties. In JSMP's opinion, none of the court actors are able to write legal documents in Portuguese without assistance from others, for instance Portuguese speaking mentors. Based on JSMP's observations, the personal circumstances of each actor, such as their background, age and education also impact on their ability to speak Portuguese, and these factors explain the slight differences in ability of the court actors in relation to this language¹⁷.

The court actors are able to speak and write in Tetum. Based on JSMP's observations, in informal discussions the court actors predominantly use Tetum. However when performing in an official capacity, in particular when writing legal documents, such as decisions, indictments and defence submissions, it appears that the court actors experience difficulties in using Tetum, due to this fact they are continuing to use Indonesian.

During 2003, in hearings at the District Court(s), JSMP observed a gradual shift from Indonesian to Tetum. When JSMP compared the language used by the court actors in hearings during 2003, with that used from January to April 2004, it was apparent that more hearings were conducted in Tetum¹⁸.

However, if we are to examine the language(s) used by the court actors when speaking, we also must examine the language(s) they use to write documents. The same language is not used for speech and writing, so consequently in many hearings the court actors swap between two languages: Tetum and Indonesian¹⁹.

JSMP has observed that due to aforementioned factors, in practice the court actors use one language for speaking – Tetum – and another language for writing – Indonesian.

If we look at the ability of the community to understand the judicial process in the District Courts, we will find the same circumstances that exist in the Court of Appeal²⁰. Therefore, when the District courts use a language they must guarantee the rights of the community to understand the judicial process; the current situation in the District Courts is one where the issue of the community being able to understand the judicial process has not been addressed in this report, because the District Courts speak in Tetum and write in Indonesian.

¹⁷ For example, those court actors who were brought up during the Portuguese period always have a more comprehensive vocabulary than those who were brought up during the Indonesian period. This is the same for those court actors who studied in seminaries because in general they were strongly influenced by the Portuguese language.

¹⁸ On many occasions, predominantly in the District Courts of Baucau and Oecussi, the courts had to rely on assistance from interpreters to interpret into the local dialect of each district to ensure that the court actors, the accused/suspects and victims could understand the trial process. Refer to the JSMP Report, Justice in the Districts, November 2003.

¹⁹ For example, the Prosecutors would normally use Indonesian when reading out an indictment. This is also the case for the recommendation on sentencing/final arguments, which were written and then read out in Indonesian in the hearings.

²⁰ Refer to *Chapter 2.2.1 The Court of Appeal*.

2.3 Directive on the Official Languages of the Courts

On 27 February 2004, the Superior Council of the Judiciary issued a Directive on the use of official languages in the Courts in East Timor ('the Language Directive')²¹.

The Directive states that the decision on the official languages to be used in the courts in East Timor is based on two considerations: namely that the official languages are based on the Constitution, and government policy issued by the public administration of the government. Based on these considerations – as set out in the directive - the courts must adhere to the policy authorized by the competent organ of the government.

The Language Directive established two stages of implementation: the period between the 5 April 2004 up until 30 September 2004, and after 30 September 2004.

Pursuant to the Language Directive, from the 5 April 2004 onwards Tetum or Portuguese must be used in procedural steps (aktus procesuais)²², correspondence²³, requests²⁴, official documents (oficio)²⁵ and letters²⁶. The Language Directive establishes an exception for the implementation of the official languages for sentences and appeal submissions²⁷. The Directive states that working languages may be used – i.e. Indonesian and English – up until 30 September 2004. This exception is necessary – as set out in the Language Directive - because these two types of documents are 'part of a lengthy and complex process'.

The Language Directive also establishes a procedure that must be used by judicial officers when they receive documents that do not comply with the Directive. Article c), d) and e) of the Language Directive establishes that: firstly, judicial officers shall not accept documents that do not comply with this directive, secondly, in the case of in which a person does not comply with the directive, they have 8 days to resubmit their document(s) in one of the official languages.

The Language Directive was based on a decision by the Superior Council of the Judiciary. When the CSMJ meeting was held to decide on the use of official languages, one of the members was absent. Based on information received by JSMP, three participants voted in support of the directive, and 1 against²⁸. The Language Directive was published in the two official languages of East Timor: Portuguese and Tetum.

²¹ Refer to Annex 1.

²² Article a) Language Directive.

²³ Article a) and b) Language Directive.

²⁴ Article b) Language Directive.

²⁵ Article c) Language Directive.

²⁶ Article c) Language Directive.

²⁷ Article f) Language Directive.

²⁸ At the time this report was compiled the decision of the CSMJ had not yet been published in the Official Gazette pursuant to Article 15 Law 8/2002. Due to this fact, JSMP does not have official information about the vote conducted by the members of CSMJ. JSMP received this information from the members who were interviewed by JSMP.

2.4 Superior Council of the Judiciary (CSMJ)

The aim of this report is to discuss the issue of language use in the courts. JSMP has no intention to discuss the work of the CSMJ²⁹, however JSMP would like to make a few comments about the composition and competencies of the CSMJ, as JSMP considers these two issues to be crucial in understanding the context of this Language Directive.

Law No. 8/2002 establishes the CSMJ. The law sets out the membership and competencies of the CSMJ.

Law No. 8/2002 states that the CSMJ shall consist of five members³⁰. Article 109(1) of the aforementioned Law, establishes the transitional composition of the CSMJ³¹ which has been the case from 2003 until June 2004.

The composition of the CSMJ is as follows:

- The President of the Court of Appeal
- The Vice-Minister of Justice
- One Judge from the Dili District Court
- One Judge from the Special Panel for Serious Crimes
- One Prosecutor

Article 15 of Law 8/2002 establishes the competencies of CSMJ.

*Article 15(1)*³²

It shall be incumbent upon the Superior Council of the Judiciary:

- a) *To appoint, assign, re-assign, promote, dismiss and appreciate the professional merits of, exercise disciplinary action over, and generally conduct all acts of a similar nature regarding, judicial magistrates;*
- b) *to appreciate professional merits of, and exercise disciplinary action over, judicial officers; without prejudice to disciplinary competencies given to judges;*
- c) *to appoint the Council Secretary, judicial inspectors, accounting inspectors and inspection secretaries;*
- d) *to order the conduction of special inspections, investigations and inquiries into courts;*
- e) *to prepare and approve the rules of procedure of the Council;*
- f) *to advise on retirement requests submitted by judicial magistrates;*
- g) *to perform other functions given by law.*

2. It is also incumbent upon the Superior Council of the Judiciary to appoint on an exceptional basis assistant judges for courts, where there is a prolonged absence of

²⁹ In 2002, JSMP published a report on the legal analysis of the Draft Law 8/2002. This report can be found on the JSMP website: www.jsmp.minihub.org.

³⁰ Article 9 of Law 8/2002.

³¹ JSMP has published its opinion on the composition of the CSMJ in the JSMP Report on East Timor's Judicial Magistrates Law (Law No 8/2002), July 2003. This report can be found on the JSMP website at <http://www.jsmp.minihub.org>.

³² This is not an official translation. Law No. 8/2002 is only in Portuguese.

an incumbent causing serious disruption of services or an excessive accumulation of workload.

A discussion on the competencies of the CSMJ in relation to the Language Directive can be found below in this Report in *Chapter 4.3.3 The Constitutionality of the Language Directive issued by the CSMJ*.

3. IMPLEMENTATION OF THE LANGUAGE DIRECTIVE

JSMP has written this report during the month of June, which indeed represented a short period since the adoption of the Language Directive. However, JSMP is of the opinion that the period from April (month when the Directive had to be firstly implemented) to June enables JSMP to identify the immediate response of court actors to the Language Directive. The analysis of this period, in JSMP's opinion, also provides an opportunity to identify the challenges that judges, prosecutors, lawyers and court staff have faced when attempting to implement the Language Directive.

The Language Directive brings obligations to every court actor to use official languages in their work. The court actors identified by JSMP are the judges, prosecutors, lawyers and court clerks³³.

In order to write the analysis of the implementation of the Language Directive included in the sections below, JSMP made use of different methodological techniques, including interviews with court actors, court monitoring and monitoring of documents from the Court of Appeal and Dili District Court³⁴.

3.1 Court of Appeal

In this Chapter, it is important to make a distinction between the secretary of the Court of Appeal – its court staff – and judges and other actors – prosecutors and lawyers.

3.1.1 Secretary of Court of Appeal and Court Staff

If a comparison is made between the District Courts, the secretary of the Court of Appeal has a 'special' position within the Courts in East Timor. During 2003 and first half of 2004, the Court of Appeal has received the support of two international specialists/advisers. These specialists have a role in the area of administration of the Court of Appeal. JSMP has observed that they also have been playing an important role

³³ In terms of JSMP's interpretation, an independent organization – like JSMP – when writing a correspondence or request to the Courts also has to use one of the official languages.

³⁴ For this Report, JSMP was unable to analyse every document written after 5th April 2004: however JSMP believes that from the number of documents analysed it is possible to identify a general trend in relation to the implementation of the Language Directive. For this Report, JSMP used Dili District Court as the example of a district level court of East Timor. JSMP is of the opinion that the language abilities of court actors working at the Dili District Courts are similar to those working in the other District Courts.

in providing assistance to the secretary of the Court of the Appeal³⁵. This assistance is important in order to improve the abilities of the court staff and to assist in the development of the administration of the Court of Appeal. JSMP believes that this is an excellent initiative. JSMP also recognizes that since these two advisers have started working together with the Court of Appeal, the court staff have improved their skills and capacity; the administration of the cases of the Court of Appeal also has improved.

JSMP acknowledges that these two advisers are from countries which are members of the Portuguese Speaking Community (CPLP). To JSMP's knowledge, the recruitment of these advisers did not include a criterion requesting an ability to communicate in Tetum or Indonesian.

This situation impacts on the implementation of the Language Directive. JSMP has observed that after the adoption of the Directive basically every document from the secretary of the Court of Appeal was written in Portuguese³⁶. JSMP observed one exception, that the majority of the transcripts of hearings were written in Tetum. Why is there a difference on the language used in different documents? JSMP believes that this difference is based on the fact that, with the exception of the transcripts of the hearings, all other documents are based on a set form which is written in Portuguese, and court clerks have only to fill the form. For JSMP, this situation shows that even though court staff can work with documents written in Portuguese, they do not have sufficient capacity to write a document in Portuguese which is of a higher degree of complexity and substance.

JSMP has also observed that since 2003 the secretary and court staff rarely used Indonesian language. This fact, to a large extent corresponds to the language abilities of the judges of the Court of Appeal³⁷.

3.1.2 Judges of the Court of Appeal

A description of the language abilities of the judges of the Court of Appeal has already been included in this report.

JSMP has observed that after April 2004, the two judges who are fluent in Tetum have already started to write many of their decisions in this language. From April to June 2004 there has not been one decision from the Court of Appeal which was written in Indonesian. JSMP has particularly noted that the Judge President before April 2004 often wrote decisions in Portuguese, however after April 2004 has started using Tetum as the main language when writing his decisions. JSMP congratulates the Court of Appeal in being able to use Tetum in its documents as explained above. Previously JSMP has already commented that when the Court of Appeal would write decisions in Portuguese,

³⁵ In reality, JSMP has been present in circumstances where advisers were providing assistance to court clerks.

³⁶ Example of documents from the Court of Appeal's secretary and court clerks: document related to the distribution of cases to judges, notification of hearings and requests for translation.

³⁷ See above *Chapter 2.2.1 The Court of Appeal*.

most of the parties – including the accused, prosecutor and defender – could not have a full understanding of the entire process³⁸. The judge from Portugal continues writing his decisions in Portuguese, as he is unable to speak or write in Tetum.

3.1.3 Other Actors: Prosecutors and Lawyers

In observing the implementation of the Language Directive in relation to the documents of the Court of Appeal, it is important to note that the written appeal statement is the main document of an appeal. The UNTAET Regulation 2000/30 establishes a time-limit for lodging the written appeal document with the Court of Appeal³⁹.

The Language Directive allows the use of any of the working languages in the arguments for appeal until the 30th September 2004. Irrespective of that, JSMP believes that it is important to analyze whether this exception is being implemented or in June 2004.

While conducting research for this report, JSMP has found seven cases which had their allegation for appeals submitted after the 5th April - date of the start of application of the Directive⁴⁰. In these seven cases, JSMP has seen a total of ten appeal documents both from the applicant and the respondent. Out of these ten documents, three were in Tetum, three in Portuguese⁴¹ and 5 in Indonesian.

JSMP has observed that there are three important factors in relation to the documents in these ten cases: 1) in one of the cases, the allegations from the lawyer was written in Portuguese⁴², and the prosecutor in this case made a request to the Court of Appeal to allow for an extension of the time-limit to submit the reply in order to have sufficient time to translate the document from the lawyer because of her lack of ability to understand Portuguese; 2) in two cases⁴³ the Judge *Rapporteur* issued a decision that the parties did not follow the Language Directive because the documents were written in Indonesian, the judge gave eight days to the parties to submit their allegations in one of the official languages; 3) in three other cases⁴⁴ the Court of Appeal requested translation of the appeal documents which were written either in Tetum or Indonesian.

3.2 Dili District Court

The box below illustrates some of the documents from the Criminal Section of the Dili District Court to which JSMP had access to between April and June 2004.

- Case No. 45/2004: Indictment written in Tetum, internal communication between judge and court clerk

³⁸ See JSMP Report on Dili District Court and Justice in the Districts, November 2003 (available at <http://www.jsmp.minihub.org>).

³⁹ See article 23 and article 40 of UNTAET Regulation 2000/30 (as amended).

⁴⁰ JSMP saw the cases: 9/2004, 15/2004, 16/2004, 17/2004, 22/2004, 23/2004 and 24/2004.

⁴¹ There was an allegation written by the lawyer in Portuguese and Tetum.

⁴² Case Number 09/2004.

⁴³ Case Numbers 16/2004 and 17/2004.

⁴⁴ Case Numbers 22, 23 and 24/2004.

in Tetum

- *Case No. 64/2004*: Indictment (28/05/2004) in Tetum; decision from Investigative Judge (7/04/2004) in Tetum; warrant of arrest (5/04/2004) in Tetum and English
- *Case No. 71/2004*: letter from Prosecutor (27/05/2004) in Tetum; Note of Indictment (27/05/2004) in Tetum
- *Case 67/2004*: document about issues of the indictment from the Prosecutor (27/05/2004) in Tetum
- *Case No. 49/2004*: indictment (7/04/2004) in Tetum
- *Case No. 40/2004*: indictment (15/04/2004) in Tetum
- *Case No. 46/2004*: indictment (10/05/2004) in Tetum; request to the Investigative Judge (20/04/2004) in Tetum; decision from Investigative Judge about conditional release in Tetum
- *Case No. 34/2004*: Document about case distribution to judge (8/04/2004) in Portuguese
- *Case No. 31/2004*: Court Order (16/04/2004) in Indonesian
- *Case No. 70/2003*: Court Order (19/04/2004) in Indonesian
- *Case No. 44/2004*: indictment (5/5/2004) in Tetum; document of granting of authority (23/4/2004) in Indonesian
- *Case No. 132/2002*: decision from Investigative Judge (20/04/2004) about conditional release in Indonesian
- *Case No. 15/2004*: hearing transcript (26/5/2004) in Indonesian
- *Case No. 76/2003*: hearing transcript (24/5/2004) in Indonesian

On the basis of the examples above, together with additional observations from JSMP, it can be seen that the majority of the indictments (and other documents related to indictments) were written in Tetum. On the other hand, many of the documents from Investigative Judges were in Indonesian. Based on JSMP's observation, the majority of documents – decisions – from the Investigative Judge were based on set forms which were drafted during UNTAET period; originally these forms were written in Indonesian. Many documents written by court clerks were in Tetum or Portuguese (for example notification of the date of hearings to the accused, prosecutor and defence lawyer). Documents written by Judges were written either in Portuguese, Tetum or Indonesian; for example, documents related to distribution of cases to judges were in Portuguese while many of the documents notifying court clerks to schedule a hearing were written in Indonesian. This last observation is supported by information provided to JSMP by some court clerks who expressed their understanding that internal correspondence – along the lines of request for scheduling hearings – are not regulated by the Language Directive. After the 5th April 2004, the majority of hearings transcripts were written in Indonesian.

JSMP was unable to find a written decision during the period April to June 2004. However, the fact that the Language Directive is exceptionally not applicable to written decisions until 30th September 2004 means that this lack of data does not have a large effect on the analysis provided in this chapter.

Court clerks have been implementing the Language Directive in relation to many documents. Court clerks have spoken to JSMP that they feel obliged to comply with the Language Directive. Even though this position is very clear, JSMP has observed that when court clerks have to write documents of a certain degree of complexity – as for example hearing transcripts – they usually make use of Indonesian language. On this basis, JSMP believes that the language which they are more familiar with is used when writing documents of a higher degree of complexity. In JSMP's understanding, such a practice is needed when trying to prevent mistakes which could negatively impact on the judicial process of the cases.

4. ANALYSIS OF THE LANGUAGE DIRECTIVE

4.1 The Process for Issuing the Language Directive

JSMP would like to state its opinion on the process of issuing the Language Directive, although JSMP has its doubts about the legal basis for this Directive⁴⁵. JSMP is of the opinion that the process used by CSMJ to issue the Language Directive has a large impact on its implementation and legitimacy.

In this section, ‘the process’ relates to how CSMJ developed, drafted and approved the Language Directive. JSMP will analyze two issues in this section: the process used by the CSMJ to issue the Language Directive and, secondly, JSMP’s opinion of what process would be best suited to deal with the language issue.

CSMJ followed an internal procedure to decide on the language issue⁴⁶. Based on information received by JSMP, the issue of language use in the courts was included in the agenda for the February meeting of the CSMJ. JSMP also understands that during this meeting the members of the CSMJ discussed the issue of language for one or two hours. Four members of the CSMJ attended this meeting, whilst one member was absent⁴⁷.

JSMP received information from court actors that the CSMJ did not actually consult the court actors – prosecutors, judges, court staff and lawyers – before issuing the Language Directive. In fact the decision making process did not include any consultation with these actors.

The CSMJ does not consist of judges only; its membership includes a member from the Office of the Prosecutor, three judges and the Vice Minister of Justice. JSMP is of the opinion that the Prosecutor and the Vice Minister of Justice within the CSMJ are not acting as representatives of the Office of the Prosecutor and the Ministry of Justice⁴⁸. Although some of the members are not judges, their participation in the CSMJ, as is the case for all members, must be in accordance with the competence of the CSMJ as set out in Law 8/2002.

In JSMP’s opinion, the decision on this directive, as is the case with all laws and regulations, must have legitimacy for those who will implement it and have to comply with it. Two essential conditions of any new law are the ability to understand it and comply with it. If either or both of these two conditions are not met, then there will be a lack of legitimacy to apply this law, and as a result this law will be rendered inefficient⁴⁹.

⁴⁵ Refer below to *Chapter 4.3* for JSMP’s analysis on the competence of the CSMJ.

⁴⁶ JSMP understands that up until the time when this report was written CSMJ had not developed its Internal Regulation in accordance with Article 15(1)(3) of Law 8/2002. JSMP obtained the information contained in this paragraph from an interview with a member of the CSMJ.

⁴⁷ Article 16(4): ‘The Superior Council for the Judiciary shall function when two thirds of its members are attending.’

⁴⁸ When JSMP conducted interviews with court actors, some of them said that in their opinion the members of the CSMJ represent components of different judicial institution in East Timor.

⁴⁹ See Frank I. Michelman, *The Integrity of Law: Ida’s Way: Constructing the Respect-Worthy Governmental System*, 72 *Fordham Law Rev.* 345, November 2003.

JSMP feels that it is important to recall that the Constitution and UNTAET Regulation 2000/11 do not specify a time frame for stopping using the working languages (i.e. Indonesian and English). In fact, the CSMJ established a time frame - 5 April and 30 September – for phasing out the use of working languages in terms of its Language Directive.

The decision made by the CSMJ not only impacts on the work of the court staff, but also on all of the court actors who are involved in some way in implementing the Language Directive. Therefore, JSMP feels that the Language Directive will have a huge impact on the work of all court actors. By not consulting with the court actors before making this decision, the CSMJ has missed an opportunity to guarantee the legitimacy of this directive.

Although the Language Directive is only a minor form of legislation; the consequences of its implementation are major, as the language used by the actors in the courts has a large impact on the judicial process. For this reason, JSMP is disappointed that there was not an attempt to establish a dialogue with the court actors⁵⁰. A directive is not only a notification, but rather a decision that will have a large impact on the day-to-day activities of these actors. JSMP therefore does support the process used to issue the Language Directive.

JSMP is also disappointed that the CSMJ did not attempt to establish dialogue with the court actors after approving the Directive.

JSMP feels that the process for approving the directive was not conducted properly. The fact that the CSMJ did not consult nor establish a close relationship with the court actors resulted in distancing the judges and court actors from the supreme organs of the judicial system of East Timor⁵¹.

The president of the CSMJ and the member from the Ministry of Justice have already publicly stated that the court actors have already had 3 to 4 years to learn how to write in Tetum and to study Portuguese. They have often stated that the court actors can speak Portuguese and are able to write in Tetum, but they are unwilling to use the official languages.

JSMP feels that this argument cannot be used as a basis for engaging in a process that excludes consultation. Although many court actors may have had opportunities to participate in Portuguese language courses during the past 3 or 4 years, this does not automatically equip them with the capacity to use the official languages to draft documents for use in court.

⁵⁰ For example, JSMP received information that the Public Defenders Unit up until June had yet to formally receive a copy of the Language Directive. Also some of the court staff told JSMP that they were yet to receive individual copies of the Language Directive.

⁵¹ This problem was identified by JSMP in a report compiled in 2003. See JSMP's report entitled Justice in the Districts, December 2003 (<http://www.jsmp.minihub.org>).

JSMP firmly believes that the issue of language use must be developed via a consultation with the court actors, who must be asked if they have the ability to use the languages that will replace the languages currently in use; and if they don't have this ability, then what they need in order to develop their skills.

The process used by the CSMJ in issuing the Language Directive, which has failed to consult court actors on the delicate issue of language use, does not support the legitimacy, the implementation, or the development of the official languages of East Timor within the judicial system.

4.2 Ambiguity in interpreting the Directive

Based on court monitoring and interviews with the court actors, JSMP has been able to observe that many court actors – court staff, public defenders, prosecutors and judges – have different interpretations on the particular wording of the Language Directive that identifies which documents must be written in the official languages. As a result, there is not uniformity in the implementation of the Language Directive in terms of its conceptualization and interpretation.

It is extremely important to provide clarification to the court actors to ensure the smooth functioning of the judicial process, and also to avoid any detrimental effect on the judicial system and the work of the court actors. Clarification is the minimum necessity of providing clear and sufficient information to the court actors. Even though, the wording used in the Language Directive can be further clarified, JSMP wants to state that this does necessarily not guarantee that the court actors are able to use the official languages in their documents.

After conducting an examination of the wording of the Language Directive JSMP is of the opinion that it is difficult to secure a satisfactory level of certainty. The Language Directive states that Tetum and Portuguese must be used in procedural steps⁵², correspondence⁵³, requests⁵⁴, official documents⁵⁵ and letters⁵⁶. The Language Directive mixes Tetum and Portuguese when using legal terms. In JSMP's opinion, the following example highlights the problem of interpretation, where the meaning of the Portuguese word '*korespondensia*' (correspondence) also includes the word '*karta*' (letters).

Another example can be drawn by when JSMP asked the court actors how they interpreted the wording '*aktus prosesuais*' (procedural steps) – Article a) – and not once did they give the same response. JSMP also notes that in an interview between the President of the CSMJ and Timor-Post, where the President did not provide clarification to the journalist who asked about the meaning of '*aktus prosesuais*'⁵⁷.

⁵² Article a) Language Directive

⁵³ Article a) and b) Language Directive.

⁵⁴ Article b) Language Directive.

⁵⁵ Article c) Language Directive.

⁵⁶ Article c) Language Directive.

⁵⁷ "*Aktus prosesuais* means that the official languages must be used for correspondence and requests to be sent to the courts" – Timor Post, 25 June 2004.

Based on JSMP's observation of trials in the Dili District Court, it was observed that some judges are unclear about what documents must adhere to the languages specified in the Directive⁵⁸. Also JSMP was able to observe that in criminal and civil matters before the Dili District Court the Language Directive is interpreted differently. For criminal matters, the registry and the court clerks are of the opinion that the Language Directive must be applied for indictments; in the civil registry, the court clerks continue to accept civil suits (*Gugatan*) in Indonesian.

The ambiguity of the wording of the Language Directive could result in arbitrariness. JSMP feels that two examples from the Court of Appeal show that the Language Directive has been erroneously applied. In two cases⁵⁹ the judges decided that they could not accept responses to appeal (*kontra-Banding*) because the lawyers had used Indonesian language.

The Language Directive states that, in exceptional circumstances working languages can be used to write appeal statements and decisions up until 30 September 2004⁶⁰. In JSMP's opinion the interpretation of the wording '*alegasaun ba rekurso*' (appeal statements) includes appeal statements from the Applicant as well as from the Respondent. JSMP feels that in these two aforementioned cases, the Judges have misinterpreted the directive by not accepting responses to appeal that were written in Indonesian. This shows that there is no uniformity of interpretation of the Language Directive, even at the Court of Appeal level.

The Language Directive gives court staff the power to ensure that all documents comply with the Directive⁶¹. In JSMP's opinion, this means that the interpretation by the court staff is decisive at the initial period when the court actors submit documents to the courts. JSMP feels that it is important to understand that if the actors do not comply with the Language Directive, delays can occur in the judicial process⁶². If the suspect or accused is detained, and the court staff makes the wrong interpretation and refuses a particular document, then the suspect or accused may have to remain in prison for an additional 8 days. The end result is a prolonged period of detention for the individual concerned. Although eight days can be considered a short period of time, any person who has had to remain in prison due to the misapplication of the Language Directive becomes a victim of injustice and this can cause people to lose their faith in the justice system.

In JSMP's opinion, based on interviews with members of the CSMJ, it seems that the aforementioned members did not spend much time discussing the draft Language Directive during the CSMJ meeting. It is possible that during the meeting convened to decide on the languages to be used in courts, the members only decided on the policy

⁵⁸ For example, in a hearing of a civil case on the 28 May 2004 in the Dili District Court, when the lawyer asked what language must be used to write documents, the Judge said that in accordance with the decision of the CSMJ Indonesian could be used up until September.

⁵⁹ Cases Numbers 16/2004 and 17/2004.

⁶⁰ Article f) Language Directive.

⁶¹ Article c) Language Directive.

⁶² Court actors have eight days to translate documents rejected by court clerks. Refer to Article e) Language Directive.

without discussing in detail, and without revising, the wording of the draft Language Directive. JSMP feels that it is extremely important to ensure that the wording of a document which has a similar nature as a law or decree is clear. In JSMP's opinion, the CSMJ must ensure that there are no inconsistencies or ambiguities in its directives⁶³. JSMP feels that it is important that when drafting a document, for example the Language Directive, to try and foresee potential risks that may be encountered in implementing the Directive. If CSMJ held more discussion on the actual wording of the Directive then it is more likely that such risks could be identified, and therefore the drafting of wording could ensure that the Directive could be interpreted clearly by the CSMJ as well as the court actors who have to implement the Directive.

JSMP feels that the failure to involve the actors in the development of the Draft Language Directive and on the substance of the Directive itself has contributed to the aforementioned inconsistencies and ambiguities.

4.3 The position of the Language Directive in accordance with the Constitution and the Laws of East Timor

JSMP believes that it is extremely important to analyze the nature of the Language Directive issued by the CSMJ.

In analyzing the Language Directive JSMP has identified two important aspects: the constitutionality of the languages and the constitutionality of the Language Directive.

The Constitution clearly states in Article 13 that the official languages of East Timor are Portuguese and Tetum. In fact, the contents of the Language Directive, *per se*, are not in conflict with the Constitution.

Before analyzing the Language Directive it is important to examine each of the laws that impacts on the issue of language use in the judicial system of East Timor. JSMP has identified the following laws: the Constitution of East Timor, UNTAET Regulation 2000/11, Law 8/2004 on Civil Service Law and Law 8/2002 on the Statutes of Judicial Magistrates. It is also important to look at Law 10/2003 on the Interpretation of section 1 of law No.2/2002, of 7 August, and sources of law to understand the hierarchy of these laws.

4.3.1 Civil Service Law, Law 8/2004

Law 8/2004 establishes a number of requirements, including the obligation of public servants to use the official languages – Portuguese and Tetum – as the languages of the Public Service. Law 8/2004 came into force on the 16 July 2004⁶⁴.

⁶³ During a meeting with Dr. Manuel Abrantes (9 July 2004) when asked by JSMP about his interpretation of the wording '*aktus procesuais*' he told JSMP that JSMP would need to ask Dr. Claudio Ximenes because he is the President of the CSMJ.

⁶⁴ Article 122 of Law 8/2004.

When analyzing the aforementioned law in relation to the issue of language use in the courts of East Timor, it is important to examine particular articles which impact on the judicial system. In this case the important articles referred to are Article 2 and 4 of Law 8/2004.

Article 2(3) states that: ‘This law also applies to civil servants of the defence forces, the Police, and administrative staff of the office of the President of the Republic, the National Parliament, the courts, the Public Defenders Unit and the Prosecution Unit.’⁶⁵

Article 4(1)(b) and (c) states that: ‘In this regulation it is specifically stated that the law does not apply to the following actors b) judicial magistrates and public prosecutors; c) public defenders.’⁶⁶

If Article 2(3) is analyzed together with Article 4 of Law 8/2004 then this law would apply to administrative staff of the courts, the public defenders unit and the prosecution unit, however this Law would not apply to Judges, Prosecutors and Public Defenders, who don’t actually have to comply with the provisions set out in Law 8/2004⁶⁷.

In JSMP’s opinion, the fact that Judges, Prosecutors and Public Defenders do not have to comply with Law 8/2004 is in line with the principle of independence of the courts. Consequently, in practice the courts have the opportunity to establish their own regulations, which may cover the use of official languages.

With respect, JSMP does not agree with the part of the Language Directive that states that the judicial system must comply with government policy in relation to language use. Firstly, because the judicial system has independent powers as specified in the Constitution of East Timor⁶⁸. Secondly, the fact that Law 8/2004 does not apply to Judges, Prosecutors or Public Defenders indicates that the judicial system has no obligation – either legal or political – to comply with government policy in relation to the issue of language use.

However JSMP needs to clarify that the Civil Service Law applies to the administrative staff in the courts, the Prosecution Unit and the Public Defenders Unit⁶⁹. Based on JSMP’s interpretation, Law 8/2004 applies to court staff. In fact the administrative staff must use the official languages in accordance with the provision set out in Article 41(b) of Law 8/2004.

The obligation to use official languages in practice would require court staff to write documents originating from the court in Portuguese or Tetum. JSMP believes that the

⁶⁵ JSMP’s translation.

⁶⁶ JSMP’s translation.

⁶⁷ JSMP observed that the President of the CSMJ on a television program aired on 29 July 2004 stated that the Law on the Civil Service also applies to Judges, Prosecutors and Public Defenders. JSMP would like to clarify that this interpretation is not in accordance with the interpretation of the Law on the Civil Service. With respect, JSMP is of the opinion that the President of the CSMJ has erred in his legal interpretation.

⁶⁸ Article 119 of the Constitution of East Timor.

⁶⁹ Article 2(3) of Law 8/2004.

implementation of the aforementioned provision on language use would mean that any document issued by the secretary of the Public Defenders' Unit would also have to be written in one of the official languages⁷⁰.

In practice this would mean that if the Language Directive had not been issued by the CSMJ, court staff and administrative staff working in the Public Defenders Unit or the Prosecution Unit would still be required to use the official languages, in accordance with Law 8/2004 issued by the National Parliament of East Timor.

4.3.2 The effect of the Language Directive on UNTAET Regulation 2000/11

UNTAET Regulation 2000/11 explicitly states in Article 35 that during the transitional period there will be four working languages in the courts.

JSMP believes that the word 'transitional' in Article 35 of UNTAET Regulation 2000/11 does not mean the period in which the United Nations had the transitional authority. A limited interpretation could create a legal vacuum and a situation where no regulations exist on important issues, including issues related to the courts. In support of the argument that the word 'transitional' in Article 35 of UNTAET Regulation 2000/11 does not just mean the UNTAET period, reference can be made to Law 8/2002. Law 8/2002 makes frequent reference to 'transition' and 'transitional' even though this Law was promulgated in 2002, when the Constitution had already entered into force and the UNTAET Transitional government no longer existed⁷¹. In fact, the word 'transitional' in Article 35 of UNTAET Regulation 2000/11 is based on providing the courts with a period where, because they do not have the capacity to implement the two official languages, they have the possibility to use the four working languages to ensure the functioning and development of the courts.

In accordance with Article 4 of UNTAET Regulation 1999/1, UNTAET Regulations shall remain in force until repealed by the Transitional Administrator or superseded by such rules that are issued by the democratic institutions of East Timor.

Until now only a small number of amendments have been made to Regulation 2000/11. Law 8/2002 has amended some articles of Regulation 2000/11⁷². Law 8/2002 predominantly relates to the work of judges, and as a consequence only amends articles relating to this issue. The application of UNTAET Regulation 2000/11 continues for other issues such as jurisdiction, language, the functions of the Presiding Judge at the Court of Appeal and the District Courts.

Law 10/2003 based on Article 4 UNTAET 1999/1 sets out the hierarchy of laws in East Timor. Article 2(3) establishes the following hierarchy of laws: the Constitution, Laws of Parliament and Government, UNTAET Regulations and Indonesian Law.

⁷⁰ An example would be a document from the Public Defenders Unit providing information to the Public Defenders about their court rosters.

⁷¹ For example, refer to Section VIII of Law 8/2002.

⁷² Article 113 of Law 8/2002.

The application of the Law 10/2003 and UNTAET Regulation 1999/1 means that the Language Directive issued by the CSMJ has no power to amend Article 35 of UNTAET Regulation 2000/11. In fact, JSMP believes that Article 35 of UNTAET Regulation 2000/11 can continue to apply to the courts in East Timor. Any attempts to modify Article 35 of UNTAET Regulation 2000/11 would have to follow the hierarchy of laws.

The parliament as a sovereign and representative organ can amend UNTAET Regulations. Law 8/2004 has no power to amend all provisions of UNTAET Regulation 2000/11 because it is expressly stated that Law 8/2004 does not apply to the majority of actors working in the courts.

As the language issue can influence the development of the judicial system and the judicial process, and also because it involves the court actors, JSMP believes that a law issued by the National Parliament is required to give legitimacy to the language issue.

JSMP believes that if there is an intention to regulate the languages in the courts with the objective of establishing a legal basis and a process for changing the working languages (or in other words, to start using the official languages of East Timor), the Parliament of East Timor must approve a Law, which regulates language use in the judicial sphere. JSMP also believes that the Parliament is a representative body that is public in nature, therefore if it intends to develop a new Law on language use within the judicial system, then it is important to consult the court actors and draft the wording in such a way as to avoid problems of interpretation. JSMP also believes, if such an initiative is to be implemented, it is important to have a mechanism in place to regulate and establish a process for the change of languages within the judicial system which reflect and complement the development of the language competencies of the actors who work within the judicial system⁷³.

4.3.3 The Constitutionality of the Language Directive issued by the CSMJ

The Constitution of East Timor establishes the legal basis for the CSMJ in Article 128⁷⁴. Law 8/2002 develops the framework set out in the Constitution. Article 13 of Law 8/2002 regulates the competence of the CSMJ.

Based on JSMP's interpretation, the CSMJ is an organ that has the power to regulate the judges' profession. In many democratic nations it is important that an organ such as the CSMJ guarantees the independence of the courts, in order to ensure that the Judges are free from government interference which can occur if the independence of the court is violated.

The Language Directive is in no way related to the judge's profession or guarantees the independence of the courts. The Language Directive has the specific objective of

⁷³ This issue is discussed below in *Chapter 5 Changing Languages in the Judicial System of East Timor*.

⁷⁴ Article 128(1) provides: The Superior Council for the Judiciary is the organ of management and discipline of the judges of the courts and it is incumbent upon it to appoint, assign, transfer and promote the judges.

regulating the languages used in the courts of East Timor; the languages to be used by the Prosecutors, Lawyers and court staff in documentation relating to the judicial process.

In fact, the Language Directive is in conflict with Article 128 of the Constitution of East Timor because the CSMJ has no authority to extend its competence to include areas such as language use in the courts.

The competence of the CSMJ can indeed be amended. The Parliament, following the process for amendment of the Constitution⁷⁵, can amend Law 8/2002 to extend the authority of the CSMJ to cover other areas which go beyond judge's profession. Although in theory this is possible, JSMP believes that any extension to the competency of the CSMJ may alter its very nature.

Based on JSMP's understanding, as of June 2004, the Parliament had not yet amended article 128 of the Constitution or Law 8/2002⁷⁶.

The reality is that the Language Directive is already in place and many court actors now feel that they are obliged to observe this Directive, although JSMP believes that the Language Directive is in conflict with the Constitution of East Timor. Therefore, what can be done to clarify the position of the Language Directive in relation to the Constitution?

An analysis of the Constitution of East Timor shows that the Constitution establishes two processes for Constitutional challenges: abstract review (Article 150) and appeals on constitutionality (Article 152).

Article 150 grants authority to the President of East Timor, the Parliament, the Prime Minister, the Ombudsman or Prosecutor General to request the Supreme Court of Justice to conduct an abstract review of constitutionality. By calling this review 'abstract', there is an understanding that those granted authority to request such a review do not need to show that they are directly affected by the application of a particular regulation which they claim is unconstitutional.

Article 152 specifically applies to those who are affected directly by the application of a particular regulation which can be challenged on the grounds of unconstitutionality⁷⁷. Before requesting a review to the Supreme Court of Justice on the grounds that a

⁷⁵ See Articles 154 to 157.

⁷⁶ JSMP understands that in July 2004 the Council of Ministers approved an amendment to Law 8/2002 which was submitted to Parliament for its discussion and approval. JSMP believes that the proposed amendment is not related to the language issue, rather it relates to international judges within the courts of East Timor.

⁷⁷ Article 152(1) The Supreme Court of Justice has jurisdiction to hear appeals against any of the following court decisions:

- a) Decisions refusing to apply a legal rule on the grounds of unconstitutionality;
- b) Decisions applying a legal rule the constitutionality of which was challenged during the proceedings.
2. An appeal under paragraph (1) (b) may be brought only by the party who raised the question of unconstitutionality.
3. The regime for filing appeals shall be regulated by law.

regulation is unconstitutional, an individual must first challenge the constitutionality at the District Court level.

JSMP provides the following example to clarify how Article 152 could be applied to the specific circumstances of the Language Directive and its relation to the courts:

A lawyer or Prosecutor handling a case at the district court level could try to submit a document to the court written in Indonesian. If the registry or Judge rejects the document because the language used does not comply with the Language Directive, then the lawyer or Prosecutor could argue that the Language Directive is in conflict with the Constitution and therefore the district court is not allowed to apply the Language Directive. Whether or not the Judge decides that the Language Directive is unconstitutional, in order to clarify the status of the Language Directive, the lawyer or prosecutor could appeal to the Supreme Court of Justice to question the constitutionality of the Language Directive.

JSMP understands that the Supreme Court of Justice is in a transitional phase. The Court of Appeal, pursuant to the Constitution of East Timor, has jurisdiction as the Supreme Court of Justice until such time that the Supreme Court of Justice is established⁷⁸.

JSMP is aware that the President of the Court of Appeal is also the President of the CSMJ. This situation can cast doubts on the ability of the Court of Appeal sitting as the Supreme Court of Justice to make an objective decision in the instance that the issue of the constitutionality of the Language Directive is brought before the Supreme Court of Justice.

JSMP acknowledges this issue, however JSMP feels that it is important to have faith in the professionalism and ethics of the Judges of the Court of Appeal. In accordance with the law, Judges must be objective and decide all cases before them guided by their conscience and the law. JSMP believes that if judges of the Court of Appeal were required to decide on the issue of the constitutionality of the Language Directive, then they would apply the law as it should be and secure their objectivity.

JSMP feels that the question of constitutionality is not merely a theoretical issue. The question of the constitutionality of the Language Directive can arise in practice.

A lawyer or prosecutor can initiate such a case even though they are likely to encounter difficulties. JSMP believes that until now the Supreme Court of Justice, (as the Court of Appeal), is yet to decide an appeal on the constitutionality pursuant to Article 152 of the Constitution of East Timor. Although it is bound to be difficult, JSMP believes that it is extremely important to use Article 152 to clarify the legal status of the Directive in relation to the Constitution.

The Constitution provides opportunities to ensure that the legal norms are not in conflict with the Constitution. Article 150 and 152 are important processes as they are the means

⁷⁸ The Court of Appeal acting as the Supreme Court of Justice has ruled on one appeal in 2003 on the issue of constitutionality where the President of East Timor requested a anticipatory review pursuant to Article 149.

through which the judicial system and legal norms in East Timor can be developed in accordance with the Constitution and its principles.

JSMP supports the action whereby a lawyer, a prosecutor or other person, who has authority pursuant to Article 150 or 152 of the Constitution, requests a constitutional review of the Language Directive to the Supreme Court of Justice.

4.4 Disparities between the language abilities of the court actors, the language in which the Laws are published and the official languages

In previous chapters, this report has already included the issues of language capacity of the court actors and the languages which they use in the courts of East Timor⁷⁹.

The historical background of East Timor has created a situation where multiple languages are currently in use within the judicial system⁸⁰.

UNTAET Regulations are predominantly translated into Indonesian and Portuguese⁸¹. However, from the time East Timor gained independence, national laws – including government decrees – have been published in Portuguese only⁸².

Based on the observations of JSMP, the majority of court actors do not possess sufficient ability in the Portuguese language to make legal interpretations of laws which are published in Portuguese. This means that the court actors continuously endeavor to locate their own translations of those Laws published in Portuguese which they require to undertake their work.

Currently Tetum does not possess legal terminology that can be used in the formal justice system. This is due to a certain extent to the fact that communities of East Timor have used an informal justice system or one based on oral tradition, which has not aided the development of a formal legal vocabulary in Tetum. No formal source of reference currently exists for legal terminology in Tetum.

The court actors continuously state that they face difficulties finding legal terms in Tetum that convey the same meanings as legal terms that exist in Indonesian and Portuguese. JSMP feels the same way on this issue. JSMP understands that the National Institute of Linguistics (INL) is currently addressing the lack of legal terminology in Tetum. Attempts are under way to resolve this problem by initiating the development of a Tetum dictionary of legal terms. This issue is discussed in *Chapter 5.2 Assisting the Court Actors to implement Language Change*.

At this time disparities exist between the language abilities of the court actors, the language in which the Laws are published and the official languages set out in the

⁷⁹ See *Chapter 2.2 Language use in the Courts*.

⁸⁰ See *Chapter 2.1 Languages in East Timor*.

⁸¹ See *Chapter 2.1.1 The UNTAET Period*.

⁸² See *Chapter 2.2.2 The Period since Independence*.

Constitution. The majority of court actors are competent in Tetum and Indonesian. The applicable Laws in East Timor are published in Portuguese and Indonesian. The official languages are Tetum and Portuguese. The difficulties caused by these disparities are considerable. These disparities have a large impact on the judicial system and the administration of justice in relation to attempts to implement Tetum as an effective language within the judicial system. JSMP feels that significant efforts must be made to address these disparities.

5. CHANGE IN THE LANGUAGES USED IN THE JUDICIAL SYSTEM OF EAST TIMOR

During the period of Indonesian occupation the language used by the government and the judicial system was Indonesian. In 2002 the Constitution rejected Indonesian as an official language and now Tetum and Portuguese have been granted status as the official languages of East Timor.

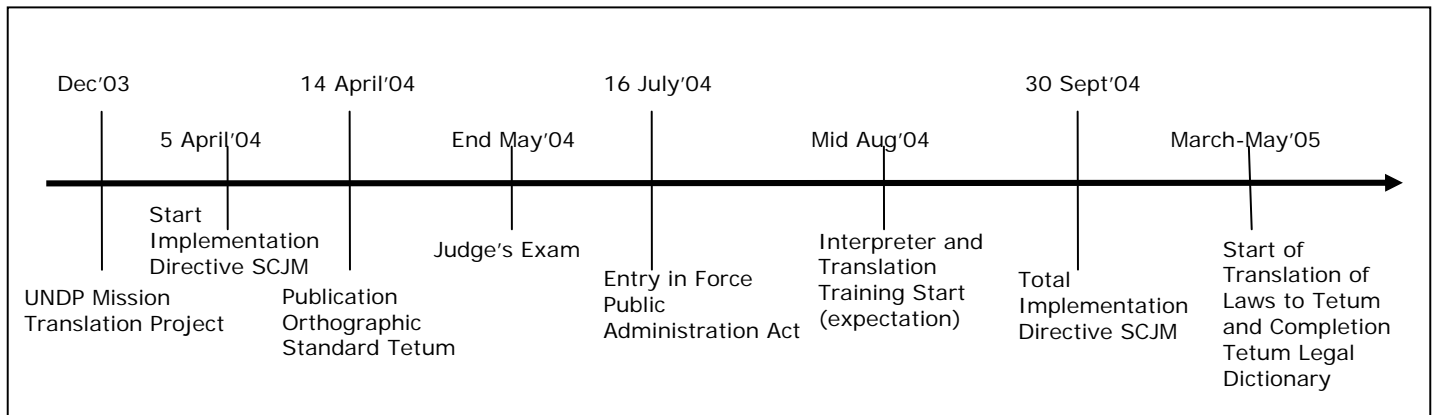
JSMP acknowledges that pursuant to the decision set out in the Constitution, the judicial system must implement the official languages of East Timor. The essential question in the context of language use is how to replace the languages currently being used in the judicial system.

JSMP believes that a step-by-step process is necessary to implement language change in the institutions of East Timor. In JSMP's opinion, the development of a process of language change must examine how that process can ensure that the individuals required to implement the official languages are able to use these languages effectively.

JSMP believes that it is more likely for Tetum to be developed quickly in the judicial system rather than Portuguese. This opinion is based on the language abilities of the court actors as mentioned previously in this report, and is also based on a comparison of the complexity of the two languages.

JSMP believes that it is important to look at two factors when initiating the process of replacing Indonesian with the two official languages in the judicial system: the development of facilities to implement this language change, and the process of language change itself. In JSMP's opinion, these two factors must be developed simultaneously.

The following diagram shows important steps taken to date, those currently in progress, and the importance of this process in bringing a successful use of the official languages in the judicial system in East Timor.



5.1 The development of facilities to implement language Change

There are many important factors that determine the capacity of the court actors to implement language change in the courts. One factor that JSMP believes to be important is the development of facilities to support the court actors to implement language change. JSMP also believes that it is of great importance to have a willingness amongst court actors to gradually develop their abilities in Tetum and Portuguese.

JSMP believes that it is important to develop language training and materials in languages which can be understood (and applied) by court actors.

Many court actors – for instance judges, prosecutors and court staff – are currently participating in Portuguese language training. Also eight judges and a prosecutor have participated in a one-year legal training in Portugal, which included the development of their abilities of the Portuguese language. JSMP welcomes these two initiatives and believes that these types of training have huge potential for developing court actors' capacities in the Portuguese language, although it will be some time before any positive impact is visible.

JSMP believes that it is important to remember that whilst the court actors may attend Portuguese language courses, they still have to continue performing their work. This means that the time they can dedicate to such trainings is limited, as their work must take priority⁸³. JSMP believes that this indeed has had a slight impact on the effectiveness of the Portuguese language training to date.

JSMP believes that it is important to note that Portuguese is a very complex language and its learning process takes a large amount of time. The argument that the court actors are automatically able to speak and use Portuguese by participating in language courses during the last few years does not reflect the reality of how difficult it is to study

⁸³ JSMP has observed that in the district court(s) many hearings have been delayed while court actors were attending Portuguese language training in the *Centro de Formação Judiciária*.

Portuguese and the complexity of this language. JSMP also believes that it is extremely important to highlight that the ability to speak or comprehend Portuguese is not the same as having the capacity to use this language within the courts, to draft judgments or to participate competently in the judicial process.

JSMP does not agree with the statement that the court actors are unwilling to learn Portuguese⁸⁴. JSMP has first hand view that many court actors are motivated to learn Portuguese. JSMP believes that generalizations such as the one mentioned above have a negative impact on the judicial system as a whole. This type of statements create obstacles when trying to identify existing problems and what needs to be done to resolve these problems in order to ensure that Portuguese language courses can function effectively and successfully.

To JSMP's knowledge until now no Tetum language training has been provided to the court actors.

JSMP believes that it is crucial to develop materials that can be used by the court actors to replace Indonesian with Tetum. The court actors have often stated the importance of developing legal terms in Tetum and the need to have translation of laws into Tetum.

JSMP understands that two initiatives are under way to develop and clarify legal terms in Tetum. The Asia Foundation is undertaking one of these initiatives and the other initiative is being conducted by the UNDP Translator/Interpreter Training Program together with the Ministry of Justice.

JSMP understands that the initiative being undertaken by The Asia Foundation is almost complete and is currently awaiting approval from the government and judicial institutions.

In relation to the training program for translators and interpreters, and the initiative to develop a dictionary of legal terms in Tetum, the coordinator of this program stated that a dictionary of legal terms is a precondition for developing this training. The coordinator explained that this is a very complex process that will take some time to develop and that the process of developing a legal dictionary will be conducted simultaneously with the training. It is anticipated that this project will finalize the drafting of a dictionary in March or April 2005. The coordinator informed JSMP that the UNDP project has received the draft legal dictionary from The Asia Foundation and will use it as a basis for the development of a legal dictionary in the training program.

As mentioned previously in *Chapter 4.3 Languages spoken by the Court Actors*, only a very small number of laws (including decrees) have actually been translated into Tetum. Up until now JSMP has only seen two laws that have been officially translated to Tetum; namely the Constitution and the Law on Local Authorities. JSMP acknowledges that it is difficult to translate laws into Tetum, and the principal reason is the lack of legal terms in

⁸⁴ For example, the Minister of Justice publicly stated that the judges do not have the willingness to study Portuguese, Timor-Post, 28th July 2004.

Tetum. Based on information provided by the coordinator of the interpreters and translators training project, upon the completion of their training, one of the tasks of the translators would be to translate the applicable laws in East Timor into Tetum⁸⁵.

Another important issue for all institutions is the development of a standard orthography for Tetum. The National Institute of Linguistics (INL) has worked hard to develop a standard orthography in Tetum. This orthography has been approved by the council of ministers as the official orthography of Tetum⁸⁶.

JSMP is aware that the standard orthography developed by the INL has been the subject of much criticism. JSMP has no intention, nor competence or experience, to comment on this standard orthography. Rather, JSMP would like to congratulate the INL for its work because JSMP understands that the *standardization* of Tetum is an onerous task of utmost importance. JSMP believes that although the end result could have its problems or could be criticized, the development of a standard orthography for Tetum is important for the judicial system and other institutions. In the future, this initiative could support the acceptance of Tetum as an effective and official working language within the justice system of East Timor. The INL has also developed spell check software to complement this standardization process. The Tetum spell check software could provide a base for implementing the standardization of Tetum as it facilitates the writing of Tetum in a standardized fashion. To JSMP's knowledge, as of June 2004, the courts and court actors had no knowledge of any initiative to install the spell check software in the court's computers and in the computers used by the court actors.

JSMP is delighted that it is now possible to start the development of a legal dictionary and the translation of laws into Tetum. These two crucial developments will support the realization of Tetum as an effective language of the judicial system in East Timor. JSMP hopes that these initiatives will be successful. JSMP would also like to state that JSMP is prepared to make a contribution towards these two initiatives, where JSMP is able to.

5.2 The Process of Language Change

The language of the judicial system in East Timor for approximately 25 years has been Indonesian. Through this report, JSMP does not wish to discuss the value of using Indonesian in the judicial system in East Timor. The Constitution has established Tetum and Portuguese as the official languages; and these two languages must be introduced into all fields including the judicial system. It also must be noted that for 25 years these two languages have not been used in the courts. Up until now the judicial system has been developing through the use of Indonesian, whereas now the judicial system must be developed through the use of Portuguese and Tetum.

⁸⁵ See also *Enhancing the Justice System to Guarantee the Democratic Rule of Law - Strengthening the Justice System in East Timor, July 2003, Annex 19 to UNDP East Timor Programme Package Document.*

⁸⁶ Government Decree No. 1/2004, 14 April 2004.

It is a concern of JSMP the process for the (re)introduction of Tetum and Portuguese in the judicial system. JSMP believes that it is important to note that language change cannot be achieved in a very short period of time.

The Language Directive issued by the CSMJ has tried to establish a particular process for bringing the use of the official languages to the courts. After examining this process JSMP is deeply concerned that it is too rapid, does not take consideration of the needs of the courts and court actors, and it does not reflect the situation that currently exists within the judicial system.

The Language Directive issued by the CSMJ establishes April to September 2004 as the period for phasing out the use of Indonesian in the courts of East Timor. In fact, the transitional period of language change includes the period from February (when the Language Issue was issued) until April as a period where afterwards the majority of documents should be written in one of the official languages. Therefore a seven-month period – February to September – has been provided to fully implement the Language Directive and to use the official languages in all documentation in the courts.

JSMP believes that this transitional period does not give sufficient time to the court actors and the judicial system to implement language change, or to develop a strong base for effectively implementing language change.

As is evident in the diagram above, seven months is not a sufficient amount of time to develop a legal dictionary in Tetum or to translate laws into Tetum. In JSMP's opinion, the Language Directive issued by the CSMJ establishes a process for implementing language change in the judicial system at a time when the base – the minimum requirements – for language change in fact does not exist. Therefore, how is it possible to start the implementation in April of the Language Directive and use Tetum, at a time when the standard orthography has not been approved; without a dictionary of legal terms in Tetum and with the majority of legislation yet to be translated into Tetum?

Other places have faced similar situations where the judicial system must adopt 'new' languages or re-introduce old ones. Malaysia and Macau are two examples that serve as useful comparison. In Malaysia for example, the Constitution prescribes that the official language of Malaysia is Malay⁸⁷. The Constitution also sets out a period of ten years as a transitional period to adopt Malay in the institutions of Malaysia. Pursuant to Article 152(4) and (5) of the Malaysian Constitution, English can be used in the Supreme Court for ten years. English may also be used in the District Courts until such time the Parliament passes a law to replace the languages used in the District Courts.

Although the Malaysian Constitution establishes a transitional period, when JSMP consulted jurists from Malaysia, they stated that until now the judicial system still experiences problems in functioning effectively in Malay.

⁸⁷ Article 152 of the Constitution of the Federation of Malaysia 1996.

JSMP understands that the court actors who support the change of Indonesian with Tetum and Portuguese continually argue that the actors have had more than three years to use Tetum and study Portuguese. JSMP believes that this period – 1999 to 2004 – cannot really be considered as a transitional period for changing languages used in the judicial system, because it was only in 2004 that attempts were made to develop the first policy and establish a process to replace Indonesian with Tetum and Portuguese in the courts.

JSMP believes that the transitional process should be set up through dialogue and follow a system that supports the development of a language without sacrificing the administration of justice. In addition, the process of language change should not create huge obstacles that will consequently be detrimental towards the development of a new judicial system in East Timor.