



**JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL**

**JSMP's Observations on Progress Achieved to date and Challenges facing the
legal system in Timor Leste**

Presented by:

Luis de Oliveira Sampaio, Director of JSMP, in a Seminar organized by the Department of Law and Human Rights, Ministry of Justice to celebrate the 11th Anniversary of the Referendum – at the Timor-Leste Legal Training Center, Caicoli-Dili, 3 September 2010

Your Excellency, President of the Court of Appeal, Maria Natercia Gusmão,

Your Excellency, Vice Minister of Justice, Ivo Valente,

Your Excellency, Deputy Prosecutor General, Vicente de Brito

Your Excellency, Representative of the Timor-Leste Human Rights Commission, Rui Pereira

Ladies and gentlemen,

Firstly I wish to thank the Organising Committee and the Ministry of Justice for once again providing JSMP with an opportunity to participate in this very important event.

When we participate in events like this, often we are only concerned with the case of Maternus Bere, the execution of prerogative rights by the President in relation to the granting of pardons, the independence of the courts, the principle of separation of powers and other issues that basically can be seen as efforts to reduce the meaning and value of the rule of law in practice.

We realize that there are those who do not agree with our stance on particular issues or cases, however in relation to the presidential pardons granted to the 26 convicted persons relating to the 2006 crisis and the attacks in 2008, we are rather confident, because in the end the Reverend Basilio Nascimento, from the Baucau Diocese, also shared our views on these issues of concern.

Before I outline our views, I think that first I should speak briefly to remind us all about a comprehensive assessment report that was issued by ICNA on the justice system in Timor Leste. This report is extremely detailed and clearly outlines key recommendations on the Timorese justice system, and what needs to be considered, updated and improved in the future.

I wish to remind everyone that that this report emphasized several issues relating to human resources in the courts, the prosecution service, the public defenders office and the role of each

of these institutions, including the strategic importance of the work carried out in the field of advocacy by legal aid organisations or private lawyers.

However, the aforementioned report underlined the existing limitations, including a lack of attention from the government towards advocacy provided by private lawyers, and their efforts and contribution to the judicial system. The report also expressed concern about the language issue in the justice system, land disputes and also the issue of 'impunity' for past crimes.

In addition to the concerns listed above, the report also acknowledged that the courts have performed their duties in accordance with their existing mandate, however our legal institutions have not been given adequate space to function nor have they been fully acknowledged by other state authorities. The report was also concerned with the independence of the justice system and the separation of powers, which are provided for in the Timor-Leste Constitution.

Another serious issue raised in the report was the case of Maternus Bere.

Through direct observation over the last few years JSMP has developed the following views:

We acknowledge that several significant achievements have been made in certain areas, namely:

1. We have our own penal code (this is a crucial step in developing our criminal justice system). This is in contrast with Indonesia, which has not yet formulated a criminal law that reflects global dynamics, patterns and characteristics of modern day crime.
2. We also have our own civil procedure code, a law on witness protection and a law against domestic violence. We also have our own criminal procedure code. These laws are very important to ensure that the rights and interests of every citizen are protected in accordance with the rule of law.
3. We also acknowledge the other processes and efforts being pursued and directed by the Ministry of Justice, one of which is the consultation process on the draft Civil Code which has been submitted to the National Parliament, as well as a draft law on juvenile justice, a draft law on paternal rights and obligations and a draft law on adoption rights.
4. Furthermore we acknowledge another positive achievement of the Ministry of Justice, namely its openness to provide opportunities and a forum to enable all parties or components to be involved in activities to draft a strategic plan for the Ministry of Justice itself. Even though JSMP remains concerned about whether or not recommendations will be accommodated, JSMP believes that this strategic planning document is very important because it identifies the challenges faced by the respective judicial institutions, and seeks a way of overcoming these difficulties. This strategic plan specifically acts as a guide or reference for the justice sector to identify priorities for a five year period. *“Previously, we did not have a document like this, even though there might have been one in existence;*

however it could not be accessed by the public because the process was not open to the public, as is the case now”.

5. We also welcome the approval of a policy on wages for judges, prosecutors and public defenders, which we outlined in the workshop last year on strategic planning. JSMP believes that this policy is really important to encourage and improve the quality and productivity of the work performed by judges and prosecutors in guaranteeing justice for all people in line with our expectations and in accordance with our Constitution.
6. Another way to measure progress or achievement in the justice sector is the process of recruitment, the provision of training and the assigning of roles and responsibilities to several national consultants. Based on information provided, several of them have left overseas to continue their education.
7. Another positive development is the consultation process which has been conducted in an open manner to enable the public to provide and develop ideas or views on a draft law before it is presented to the Council of Ministers for approval.

Human Resources and Infrastructure

8. JMSP believes that the policy on the judicial training centre to provide training to judges, prosecutors and public defenders, as well as training that currently involves private lawyers is a crucial step in increasing the capacity of human resources in the justice sector, and at the same time can improve the professional quality of judicial actors. However, we believe that training for private lawyers needs to be reviewed so that everything is done to accommodate all people to give them an opportunity to participate in such training, as well as a specific review of the Advocacy Law.
9. Also, we believe that the recruitment and training process for judges and lawyers needs to be increased to provide adequate numbers of trained personnel. JSMP has noted that due to the limited number of prosecutors, at certain times and in certain jurisdictions, international judges have appointed private lawyers to replace and take over the role of prosecutors and act as prosecutors during trials. JSMP is extremely concerned with this situation, because it is really difficult to accept the legal grounds for doing so, because as we all know, only prosecutors have the authority and legitimacy in accordance with the law to represent the state before the courts and prosecute a defendant. We have tried to identify a legal basis or legitimacy for this practice; however we have not found a single article in the procedural code which permits this to occur. If such a provision exists, then we will be happy to accept criticism from all parties for our professional negligence in terms of our understanding of the procedural law, and this would also erase the confusion that we have felt over this issue.

10. We also note another achievement in the justice sector, namely the court buildings in all jurisdictions have been repaired, and now there are communication facilities and transport for judges and prosecutors. However, there are still some necessities that need to be addressed both in Dili and other jurisdictions. We also note that in several jurisdictions permanent housing has been provided for judges, prosecutors and public defenders.

Even though some of the things we have mentioned have not been adequately addressed, we believe that there is a really pressing and important need to establish legal libraries in all jurisdictions. In addition, we also believe that it is most urgent and crucial to develop a legal dictionary for standard Tetum language with the intention of helping members of the legal community who have a limited ability to use Portuguese by allowing them to use the aforementioned dictionary as an alternative reference in their professional work, both as practitioners or academics. This process could be implemented together with academic institutions, or specifically with JSMP, as we are willing to be involved and contribute, in a modest way, so we can also learn from this process at the same time.

Criticisms of the Timorese legal sector

Although JSMP has acknowledged the level of achievement and significant progress that has been reached in the justice sector in relation to the development of a legal system in Timor-Leste, we also have some criticisms that we consider to be the biggest and most serious challenges in Timor-Leste at this moment.

1. Independence of the courts and the Separation of Powers

As set out in the recommendations of the independent assessment report from ICNA, we also believe that the issue of judicial independence, the principle of the separation of powers and the principle of equality before the law all require greater and more specific attention in the future. Nevertheless we acknowledge that the courts have done their best in spite of the massive limitations to guarantee and ensure their institutional neutrality as set out in the Constitution. However cases that happened last year, such as the Maternus Bere case, and the order issued to prohibit an investigation into the destruction and burning of a school in Becora, are issues of concern for JSMP in relation to the independence of the justice system and other principles.

2. Issue of the President's Competence to Grant Pardons

JSMP believes that until now there has been a very serious problem relating to the method or system used to regulate the practice of granting pardons or commuting sentences which is the prerogative right of the President. This issue also includes the drafting of a law on amnesty and pardons which has been the practice of the President of Timor Leste. Our history and experience shows that there is major confusion about the concept and practice of granting pardons, commuting sentences, amnesty and impunity. This practice also indicates a tendency for the

President to use his authority excessively and with wide interpretation, without paying heed to the recommendations and advice of the government, in disregard of the spirit of the Constitution and customary practices under international law. JSMP believes that this has the potential to undermine the justice system which is still quite vulnerable.

JSMP believes that the Timor-Leste justice sector is still quite young and is in a vulnerable stage of development. Therefore, a draft law that regulates the competence of the President in relation to the granting of pardons as well as clearly specifying clear conditions exercising this right, together with other steps, is crucial to ensure that the justice sector continues to be developed and especially to guarantee justice for all people in Timor Leste.

JSMP hopes that a draft law on pardons will provide guidance and regulate how to properly consult on the issue of the right to grant pardons. This effort also includes raising public understanding about the negative effects of pardoning, clarification from the courts about the Constitution and strengthening the punitive process, and also demands for the President to use his right/competence to grant pardons in a consistent and legitimate manner. JSMP also realizes that this law is not intended to force the President to follow all of the recommendations of the government. The President can still choose to grant a pardon to a convicted person without a recommendation from the government, but if there is a law JSMP is certain that this process will be more transparent and consistent. However, if the President acts outside of the provisions of this law the President must provide a logical basis why he has chosen not to follow the recommendations or advice of the government.

3. *Petition on Constitutional Grounds - Right to Petition in accordance with Article 48 of the Constitution.*

Until now JSMP considers that this issue is unclear, because the Constitution provides an opportunity for every citizen to stand before the courts, or through a legal representative, to defend his rights and interests or defend public interests as provided for in Article 48 of the Constitution. However in practice, this article has not had any impact because it has not been used by the courts. Even though this article allows complaints to be submitted to the courts on constitutional grounds, the courts refuses to use this article to accept public complaints and to process such complaints through the courts.

JSMP believes that this article actually is of strategic importance and can be used in order to question and control the political decisions/policies made by the organs of state authority that do not reflect the norms and principles enshrined in the Constitution. But, once again this article is not productive and useful because it is not used in practice.

4. *Issues of drafting laws*

We really appreciate and welcome all efforts made by the Minister of Justice to continue the development of the legal framework in Timor-Leste; however we still have some criticisms of the legal drafting process itself.

4.1. We note that the legal drafting process does not include sufficient reference to studies, research or analysis to identify what truly needs to be covered in a law. For example, the draft law on juvenile justice. A draft was prepared in 2005 or the beginning of 2006 but until now this law has not been enacted. The draft law has been worked on by two different consultants. The first draft was rejected because it did not reflect the actual conditions and issues facing minors in Timor-Leste. The current draft is going through a consultation process which is a quite serious matter because the drafters have not examined other laws that relate to children's issues in Timor-Leste.

4.2. We have noted another issue concerning the legal drafting process. Article 442 of the draft civil code deals with compensation for accidents caused by public transport. This article states that if an accident is caused by public transport it will be compensated at a rate three times higher, however for accidents resulting in injury or death that are caused by trains the compensation will be at a rate of 10 times higher. The question is, do we really think that we are going to have train tracks in Timor-Leste? This is something we believe needs to be addressed. Perhaps some others feel that this is a trivial matter or not really serious, but for JSMP this article strengthens our suspicion that all draft laws have been prepared without proper research, and the worst thing is that these draft laws have just been copied and pasted from legislation overseas and then introduced as Timorese laws. Therefore, the consequence is that these laws do not reflect the real conditions and situation in Timor-Leste.

I have presented a brief outline of the observations of JSMP on the development of the justice sector in Timor-Leste. If anything is unclear I will be very happy to provide clarification in the next session.

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