



JUDICIAL SYSTEM MONITORING PROGRAMME  
PROGRAMA MONITORIZASAUN BA SISTEMA JUDISIÁRIU

**Submission to:**

**The President of the Court of Appeal**

**Results of JSMP monitoring and findings**

**2018**

## **Introduction**

On 11 October 2018 JSMP had an opportunity to meet with the President of the Court of Appeal, Deolindo dos Santos, at the Court of Appeal in Kaikoli, Dili.

The aim of this meeting was to present and discuss the results of JSMP monitoring and findings with the court, as well as discussing concerns about the issue of accessibility to the Court of Appeal and relevant issues documented by JSMP over the last few years.

These issues included facts and findings that were outlined and highlighted in the 2017 Overview of the Justice Sector Report and other concerns relating to the application of provisions in accordance with the applicable legal framework. In addition, JSMP also took the opportunity to again highlight recommendations made by JSMP and raised on multiple occasions that have not yet been given consideration or a response.

This document summarises the issues that were presented and discussed during the aforementioned meeting.

### **1. Appropriate application of coercive measures**

JSMP has observed that in some cases, especially complex and serious crimes including cases of corruption involving East Timorese with dual citizenship and/or foreigners, it has been very easy for defendants to flee the national territory during the appeal process before the Court of Appeal. For example in 2017 there was a case involving two Portuguese citizens, Tiago Guerra and Tammy Guerra (even though there much criticism and concerns about the case itself), as well as the case involving the former Minister of Finance, Emilia Pires, and including the case of the illegal oil supplies from Indonesia. Prior to these cases, there were two other serious cases involving crimes against humanity (Valentim Lavio and Domingos Maubuti) and the defendants also fled during the appeal process and have been at large since six or seven years ago.

JSMP believes that in major cases like those mentioned above, priority must be given to the application of coercive measures such as pre-trial detention rather than other coercive measures. In cases such as these we need to ensure that necessary steps are taken to confiscate relevant documents to prevent defendants from fleeing Timor-Leste during the appeal process.

When a court decides to apply other coercive measures, it must ensure that there are strict mechanisms to guarantee security and conduct monitoring to control their movements and communications.

In order to avoid these negative experiences from reoccurring in the future, JSMP recommends for the court to comprehensively study and analyse each case to assess and identify which coercive measures are appropriate based on the procedural requirements and complexities of each case, and the legal implications on the public interest.

### **2. Notifications of decisions or rulings**

Article 279 (3) of the Criminal Procedure Code (CPC) on preparing and reading out a sentence states that the sentence shall be read out and explained publicly by the judge at the hearing, within fifteen days of its issuance. Also, Article 279 (4) of the CPC states that the reading is tantamount to notifying the persons who are, or are to be considered, present at the hearing.

JSMP has observed that in many cases the courts just notify the parties and do not publically announce the sentence in an open hearing to the parties, the media or the general public to allow for decisions to be monitored and evaluated. JSMP understands that the courts face serious human resource challenges, but the courts/judges need to abide by the law. JSMP believes that ideally decisions must at least enable the parties to hear the decision or ruling that impacts on their rights and legitimate interests.

In cases where the courts have only notified the decision, and have not explained the decision in a way that is simple and easy to understand, many people are disappointed with the court's decision. The litigants or parties affected by a decision of the court have even taken their concerns and dissatisfaction to JSMP because they don't have the opportunity to defend their rights and to hear the decision that impacts on their interests.

JSMP believes that decisions or rulings announced publicly in the presence of the parties or people involved in these cases are going to result in greater compliance/adherence, in comparison with decisions that they hear from another person or an unofficial source or one that has no credibility.

Judicial decisions that are announced in the presence of the parties enable the parties to hear the considerations and explanations of judges in a way that is appropriate and credible that will result in greater compliance because these decisions have credibility and they adhere to procedural requirements.

### **3. Accessibility of trials at the Court of Appeal**

Currently in Timor-Leste the Court of Appeal is the highest court or the court of last instance. Sometimes the Court of Appeal exercises other competencies as the Supreme Court of Justice as provided for in Article 124 and Article 126 of the Constitution.

In fact, the Court of Appeal and the Supreme Court of Justice are the same institution, although technically they perform their own respective functions. This reality causes a lot of confusion in practice, and there are concerns relating to the appeal process regarding the composition of panel members<sup>1</sup> in cases heard by a panel of judges. This issue has serious and substantive implications in cases where the parties are dissatisfied with the

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<sup>1</sup> Please refer to the 2012 Overview of the Justice Sector Report: <http://jsmp.tl/wp-content/uploads/2012/05/Overview-of-the-Justice-Sector-2012.pdf>; page 6 regarding an extraordinary appeal in the case of Lucia Lobato. There is discussion about concerns relating to the appeal process and JSMP's position and criticism about the composition of the panel that was the same during the ordinary appeal phase and the extraordinary appeal phase.

decision of the Court of Appeal and if they want to challenge the decision/ruling through legitimate mechanisms to lodge an extraordinary appeal in accordance with the applicable procedures.

JSMP has observed that most trials or rehearing of evidence before the Court of Appeal was done differently to the Court of First Instance, and almost always via written notification only. Trials before the Court of Appeal were almost always closed to the public, or completely closed, without access to the public or the parties (appellant and respondent) as parties involved in this process.

JSMP believes that to ensure that all people understand the process and the respective interests in each case, and at the very least the announcement of the decision, the Court of Appeal needs to make the hearing to announce the decision open to the public, especially for the interested parties. This will help the parties to receive clear and credible information relating to the decision and considerations of the court in each case.

There are several reasons why JSMP feels that is important for hearings and the announcement of decisions to be open to the public.

1. Obligations in the law

Article 14.1 of the International Covenant on Civil and Political Rights clearly states that trials need to be open to the public, and only in limited circumstances can trials be closed to the public.<sup>2</sup> Article 131 of the Timor-Leste Constitution also similarly states that court hearings shall be public.

2. To ensure that applicants and respondents understand the reasons and grounds why they have lost a case and why the other party (opposing party) has won the case. Normally a person will feel satisfied and will accept the results if he/she is involved and understands the formalities of the process. The court needs to have the capacity and responsibility to ensure that decisions produced by judges have value and are binding because these decisions need to have credibility so that people have faith in and accept these decisions.

3. Promote the transparency and accountability of these judicial decisions. Decisions that are open and accessible to the public will guarantee monitoring and allow for public assessment/examination to promote transparency and accountability amongst the public and the media.

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<sup>2</sup> Circumstances that allow for a trial to be closed to the public:

- 1) for moral reasons;
- 2) public order;
- 3) national security;
- 4) when the interest of the private lives of the parties so requires;
- 5) publicity would prejudice the interests of justice;
- 6) the interest of juvenile persons otherwise requires; or
- 7) matrimonial disputes or the guardianship of children

ICCPR (1966) entered into force on 23 March 1976, art. 14(1); 14(4) and Timor-Leste ratified this Convention in 2003.

Decisions that promote transparency will encourage people to have faith in decisions in particular cases and the judicial system in general. It is important that the public, and in particular those people involved in the trial, understand how judicial actors determine the results of a case. A decision that is accessible to the public in general, and specifically to the parties, will help limit or reduce allegations and misconceptions that a decision in a case is unfair, or that there is nepotism, bias, abuse of power and corruption in the judicial sector and other negative perceptions that undermine public confidence in the justice sector.

4. Decisions in all cases use Portuguese which automatically makes it difficult for applicants or respondents and the general public to understand these decisions. JSMP believes that even though the prosecution and defence play a role in explaining the decision and the considerations to the applicant and respondent JSMP doubts that the prosecution and defence can do this properly when the applicant and respondent are not present when the Court of Appeal hands down its decision.

Based on these concerns and considerations, JSMP recommends that if no need exists in the law, for example sending the case back to the court of first instance, then the Court of Appeal should announce these decisions in the presence of the parties and explain the grounds of each decision/ruling and legal effect on the parties.

#### **4. Suspended sentences with rules of conduct or additional responsibilities**

Most cases of domestic violence (DV) continue to result in suspended sentences. Suspensions often have no effect or no deterrent effect on convicted persons because they believe that the suspension is not a substitute for a real penalty.

The substitution or suspension of a prison sentence that does not include additional responsibilities or rules of conduct to guide and control the convicted person can result in the idea that the penalty or sentence has no meaning or executive force, because the convicted person has limited knowledge. This can send a negative message to family members or other members of the community that domestic violence is not a serious crime, because the defendant has appeared in court, but then he has returned home and can move around as normal, without any legal measures imposed on him.

To deal with this, JSMP believes it is important for the courts to apply suspension with additional responsibilities (Art 69) and rules of conduct (Art 70) of the Penal Code.

#### **5. Guidelines on preparing charges in cases of gender based violence (GBV)**

Since the Law Against Domestic Violence (LADV) came into force in July 2010 some progress has been made, especially in terms of acknowledging and affirming that domestic violence is a public crime and many cases are taken to the court in comparison with previous years before the LADV had come into force.

The results of JSMP monitoring show that in most cases prosecutors only apply Article 145 of the Penal Code on simple offences against physical integrity. In extremely limited

circumstances they apply Article 154 of the Penal Code on the mistreatment of a spouse or Article 146 of the Penal Code on serious offences against physical integrity.

This practice shows that there is a very large amount of confusion and inconsistency in relation to the most relevant and appropriate article to apply in cases involving domestic violence characterized as physical violence. This situation has resulted in inconsistent sentencing in cases of domestic violence and places victims in unfair and unsafe situations.

Article 154 of the Penal Code does not expressly state that there has to be evidence of repetition to allow the application of the article on mistreatment of a spouse. Article 154 of the Penal Code only requires for the defendant to have the intention of causing physical or mental harm, or cruel treatment against his spouse or de facto spouse. This article can be applied more specifically in cases of domestic violence against a spouse. However, in practice there is a tendency for judicial actors to only apply Article 154 of the Penal Code when the circumstances involve evidence of repetitive violence.

Therefore, JSMP recommends for the courts to introduce guidelines to provide the courts and prosecutors with guidance on how to explain key (legal) elements of Articles 145, 146 and 154 of the Penal Code, and provide examples on how to apply and use these articles properly to charge defendants.

These guidelines could also provide clear guidance on appropriate sentencing based on the circumstances of each case.

## **6. Introducing more civil compensation in cases of serious gender based violence**

Normally civil cases take a long time – therefore JSMP makes a recommendation, specifically because the law allows, for the courts to immediately determine civil compensation when imposing a criminal sentence (prison sentence) in cases where the courts believe that victims have been harmed or have had to take on additional responsibilities. For example, defendants who have committed sexual abuse against a minor that has resulted in the victim becoming pregnant. JSMP believes that in other cases, for example when a defendant has committed sexual abuse against a disabled person, the court should consider introducing civil compensation, in addition to a prison sentence against the defendant, because the defendant's actions has placed an additional responsibility on a victim suffering a physical disability or other limitation.

JSMP has observed that in many cases victims have suffered a range of physical, material or moral harm, but the public prosecution service and the courts have failed to identify and apply civil compensation for these victims.

Article 72 a, b, c of the Criminal Procedure Code (CPC) – allows for a request for civil compensation in the determination of a criminal matter.

Compensation is a means to redress the harm and suffering experienced by a victim and to correct the defendant's criminal behaviour that has affected the victim. Also, it can

educate society that sexual abuse or rape is a serious crime because in addition to the defendant being sent to prison, the defendant and his family are also held responsible in another way by paying compensation to the victim.

## **7. Applying a fine based on the requirements of Article 36 of the Law Against Domestic Violence**

JSMP has observed and found that the public prosecution service also often requests that fines be imposed in cases of domestic violence and the courts accept this and impose fines without consideration or compliance with the requirements of Article 36 of the Law Against Domestic Violence:

In many cases the courts have the option of imposing a fine as the main penalty pursuant to Article 75 of the Penal Code. However in cases involving domestic violence, the application of a fine must consider the requirements of Article 38 of the Law Against Domestic Violence.

This is important to ensure that the courts comply with the provisions in the applicable law and ensure that court decisions have the ability to prevent other crimes in the future and to ensure the wellbeing of society.

Article 36 of the Law Against Domestic Violence states that the Court can substitute a prison sentence with a fine, to:

1. Guarantee the security of the victim;
2. The defendant is ready to accept treatment or monitoring from support services for victims; and
3. To preserve family unity.

JSMP requests for the courts to apply a fine with consideration of the vision and perspectives that reflect the requirements of Article 36 of the Law Against Domestic Violence.

## **8. Giving priority to hearing civil trials at the courts**

JSMP has observed that the courts do not really give priority to hearing civil cases. Cases that are left pending for a long time undermine confidence in formal justice. These circumstances have serious consequence in the community because they encourage litigants to seek their own justice in ways that are unsafe and could potentially result in other crimes.

Also, these circumstances can create a very negative impression for foreigner entrepreneurs or investors that the civil jurisdiction/case in Timor-Leste is not functioning and this could prevent them from investing in Timor-Leste.

JSMP understands and acknowledges that the courts have limited human resources but they still need to uphold the principle of administering justice through simple, speedy and affordable trials.

JSMP recommends for the courts to manage the limited human resources available to give priority to civil cases.

## 9. Applying international instruments in judicial decisions

Timor-Leste is a State Party to many of the main international conventions<sup>3</sup> because it has ratified these conventions, that include the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) without reservations in 2003. CEDAW requires State Parties to take immediate action to eliminate all aspects of discrimination against women. To comply with this convention, Timor-Leste needs to adopt and apply the principles of CEDAW in legislation, policies and development plans at the national level, including protection for women and access to justice.

The CEDAW Committee recommends that regulations based on CEDAW and the Convention on the Right of the Child should be included in court decisions.

JSMP has observed that on some occasions one or two judges have introduced these conventions, particularly CEDAW, but not thoroughly and in a way that properly reflects that requirements set out in these conventions. This is because the practice of introducing these international conventions has not been institutionalised yet so only one or two judges are applying them and many (most) judges are not doing this.

JSMP requests for all judges to include these international instruments in their decisions, especially in relation to cases involving gender based violence. This will be a way to educate defendants and society in general that the international community also abhors violence against women.

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<sup>3</sup> Please refer to this link: <http://unhrt.pdhj.tl/en/universal-declaration-of-human-rights-udhr/>; the official website of the Ombudsman for Human Rights and Justice on the main international conventions that have been ratified by the State.