

Report on visit to Timor-Leste 20-24 March 2017

- 1 I visited Timor-Leste on 20-24 March 2017, in the role of rapporteur in relation to Timor-Leste's application to be admitted to membership of the International Association of Judges.
- 2 I was assisted in identifying and setting up meetings with relevant persons and entities by Anna Yang, the Access to Justice Coordinator, Ending Violence Against Women Program, The Asia Foundation. Anna was invaluable and in such a small society was knowledgeable as to all the key players in the justice area. This is apparent from the meetings that were arranged. The persons and entities with whom I spoke are listed in Attachment A.
- 3 In discussions, I focussed on and/or the following topics arose:
 - The constitutional and statutory structure relating to the judiciary;
 - The manner in which the judiciary operates;
 - The independence of the judiciary in a practical sense;
 - The relationship between the judiciary and the government;
 - The various assistance and training programmes available to the judiciary;
 - The issues that each entity considered to be confronting the judiciary;
 - Meetings with relevant agencies and individuals.
- 4 If I made notes in a meeting, I later forwarded them to the person or entity with whom I had met to ensure that I had correctly recorded our discussion.

5 My report in respect of each these matters and my various meetings is as follows.

The Constitution and statutory structure

The Timor-Leste Court structure

6 The Court System comprises three categories of court: the Supreme Court of Justice and other courts of law; the High Administrative and Audit Court and other administrative courts of first instance; and military courts: Constitution of the Democratic Republic of Timor-Leste, s 123(1). In addition to the Supreme Court, there are two further courts of law, the Court of Appeal and four District Courts.

The Supreme Court

7 The Supreme Court has not yet been established although it is hoped that this will happen at the conclusion of the current inspection by the Portuguese judges, which is discussed below.

The Court of Appeal

8 The Court of Appeal comprises the President and two other judges. The Court of Appeal determines approximately 400 appeals a year. Appeals are determined mostly on the papers, but occasionally there is an oral hearing with additional evidence. Its decisions are written.

The District Court

9 The District Court has jurisdiction in all civil and criminal matters. It is comprised of 31 judges. There is also a mobile court, upon which the District Court judges sit. The Court sits in four districts and the workload is very heavy.

Appointment to the judiciary

- 10 Appointment to the judiciary requires that an individual be older than 25 years of age and a national citizen. They must have completed a university degree in law and two years training at the Judicial Training Centre. Entry to the Judicial Training Centre is by examination. Those who graduate with the highest marks are appointed to the judiciary. Those with the second and third highest are appointed as prosecutors and public defenders respectively.
- 11 There are three judicial levels: third-class, second-class and first-class: Statutes of Judicial Magistrates, art 26. A judicial officer commences in the third-class after graduation from the Judicial Training Centre. Thirty-four judges have graduated from the Judicial Training Centre to date and comprise the current judiciary.
- 12 There is a separate training course at the Centre for those who wish to go into private practice. To date, 99 lawyers have graduated from the Training Centre and there are presently 34 lawyers training at the Centre with training being provided by international lawyers: one from Cape Verde and two from Brazil.
- 13 Disciplinary proceedings may be taken against a judicial member through the detailed procedure established in Ch VI of the States of Judicial Magistrates. Judges may be subject to a number of penalties, including warnings, fines, reassignment and dismissal: art 64.
- 14 Under Ch III of the *Statute of Judicial Magistrates 2004*, Judges should be inspected every three years by a Judge Inspector. Promotion through the classes of judicial officer is dependent upon a satisfactory result on inspection: art 27. Promotion to the Court of Appeal has an additional examination requirement: art 28. Inspections have, to date, been undertaken by Portuguese judges.
- 15 There has not been an inspection for six years, although two Portuguese Judge Inspectors arrived in March 2017 to undertake a comprehensive

inspection process. The delay in the inspection process appears to have been due to a breakdown in the relationship between the governments of Timor-Leste and Portugal following the expulsion of international judges from Timor-Leste in 2014. The expulsion was justified by the Timor-Leste government as being in the national interest.

- 16 The salary of judicial officers is prescribed by the Statutes of Judicial Magistrates, art 45. Judicial salaries sit at about the same level as mid-ranking public servants and there is a judicial pension. There is also a judicial pension in the case of retirement on the grounds of ill-health.

The manner in which the judiciary operates

- 17 Judges sit either as a single judge or as a bench of three, depending upon the seriousness or complexity of the matter. A decision is usually given immediately. Written judgments are required in each case. The full written judgment is usually given at a date after the decision itself and is made available to the parties. Although some proceedings are recorded it is rare for there to be a transcript.
- 18 Proceedings are in open court, although orders can be made for a closed court to protect the privacy of individuals, including witnesses. This is considered to be of importance in sexual assault trials, particularly those involving the sexual assault of minors.
- 19 Court hours are 8am to 5pm. There are only three court rooms in the Dili District Court, which is not adequate for hearing of the current case load. In the Dili District Court, judges have separate chambers located on the level above the court rooms. This is accessible to any person simply by walking up the stairs, and judges are required to walk through litigants and other persons sitting in the open areas outside the court to access their chambers. However, save for three incidences of violence directed to judges in other District Courts, there was not a strong concern in relation to court security,

although it was a matter raised by Dr Antonino Goncalves, President of the Association of Judges.

- 20 Approximately 12 months ago, the Association of Judges was formed and Dr Goncalves was elected its President. The formation of the association had the support of the judges generally, as well as from persons outside the judiciary, including the Minister of Justice and private lawyers.

The independence of the judiciary in a practical sense

- 21 There was a uniformly strong view that the Timorese judiciary **considers** itself independent and acts independently from the other organs of government in the daily discharge of judicial duties. The judiciary **values** independence highly.
- 22 There was also a uniformly strong view that the Timorese judiciary in fact **conducts** itself independently, although as might be expected, the work of the judges was not without criticism. This ranged from a concern as to the understanding of some judges to the sensitivities in child abuse and domestic violence cases, to concerns regarding efficiency. The criticism was not directed to the judiciary as a whole, rather, it was directed to the fact that some judges did not understand that there needed to be care around the language used in court, especially in child abuse and domestic violence cases, and some judges were not efficient.
- 23 The expulsion of the international judges and its impacts was also an area of concern. The expulsion was the subject of international attention and criticism. More fundamentally for the local judiciary, it has made them feel vulnerable to executive power. There was, however, uniform praise for the outspoken stance taken by the President of the Court of Appeal at the time, which was viewed as a positive and practical demonstration of judicial independence.

The relationship between the judiciary and the government

- 24 There have been a couple of high profile cases in recent years in which the Timor-Leste judges have withstood political pressure and criticism. An example of political pressure was when a leading politician issued an “open letter”, in which criticisms were made of the bringing of a prosecution. Pressure might also be felt when there is criticism of the judgment or the penalty imposed. Yet another concern, in terms of political pressure, was when senior political figures gave evidence, for example, by giving character evidence in cases involving high profile defendants.
- 25 In respect of one criticism made of a sentence imposed on a Minister of State, it appeared from discussions with a member of the judiciary that the critics had failed to understand (or had decided to ignore) that there was a mandatory minimum sentence for the crime of which the official was indicted and found guilty. The official left the country before verdict.
- 26 It seemed to be well-accepted that the judges had withstood the pressure well, although it cannot be assumed that such factors do not take a personal and collective toll.

Assistance and training programs available to the judiciary

- 27 As mentioned earlier, all judicial officers undergo a two year training programme. A law degree is a pre-requisite to entry to the programme and all candidates must pass an exam to be admitted into it. The first year is a theoretical course where formal legal subjects, including constitutional and administrative law, criminal and civil law, as well as ethics, are taught. There is also training in the Portuguese language. The second year is a practical course, with six months practical training and six months at the court.
- 28 There has been no intake at the Judicial Training Centre since 2014, as no judges have been approved to come from Portugal to teach the programme since the expulsion of the international (Portuguese) judges. Usually there is

an intake every second year. Accordingly, the much-needed increase in judicial personnel has completely stalled. There has been a concomitant negative impact on the prosecution service and the public defenders.

- 29 The Director of the Judicial Training Centre understands that an arrangement has been reached between the Timor-Leste and Portuguese governments and a memorandum of understanding has recently been signed. It is expected that two judge trainers will arrive in Dili in April or May 2017. The Director plans to commence a new intake in 2017 and again in 2018 in an attempt to redress the problem of the shortage of judges, prosecutors and defenders. Training of private lawyers has, however, continued, as earlier mentioned.
- 30 There is a strong call for ongoing legal education and training for the judges. The need for this was recognised by those with whom I spoke, including the Director of the Legal Training Centre and the Law Reform Commissioner. However, the Legal Training Centre has no capacity to provide ongoing judicial training.
- 31 Occasional lectures are provided by overseas entities. Recently, there were lectures on money laundering and terrorism. Although neither of these matters are legal issues with which the judges have been dealing, they were thought to be useful for the judges' general legal knowledge.

The issues that each entity considered to be confronting the judiciary

- 32 The salary structure was a key area of concern for the judges. There were three aspects to this. First, although the salaries are on par with other public servants, and with deans of law schools and doctors, judges were not able to add to their salary by, for example, undertaking lecturing at law schools, without permission from the President of the Court of Appeal: the Statute of Magistrates, art 34. It seems that permission is either not sought, or is not given, so that the judges do not feel that such work is available. By contrast,

doctors were permitted to do so. Although I do not see this as affecting the independence of the judiciary in Timor-Leste, it would appear to be an unnecessary constraint, as in many countries, in both civil and common law jurisdictions, judges also hold lectureships at law schools and this is seen to be an aid to their professionalism, not a challenge to it.

- 33 The second aspect of concern is that there is presently a bill before the Parliament that equalises the remuneration of the judges and the prosecutors. The judges are extremely unhappy about this as they consider that it fails to recognise the judiciary as one of the sovereign arms of government. Nevertheless, it seems that the Director of Prosecutions has been able to persuade the authorities that such a change is appropriate. The judges are not assisted by the fact that this is the remuneration structure in Portugal.
- 34 The third aspect of concern was that, as already stated, there have been no inspections of the judges for six years. As a result, there have been no judicial promotions in this time. This has had salary consequences for individual judges, especially the 12 judges who would have expected to be promoted from the third-class during the period in question. There are also judges who would have expected to be first-class judges by this point. As it turned out, the Portuguese Judge Inspectors were in Timor-Leste at the time that I was there and I met with them.

Meetings with relevant agencies and individuals

The Judge Inspectors

- 35 The Judge Inspectors arrived in Timor-Leste in mid-March and will stay for approximately a year to undertake an audit of the judge's work. They will also train local judge inspectors so that inspections, which are mandated under the Statute of the Judicial Magistrates, can be undertaken regularly.
- 36 The Judge Inspectors will also be conducting the examination to choose judicial officers to be appointed to the Court of Appeal. This is necessary

because it is proposed to establish a Supreme Court as a final appellate court as soon as possible.

- 37 The inspection process that is being undertaken is the same system as in Portugal. The two Judge Inspectors are senior first-class judges. The Judge Inspectors have no involvement in the Judicial Training Centre.

The Prosecutor General and Deputy Chief Prosecutor

- 38 The Prosecutor General spoke generally about the level of crime in Timor-Leste, particularly domestic violence. This was a universally held view. He advised that in his term as Prosecutor General, he had set a number of goals to improve the prosecutorial services, which included training and being involved in a number of international prosecutorial associations. He considered that this had been of huge benefit to the prosecutors. It has provided them with an opportunity to see how other prosecutorial bodies dealt with issues such as asset recovery, money laundering and organised crime, matters which he saw as increasingly important for Timor-Leste and in respect of which they had no, or inadequate, laws.

- 39 The Deputy Chief Prosecutor also expressed the view that the judges were independent and whilst it was notorious that members of the government at times attempted to pressure the judiciary in respect of particular matters, the judges had resisted the pressure. The Deputy Chief Prosecutor echoed the need for ongoing judicial training and for more efficient systems in the court and expressed the view that the court needed more support services. She was also of the view, common to others, that the judges are not sufficiently well trained to deal with complex cases including money laundering, and that it would be useful if there was some specialisation within the court.

Law Reform Commission

- 40 A Law Reform Commission was established by government resolution in August 2015. Its mandate is to update and develop legislation in priority

areas, including the justice sector. It drives, promotes and develops strategies for legislative and justice sector reform. In undertaking that work, it is guided by a strict recognition of the statutory independence and autonomy of each institution, including the judiciary. Its mandate concludes in December 2017 and it is not clear whether it will be extended. It has published its first report. The report identifies areas where existing legislation is inadequate or where legislation is non-existent. The former includes the fact that incest is not criminalised, meaning that cases of incest are prosecuted through general criminal sexual assault provisions. This is inadequate for a number of reasons, including the fact that consent is often assumed if there is no evidence of violence. The latter category includes legislation in the area of cyber crime.

- 41 The Law Reform Commissioner expressed the view that reforms were warranted within the judicial system. In particular, he expressed the view that some specialisation of the judges would be helpful, including in the area of family law. It is also his view that a separate family law court or division should be implemented. At the moment, the rights and obligations of parties in this area are poorly understood by parties and sometimes by judges. He considers that a separate court or division would be more accessible and outcomes would be more consistent.
- 42 The Law Reform Commissioner also expressed the view that the courts and judges need increased capacity. The budget for the court is quite low and ongoing training for judges is inadequate. The Commissioner was not in favour of a mentoring programme, as he considered that it would carry the possibility of creating dependency by the mentee judge on the mentor, whereas each judge should be encouraged to exercise independent thought. It seems his concept of a mentoring programme was more formal than a programme where a judge can approach a senior judge for out of court support and guidance.

- 43 Whilst accepting the requirement for judicial inspection, the Commissioner questioned the need to have Portuguese Inspectors who may not have sufficient knowledge and appreciation of local conditions. It appears this will now be rectified.

Justice System Monitoring Programme

- 44 A significant, effective and well respected organisation is the Justice System Monitoring Programme (JSMP). Notwithstanding its name, it is not a monitoring body of the judiciary. Rather, it is well established NGO. One of its significant activities is to monitor court cases for the purposes of publishing a short summary of the case, which is then made available to the public. In 2016, it monitored and published a judgment summary of 941 criminal cases and 16 civil cases. The publication of judgment summaries is a significant aid to open justice, as it is presently very difficult for a non-party to gain access to the written judgments of the court.
- 45 JSMP produces an annual report of cases. It also reviews aspects of the judicial and court system. For example, it reviews court budgets and makes recommendation to the courts, to the government and other institutions. Mostly its recommendations are welcomed. The following are two examples.
- 46 Before 2011, women victims were not compellable witnesses. The theory behind that principle was that if the victim was not compellable it would be easier for a family to remain together. However, the consequence was a low prosecution rate in relation to crimes of domestic violence. JSMP recommended that victims should be compellable in order to ensure that crimes of domestic violence were prosecuted. The Court of Appeal in one of its decisions supported JSMP's stance on the basis that family trust had already been broken by the domestic violence.
- 47 JSMP also recommended that victims of crimes be awarded civil compensation in addition to a criminal sanction being visited on the

defendant. Whilst there was a provision in the penal code authorising compensation it was not previously being used. JSMP observed that following reforms, compensation is now being ordered on a regular basis.

48 In the view of JSMP, the judiciary are working very hard. Judges have maintained their independence even in the face of government pressure. They could be better assisted in a number of ways, for instance the availability of a bench book. However, this does not seem to be supported by the President of the Court of Appeal.

49 JSMP supports membership of the International Association of Judges, on the basis that it would assist the judges to feel they have outside support. JSMP also expressed the view that exposure to other judges' experience in various situations would be helpful. It would also be helpful in assisting the Timorese judges to understand and apply international conventions.

ALFeLa

50 Asisténsia Legál ba Feto no Labarik (ALFeLa) is an NGO which was formerly part of JSMP. It specialises in the provision of legal aid to women and children. In our meeting, the Director, Merita Correia, expressed the view that the judges acted independently in the discharge of their duties. However, she expressed concerns as to judicial delay and also the problems that had arisen from the absence of an inspection for the last six years.

51 The Director considered that the law, having been borrowed from Portugal, was not always suitable to local conditions and expressed the view that the judges should be permitted, or feel entitled, to point this out to the government. Language was a problem, with Portuguese being inaccessible to a majority of the population so that court decisions were not always understood by the parties. The Director referred to this as a need for linguistic independence as well as judicial independence.

52 The Director also expressed the view that some judges are not sensitive to gender and children's issues and that it would assist if there were specialised family law judges. She pointed out that there are prosecutors who specialise in family matters. In addition, some of the judges are very young and do not have a broad world view.

Private law firms

53 I also met with a number of private law firms. One law firm, Da Silva Teixeira Associados, is a local Timorese law firm, although its two principals were educated in Australia. Miranda & Associates is a Portuguese law firm. Abreu e C & C Advogados designates itself as a Timorese law firm with partners from Portugal and Macau. The lead firm in the group is based in Portugal and it has offices in all Portuguese speaking countries.

54 Because of the small population, all firms do a range of work, both civil and criminal. They consider that the judiciary has a strong and independent ethos and is able to, and does withstand, governmental pressure. Government pressure is well-known, particularly in the case of two criminal prosecutions against Ministers.

55 All firms spoke of delay, inadequate training and inefficiencies, language difficulties and poor interpretation support. Reference was also made to poor court infrastructure, in circumstances where there were new building projects throughout Dili. The impression was that the facilities for the judiciary were a low government priority. For example, small matters like broken air conditioners and plumbing can take months to fix. This view was echoed by one of the judges.

56 One of the lawyers stated that the judges have deliberately created a "closed door" policy in respect of their chambers so that people cannot "drop in". This was seen as a physical bulwark both against being open to influence and also

being seen not to be open to influence. This was considered to be an important outward demonstration of judicial independence.

57 Criticism was directed at the Training College, which does not have books. In fact, one firm arranged for books to be donated from Portugal for the training of private lawyers. As with other interviewees, the judicial section of the Training College was criticised as not have the resources to provide adequate judicial training, especially given that the legal issues facing Timor-Leste are becoming more complex, particularly in the areas of taxation, corporate and commercial law and labour law.

58 None of the lawyers saw or had heard of problems concerning corruption and the judiciary, although one lawyer expressed a concern regarding low level corruption in other agencies. The example given was the delay in registration of documents, it being believed that the delay could be minimised by a payment. It was not suggested that this had any flow on effect to the judiciary and there was no complaint that judicial staff acted in a similar way.

Association of Lawyers of Timor-Leste

59 I met with five staff members of the Association of Lawyers of Timor-Leste. All were young lawyers and did not appear very experienced. Unfortunately the Director, Ana Pessoa, a former Prosecutor General and well respected legal figure in Timor-Leste, was called to another meeting.

60 The main complaint from the Association was the failure of judges to keep to court schedules. This was a particular concern as parties, including victims, often had to travel long distances and were seriously inconvenienced if the case was delayed or cancelled without notification. The lawyers explained that this is a complaint that they hear coming from the community when the Association delivers community education programmes. The lawyers also questioned the quality of decision making in some cases.

Counterpart International

- 61 Counterpart International is an organisation which seeks to help local communities build the infrastructure needed to resolve their own problems. Its activities include judicial training. This project finishes at the end of this year.
- 62 The Director of Counterpart International had not seen evidence of corruption or evidence of the judiciary taking inappropriate judicial stances. For example, she was of the view that the President of the Court of Appeal took an appropriately strong stance at the time of the expulsion of the international judges and this was seen as an example of good judicial leadership.
- 63 The Director did, however, express the view that pardons had been used excessively and inappropriately. International law proscribes the grant of pardons for crimes against humanity and this had not been honoured in some cases. The government justification for the pardons was that they were necessary to allow the country to move forward peacefully. No recent examples were given.
- 64 The Director expressed the view that the importance of better training was not necessarily understood at the top levels of the judiciary and that the President of the Court of Appeal appeared more concerned with judicial administration, especially delays.

United Nations Human Rights Adviser's Unit

- 65 The UN Human Rights Adviser considered that the essential elements of judicial independence, including the separation of powers, were well-established in the Constitution and relevant statutes. A notable example of the clear operation of judicial independence was the fact that the case against a former Minister, Amelie Perieras, proceeded notwithstanding significant political pressure. The Adviser also expressed the view that the President of

the Court of Appeal had acted strongly and appropriately at the time of the expulsion of the International Judges.

- 66 The Adviser expressed a concern with the adequacy of judicial training, particularly in more complex areas. She also observed that there appeared to be a governmental view that development and human rights do not necessarily go together and that constitutional interdependence sometimes gave members of Parliament the view that all branches of government should be working in the same direction to pursue development opportunities. In practice, that created the belief that Parliament's view should be determinative.

Conclusion

- 67 I support the application of the Timor-Leste's Association of Judges to be admitted to membership of the International Association of Judges. The local judiciary was established in 2002 and all aspects of judicial independence are appropriately contained in the Constitution and the Statute of Judicial Magistrates.
- 68 The judiciary considers itself and acts on the basis that judicial independence is central to its functioning. Indeed, the strength of judicial independence in every aspect of its functioning is a testament to the commitment of the judicial officers to their judicial oath.
- 69 There are pressures and there are complaints which are outlined in the report. I do not see these matters in any way impinging upon the actual independence of the judges. Indeed, as a judiciary with a mere 15 year history, its strength and professionalism is remarkable.
- 70 The judiciary has a need for continued support in various areas, particularly in respect of ongoing training. That is essentially being provided at the moment through various NGOs and other international agencies. However, a

structured education programme would be of assistance. It may be that now that an association has been formed, attention may be able to be given to ongoing education.

71 I would re-iterate that none of these matters should be seen as obstacles to membership of the International Association of Judges.

72 Judge Pedro Miguel Vieira has carefully considered and analysed this report, and has stated his full agreement with its content and conclusions.
