



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

Dili, 21 July 2002

Comments on the draft judicial magistrates law

The Draft Judicial Magistrates Law is a law designed to regulate the judiciary in East Timor. It establishes a new body, the Superior Council of the Judiciary, to oversee the judiciary and in particular to control the appointment, promotion, discipline and dismissal of judges.

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

Nonetheless, there are aspects of the draft law which raise concerns about how the law might operate in an East Timorese context and the possible implications the law might have for the independence of the judiciary and the rule of law in East Timor.

JSMP does not take a political position in relation to the draft law but seeks only to contribute legal analysis of the law and its possible impact on the newly established East Timorese judicial system. JSMP's comments are based in part upon the international standards for judicial independence as set out in the Beijing statement, IBA's minimum standards, the UN basic principles on the independence of the judiciary and the Montreal declaration.

It is not a comprehensive review of the law section by section. Instead our comments focus on the following core areas:

- **Is it possible to implement this law in East Timor?**

The draft law establishes a complex system of regulation which requires many judges with lengthy experience. A simpler model would have been more appropriate at this stage in the development of the East Timorese judiciary.

- **Are the procedures for judicial review adequate?**

Procedures for judicial review are a good idea to ensure judicial accountability especially in a new judicial system of inexperienced judges. However, reviewing judges is a difficult and time consuming exercise. JSMP suggest that clear criteria must be in place so that all judges are assessed in the same way against clear and uniform standards, and that the reviews are extensive enough to properly evaluate all judges as part of a fair process.

- **Are judges sufficiently protected from arbitrary dismissal?**

The law grants security of tenure but provides for dismissal of judges by the Superior Council after disciplinary proceedings. JSMP suggests that the grounds on which a judge may be dismissed should be set out more clearly and that a judicial code of ethics is required so that judges clearly know their responsibilities in advance. This is especially important because the Superior Council, although independent, has a majority of members appointed by the President, Government or Parliament.

JSMP is also concerned that the remuneration of judges is not properly secured by the draft legislation

Are the procedures for disciplinary proceedings adequate?

The procedures for how to investigate and discipline judges are not clear. In particular it is not clear whether the Superior Council is responsible for hearing and evaluating evidence presented in a case against a judge or whether that task is to be performed by a single judicial investigator. JSMP also suggests that the law should set out a procedure which states who can make complaints against judges and how.

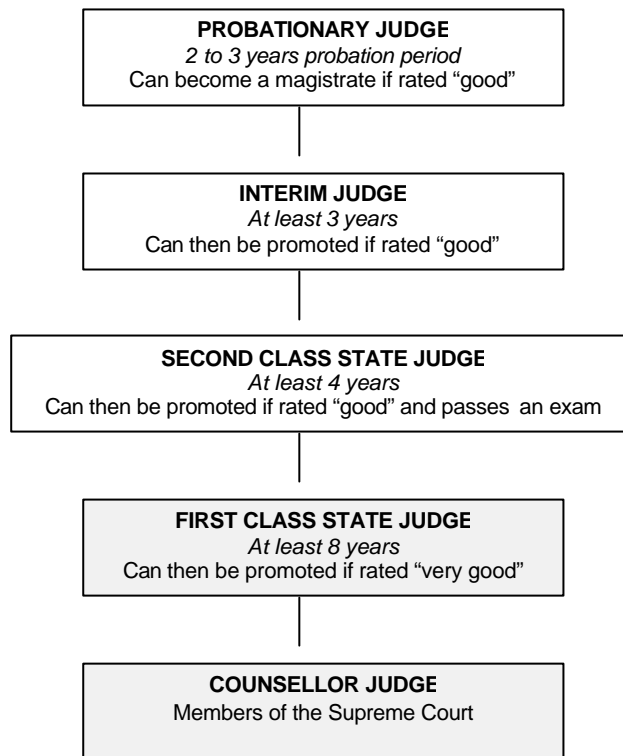
Is the Draft Law Constitutional?

JSMP suggests that some aspects of the law may not be consistent with the Constitution.

JSMP is available generally to give further information or advice on the Draft Magistrates Law to any interested members of the Parliament and in particular to the Commission of Constitution, Human Rights, Liberties and Guarantees.

1. OPERATION OF THE LAW IN AN EAST TIMORESE CONTEXT

The draft law sets out the following career path for judges in East Timor:



In East Timor there are currently only 22 judges. None of them have more than 2 years experience. Therefore, even if their time spent as judges under the transitional regime is included in their career progression (which the law does not clarify whether it is), there are currently no judges in East Timor more senior than the level of probationary judge.

The draft law establishes a system which requires judges to fill a number of new positions. For example:

- there must be a Counsellor Judge to fill the position of President of the Superior Council of the Judiciary (who will also be the President of the Supreme Court);
- there must be a judge, who is elected by the other judges, to be a member of the Superior Council
- there must be a first class state judge to act as the Secretary of the Superior Council (s 21)(1))
- there must be at least one first class state judge to act as a Judicial Inspector (s 22(4))

There are transitional provisions which set out who will be the President of the Superior Council of the Judiciary until there is a judge who is appropriately qualified (something which will take at least 15 years) and which allow a probationary judge to fill the other elected position, but there are no transitional provisions to cover who may fill the other positions until there is a judge appropriately qualified. This is a serious flaw with the legislation.

For example there will not be any judges at the level of first class state judge for at least 7 years. That means no one can be appointed to the position of judicial inspector for at least 7 years. Therefore there will be no one who can investigate complaints against judges for at least 7 years. Likewise, there will be no one who can evaluate and rate the judicial performance of judges.

As a result either none of the current judges can progress or all of the judges must progress automatically – which means that the law will have no real operation. At any rate, even if there were transitional provisions to appoint judicial inspectors, it would be inconsistent with the development of a judiciary based on merit and skill to have inexperienced inspectors evaluating other judges.

Furthermore, even if some of the 22 judges were sufficiently experienced to hold the various positions – it would have a negative effect on the judicial system if a significant percentage of East Timor’s judges were occupied with the new positions and the duties that go with those positions. East Timor’s judicial system is already overburdened and there are already insufficient legally trained personnel to deal with the current case load.

Many of the ideas and principles behind this law are positive but it is not a suitable law for East Timor at time when the current system is already struggling. This law is designed for a country where there are more judges, with more resources and more experience. In East Timor it will be many years before this law could be any more than words on paper. At this point in time it can not operate in practice.

RECOMMENDATION:

- **More consideration and attention must be given to how the law will operate in East Timor particularly in the first crucial decades of East Timor’s development.**

2. PROCEDURES FOR REVIEW OF JUDICIAL PERFORMANCE

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

General comments

Detailed and structured reviews of judges are a relatively recent phenomenon seen in some domestic jurisdictions. The most extensive being the review of judges in Germany after the fall of the Berlin wall and the second being organized by the UN in Bosnia and Herzegovina. Period reviews have also been implemented other places, such as seven year reviews in several states in the US.

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

Special concerns

- Although it is unclear, it appears as though judicial inspectors appointed according to Chapter III will have the mandate of conducting not only the general judicial review, but also produce reports in the personal rating of the judges under Chapter V.
- Although it is positive that the appointment and promotion of judges is to be based upon a system highlighting qualifications, it is important that the process of rating the judges be further detailed in the form of clear assessment criteria which would ensure

conformity and equal treatment of all candidates. This would also ensure that the review process could not be used to discredit a judge arbitrarily. Further, any assessment criteria should focus on evaluating the most important judicial functions and not simply an analysis of the volume of cases a judge has dealt with or performance on a written exam alone. Effective judicial review requires significant time and resources because the nature of the position means that it is difficult to measure the standard of performance.

- JSMP is concerned that the Judicial Inspectors may be selected from judges with minimal judicial experience and no relevant practice of conducting judicial performance reviews, and that this may influence their review findings.
- Judicial Inspectors can not, according to Section 23(3), investigate judges of an equal or higher position than themselves. As earlier mentioned, the inspectors should be “First class state Judges”. As the Supreme Court is to be composed of a minimum of five “Counsellor Judges”, it would exempt this court from inspection.
- It could be symbolically important to state explicitly in the law that international judges are to be subject to the same reviews as East Timorese judges. (The law possibly provides for this in transitional provision s 117(1).) It is possible, however, that the Parliament does not have the power to make international judges subject to review because it may impliedly involve the amendment of an earlier UNTAET regulation.

RECOMMENDATIONS:

- **Guidelines should be developed, possibly by the Superior Council itself, on how to perform the reviews, and identify measurable benchmarks for rating. Previous review systems, such as the Judicial System Assessment Program in Bosnia and Herzegovina, have spent both time and resources on developing such a framework, including disclosure forms, evaluation forms from the court administrators, and a methodology for receiving complaints on judges from the public.**
- **International judges and Counsellor Judges should also be subject to review.**

3. GROUNDS FOR DISMISSAL OF JUDICIAL MAGISTRATES

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

General Comments

Security of tenure is a vital element of judicial independence, however, mechanisms must also be available to dismiss judges for serious misconduct which undermines the community’s belief in the judicial system. The best way to find a balance between these two competing demands is to ensure that all disciplinary, suspension or removal proceedings are determined in accordance with *established standards of judicial conduct*. Also, dismissal of a judge

should be limited only to those cases where the conduct of a judge is so serious that it makes him or her *unfit to be a judge*.

Special Concerns

- The kind of judicial misconduct which would justify dismissal is not set out clearly in section 77 and includes reasons as imprecise as “dishonesty”, “immoral or dishonoured conduct” and “professional incompetence”. None of these terms are defined in the law and could be interpreted in any number of ways. In particular, the activities of a judge in his or her private life which do not necessarily have any relationship to his or her capacity as a judge could be used to justify dismissal.

The duties of a judicial magistrate are set out in section 37 of the law and are stated very broadly. For example, section 37 states that judicial magistrates must discharge their duties with “honesty, neutrality, impartiality and dignity”. These words mean different things to different people. A judge would not know with any certainty what sort of conduct might result in disciplinary action, and in particular, dismissal. This uncertainty might prevent a judge from performing his or her duties well.

- As required by the Constitution, four out of five of the positions on the Superior Council are appointed by either the President, the Government or the Parliament. Only one of the members is elected by the judiciary themselves. It is possible that only two of the members will be judges. This could influence the independence of the Council. These circumstances create a particular need to ensure that the Council can only dismiss or suspend a judge in very specific circumstances which are set out clearly in advance.
- The legislation does not limit dismissal to those cases where the conduct of a judge is so serious that it makes him or her *unfit to be a judge*. Although section 78 does provide that the type of penalty will depend on due consideration of the seriousness of the judicial misconduct and the culpability of the magistrate it does not directly limit dismissal to the most serious cases of misconduct.
- The law provides in section 35 that a judge should not take a political position or make public statements of a political nature. While it is of course essential that judges are not actively involved in party politics, section 35 is drafted so widely that it would cover all sorts of activities that judges could be legitimately involved in. For example, it might cover making a speech about human rights at an international conference or publishing a paper in a law journal about the independence of the judiciary in East Timor. If any of a judge’s public or private behaviour shows a political persuasion of any sort, on any matter, and in particular one which is not consistent with the ideals of the particular government in power, they could be subject to disciplinary proceedings leading to dismissal. It is important that judges have the right to form an association of judges with the purpose of representing the interests of the judiciary and protecting judicial independence. That right is necessary to help protect the independence of the judiciary as a whole. Under the law it is not clear whether forming such an organisation would violate section 35.

RECOMMENDATIONS:

- **The law should make provision for the publication of a Code of Judicial Ethics which would form the basis of any disciplinary proceedings.**

- **The law should state clearly that Judicial Magistrates can only be removed from their job in circumstances where very serious misconduct has been proven against them.**
- **Members of the judiciary should continue to enjoy freedom of expression, belief, association and assembly, subject only to their duty to protect the dignity, impartiality and independence of the judiciary. In particular judges should be free to establish and join an association of judges.**

4. DISCIPLINARY PROCEEDINGS AGAINST JUDICIAL MAGISTRATES

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

General Comments

The law sets strict timelines for disciplinary proceeding which is positive. It is also positive that the law provides for disciplinary proceedings to be conducted by the Superior Council and not by the government. There is some provision in the law for the defendant magistrate to present a defence but the procedures are not entirely clear.

Special Concerns

- The bill does not clearly set out who is to make the decision after the Judicial Investigator makes his or her report. Will it require a majority vote of the Superior Judicial Council? Will they have to be satisfied beyond reasonable doubt? Will they have to publish reasons for their decision? All of these matters should be set out in the law.
- It appears from the bill that the defendant magistrate will not have an opportunity to put evidence, cross examine witnesses and make submissions directly before the Superior Council even though presumably the Council will ultimately make the decision about his or her guilt and what penalty should be imposed. In that way, the law does not really provide for a fair hearing. It is the Judicial Investigator who presents the entire case and his conclusions on the case to the Superior Council. This means that although it will be the Council who ultimately *appears* to make the decision in a disciplinary matter, in practice it will really be one person, the Judicial Investigator, who makes a decision about the evidence as presented. This is not an adequate safeguard for what is a very serious matter.

- The law does not clearly set out what would trigger a disciplinary proceeding or what the process is for making a complaint. Does it have to be a written complaint? Can it be an anonymous complaint? The procedure for handling and processing complaints is an important one. This should be set out with more clarity to ensure two things:
 1. that people are not able to anonymously make baseless allegations against a judicial magistrate which ruin their careers
 2. that legitimate complaints are not just ignored forever because no one is obliged to investigate them.

The law should also clarify what role, if any the legislature or executive might play in initiating disciplinary proceedings. The bill is silent on all these matters.

- The law does not set out how disciplinary proceedings against a judge who is a member of the Superior Council of the Judiciary might be brought. Likewise, because a judicial investigator can not investigate a judge who is in a position equal or higher to them, it would seem impossible to bring disciplinary proceedings against a Supreme Court Judge.
- Security of remuneration for judges is not secured by the draft law. Although a regime is mentioned in Section 45, it does not ensure that salaries of judges can not be cut. If judges fear their salaries may be cut by the executive, it can influence their ability to act impartially.

RECOMMENDATIONS:

- **The law should ensure that the defendant magistrate has the opportunity for a full hearing before the Superior Council. Disciplining judges is one of the most important functions of the Superior Council of the Judiciary and it should not be effectively delegated to one person.**
- **The law should establish a procedure for making and processing complaints against the judiciary. This procedure should set out what role, if any, the Parliament or Executive or the public might play in initiating disciplinary proceedings.**
- **Members of the Superior Council of the Judiciary and the Supreme Council should not be exempt from disciplinary proceedings.**
- **A provision should be included stating that judges salaries can not be lower than they were the previous year.**

5. IS THE LAW CONSTITUTIONAL?

- Section 43 of the draft law says that judicial magistrates cannot be arrested or detained without being charged, except if they are caught in the act of committing an offence which carries a penalty of more than three years. Section 16 Article 1 of the Constitution states that everyone is equal before the law and all people have the same rights and duties. This section of the draft law is not consistent with the Constitution. If it was put into practice it could mean, for example, that a judge might be able to steal goods from a shop without being arrested.

- Section 122 of the Constitution states that Judges must not perform any other functions *whether public or private*, other than teaching or legal research in accordance with the law. The draft law also restates that restriction in s 34. This is too ensure that judges are free to decide cases independently without having other interests that may affect their decisions, such as business interests, and so that their main job is to be a judge and decide cases. The draft law sets out many functions that judges need to perform which will take away from their primary duties as judges. In this way it may be unconstitutional.

6. MISCELLANEOUS

Section 5 of the draft law provides that judges can not be held responsible for liable for their judgments except as provided for by law. This reflects Section 121 Article 4 of the Constitution. In practice it means that a judge can not be sued as a result of any decision they make as judges. In many countries, judges cannot be sued at all for decisions they make in court. This allows judges to make the best decision in accordance with the law without worrying about whether they might be later sued by the parties to the case.

RECOMMENDATION:

- ***The section should simply state that judges can not be held liable for their decisions and should not contain any exception to that rule.**

Throughout the law many different terms are used such as judicial officer, jurist, judge and judicial magistrate. It is not always clear what these terms mean and how they are different from one another.

RECOMMENDATION:

- **The law should contain a definition section where these terms are defined. Words should be used consistently throughout the law.**

Section 36 of the draft law states that Judges shouldn't practice law except in cases of their own, their spouse, or their ancestors. In any case where a judge represents a party, whether that party is a family member or not, it would be very difficult for the judge hearing the case to be impartial. Particularly, if the judge representing one of the parties was more senior.

RECOMMENDATION:

- **Judge's should not be able to practice law whether for themselves or their family members, except to represent themselves in criminal proceedings.**