



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

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**JSMP COMMENT ON THE DRAFT LEGISLATION ON EAST TIMORESE
LAWYERS**

1 Introduction.

The State of Timor-Leste is a State of law as confirmed in Article 1 paragraph 1 of the RDTL Constitution¹. To uphold this provision, there needs to be credible lawyers working in both government and private practice. To enhance their expertise and identity in legal affairs, our government needs to enact legislation that regulates all activities of East Timorese lawyers. To respond to these requisites, the government has submitted a *Draft Law on the Function of the Legal Profession and Statute of Professional Development* for discussion in the National Parliament. Previously, in 2005/2006, the Secretariat of the East Timor Lawyers Association (AATL) had already submitted an AATL² version of draft legislation on private lawyers for discussion in the forum of the National Parliament. Both the AATL draft and the government draft are progressing together in the debate in the National Parliament. According to information obtained by JSMP³, the National Parliament is focusing on discussion of both of these drafts; the one from the AATL secretariat as well as the one submitted by the government.

2. Definition or Meaning of Lawyer.

Article 2 paragraph 1 (a, b) of the draft law submitted by AATL states that:

(a) *“Advocacy” is the activity of consultation or legal representation, both individually and collectively, throughout the entire national territory, and appearing before all courts, jurisdictions, authorized parties and public and private entities.*

(b) *“Lawyer” means any person who holds a law degree and practises law in a regulated and professional manner.*

In principle, a Lawyer is a person who pursues the profession of providing legal services, both inside and out of the court, and who fulfills the necessary conditions as determined by law.

¹ RDTL: República Democrática de Timor Leste (Democratic Republic of Timor-Leste).

² AATL: Associação dos Advogados de Timor Leste (Timor-Leste Lawyers Association).

³ JSMP: Judicial System Monitoring Programme.

"Legal Services" are services that are provided by a lawyer in the form of legal advice, legal assistance, the operation of delegated powers, representation, defence and the undertaking of all other legal actions in the legal interest of the client.⁴

In reference to these definitions, it is the view of JSMP that being a lawyer is noble and honourable work because it reflects the total dedication of an individual or group to defend the public interest with emphasis on a professional approach that is completely free and impartial and because being a lawyer tends to be a learned profession that is comprised of citizens who are independent of political interests and/or political control or power.

3. The Function of the Lawyer.

The function of the lawyer that is set out in article 21 of the draft law made by the government is that:

"Lawyers must be subject to their principle function of providing administrative assistance in respect of the judicial system so that it runs well, while defending the Basic Rights and interests of all citizens in accordance with the law."

JSMP is of the opinion that the function of the lawyer is clearly to provide assistance to all citizens who do not know the law and, in principle, JSMP appeals to all those who use the services of lawyers to understand the circumstances or conditions in which lawyers work in dealing with their cases. In regard to public lawyers, they are paid by the government to handle all cases. So there is no need for the community to pay public lawyers in handling both criminal and civil proceedings that the poor have to face.

4. Categorisation of Lawyers.

Article 3 of the draft submitted by AATL provides for the following categorization of lawyers:

a) A Lawyer holds a law degree and is entitled to practise law in accordance with the applicable legislation.

b) A Candidate Lawyer holds a law degree, is registered with the lawyers association, and is only qualified to undertake legal actions or give legal advice as permitted by law and the legislation that regulates the period of training for a lawyer.

JSMP is of the view that all persons who hold a Law Degree are lawyers; with the exception of those who work in an area that has no connection with the law at all. A person who holds a law degree, works in government and there is some connection with legal problems in that work, will still be referred to as a

⁴ See the General Provisions in Chapter 1, Articles 1(1-2) of Indonesian Law No 18/2003 on Lawyers.

lawyer because he or she will still guard his or her independence in that work and will also guard his or her impartiality.

Matters that are connected with a lawyer's professionalism are found in the draft submitted by the government in Chapter VI article 39 paragraphs 1, 2, 3, and 4 as well as in the draft submitted by AATL in Title V, Article 24 paragraphs 1, 2, 3, on the Professional Code of Ethics, as follows:

1: A lawyer, in undertaking the profession or outside the profession must consider him or herself as an individual who is faithful to justice and the law who shows that he or she is suitable to be given the respect and responsibility that attaches to that position.

2: In undertaking the profession, a lawyer must always maintain the highest levels of independence and impartiality and must not use his or her mandate to pursue purposes that are not professional.

3: A lawyer must carefully and in a timely manner fulfill the obligations that are imposed by this law and all obligations, customs and traditions that are regulated in legislation relating to actions in respect of other lawyers, judges and clients as well as the members of other public or private entities.

According to JSMP, this means that a lawyer must have a mature personality because, in undertaking his or her duties, he or she is required to possess the characteristics of loyalty to the profession and high integrity and, furthermore, a lawyer must always be able to maintain the highest levels of independence and impartiality.

5. The Recruitment Process for Lawyers and the Process of Attending Education at the Judicial Training Center.

In the recruitment process undertaken by the government, priority is given to those who had already completed the training and passed the examinations that were implemented by the Judicial Training Center. Those who had passed the examinations in Judicial Training that was implemented by the PPJ⁵ will be accredited by the government as lawyers. While those who participated in the training but did not pass the evaluation will be considered as unsuitable for becoming a lawyer.

This issue is actually discussed in the provisions that are contained in the draft law that was submitted by the government, principally, in Article 2 paragraph 1, 2 that provides that:

1. *The profession of being a lawyer will be conferred on those who register themselves and obtain good qualifications from the Legal Training Center and who commence the functions of a lawyer.*

⁵ PPJ: Pusat Pelatihan Judisial (Judicial Training Centre).

2. *Those who can register themselves at the Legal Training Center to undertake the professional function of a lawyer are those who, accumulatively:*
 - a) *have completed a Law Degree*
 - b) *have at least oral and written mastery of both of the official State languages*
 - c) *have completed the course referred to above with good result*
 - d) *Mature aged persons may also submit an application.*

According to JSMP, these provisions constitute a rule that is discriminative because the government, through this draft law, has abandoned all those who have passed and hold a Law Degree.

JSMP itself is of the opinion that all persons who have passed and hold a Law Degree are still in the position of a lawyer because through that professional qualification, he or she can practise and provide legal assistance to those who need it. Except in the case where routine activities have no connection at all with legal problems or any connection with the legal profession is it inappropriate to refer to the person as a lawyer.

According to JSMP, a recruitment process such as this, namely, that a person who holds a law degree must be first registered at the PPJ before he or she may become a lawyer and be recognized by the government, will cause very complicated problems to arise. This is because, in principle, a person who holds a law degree will be a lawyer if, in his or her routine work, there subsists a connection with legal problems – as written in the draft law that was submitted by AATL; principally, in Article 3 on the Categories of Lawyers, and as written in Article 6 (1-3) on the Conditions for registration with the Lawyers Association.

According to JSMP, the process of participating in training in the course given by the government through the Judicial Training Center is a main concern because, in the government's view, all legal knowledge obtained through the Indonesian law degree is exceedingly minimal. Mastery of the Portuguese language is a principal concern of the government. In the government's view, mastery of the Portuguese language amongst those who hold Indonesian law degrees is nil. With such concerns, the government, through the Judicial Training Center that it established, seeks to re-educate law graduates in accordance with the government's way of thinking.

In article 5 of the draft law submitted by the government, the purpose of the education that is implemented by the government through the Judicial Training Center is referred to.

The main purpose of the education for undertaking the profession of lawyer is the development of the technical, professional and deontological capacity or capability that is required by lawyers to discharge their duties in a high quality way.

From this purpose, JSMP concludes that through the Judicial Training enter course that is provided by the government, the government seeks to

surreptitiously control the activities of lawyers in this country in such a manner that those who do not register and participate in the training are not permitted to be involved in litigation or practice law in accordance with their chosen educational background.

6. Accreditation of Lawyers.

a) Accreditation of Associations

In relation to the problem of accreditation or acknowledgment of an institution or an association of lawyers, we need to again carefully study the draft law that was submitted by AATL in Title VIII Chapter I General Provisions Article 42 (1,2,3,4 and 5) on Forms, Types and Characteristics.

Article 42 paragraph 4 states that:

“Inconsistencies with the Constitution or invalidities in respect of rules that are set out in legislation or internal regulations that have been agreed to by the legitimate organs of the lawyers association may be challenged by a prosecutor or lawyer before a competent court.”

According to JSMP, obtaining accreditation or acknowledgement for a lawyers' organisation can be legally challenged if the by-laws of the institution or lawyers association are not in accordance with legislation or internal rules that have been agreed to by its internal organs.

b) Accreditation of Individuals

In performing the profession of lawyer, a lawyer must meet several main criteria such as those in the draft law submitted by AATL; namely, Article 6 paragraph 1 and 2(a,b,c) as well as paragraph 3(a,b,c).

Article 7 explains that:

- 1) *As evidence of compliance with the conditions in paragraph 1 (b) of the preceding article, a certificate or diploma issued by a relevant educational institution must be produced, and so on....*
- 2) *If the document referred to in the preceding paragraph is not written in one of the official languages of the Republic of Timor-Leste, then it must also be accompanied by a translation into one of those official languages.*

JSMP wishes to point out that these two Articles confirm that legal actors who practise law in a professional manner are required to comply with all relevant conditions in order to obtain either individual or group accreditation or acknowledgment. This means that a person who wants to practise law must be a person who really understands the law and has a legal education as well as a certificate or diploma so that the public and the government can have confidence in them and so that such practice is not considered to be unlawful.

It is JSMP's view that it is a fundamental condition of the practice of the law in a complete way that there must first be acceptance by the Lawyers

Association and satisfactory completion of the training for legal practice. If these conditions are not met, then the undertaking of professional duties will be considered in breach of the law as spelt out in article 5 of the draft law submitted by AATL.

7. The Lawyer's Responsibilities in Certain Cases.

The State of Timor Leste is a Democratic Republic founded on law as provided in Article 1 (1) of the RDTL Constitution:

The Democratic Republic of Timor-Leste is a democratic, sovereign, independent and unitary State based on the rule of law, the will of the people and the respect for the dignity of the human person.

This means that all East Timorese and all foreigners who are in the territory of Timor Leste are guaranteed freedom of action provided that such actions comply with the applicable law. All persons who live within the territory of Timor-Leste must obey the applicable law of this country.

Thus, JSMP is of the view that all persons who undertake the profession of a lawyer are certainly obliged to obey the law that is applied. If the actions of a lawyer conflict with the law, then that person must also be have the courage to take responsibility for such actions. That might mean institutional responsibility as well as through the court based on the KKP and KPS (Criminal and Civil Codes) that apply in Timor-Leste.

8. The Future of AATL

According to JSMP, the future of AATL will be precarious because the government does not clearly acknowledge the existence of an organization that includes all lawyers in Timor-Leste.

In the draft law that has been submitted by the government, there is not one single article or paragraph that discusses the acknowledgment of the existence of AATL. However, AATL has long been known to the government; in this instance, the Justice Ministry and the Prime Minister. The government's knowledge of the existence of AATL is known by the fact that invitations have been sent to AATL by the Justice Ministry and the Prime Minister to attend meetings held by them. In JSMP's knowledge, AATL has long been known at both the national and international levels.

Articles 14, 62 and 63 do touch on the matter of a private lawyers association but there is no reference to acknowledgment by the government of the existence of the respected organisation referred to into the future if this draft is going to be passed by the National Parliament to regulate all activities of and the existence of private lawyers in Timor-Leste.

9. JSMP's View of both Draft Laws on Lawyers

A lawyer is a person whose practice is to provide legal services, both in and outside of the Court, based on the applicable laws; and this includes private

lawyers, legal advisers, and even lawyers practising as legal consultants in certain companies. Therefore, a lawyer is a respected profession (*officium nobile*).

To regulate lawyers, it is already clear that the government must draft rules or legislation to bind the legal profession and then submit them to the National Parliament for debate before they are enacted into law.

JSMP's view is that both drafts – the one submitted by AATL as well as the one submitted by the government itself – are very good because they express the demands of how a lawyer must undertake the provision of legal services to the community in a professional way and guard their neutrality and impartiality in defending cases that are facing their clients.

JSMP views the draft law submitted by AATL as the most complete. In JSMP's opinion, this draft law is more favourable to the interests of private lawyers while the draft submitted by the government only emphasizes the educational aspects without seeing all of the main problematic aspects, for example, the existence of a private lawyers association and other such matters. However, JSMP is of the view that, in order to avoid social jealousies between AATL and the government, it is better if both of the draft laws are combined by the National Parliament to become one law that covers all interests, whether the interests are the government's or the interests of that organization or group itself.

10 Conclusion.

A country's judicial system functions well if there is room for lawyers to practise both criminal and civil law.

The judicial system should be constituted as upright without the influence of the political problems of various parties so that it can be said that there is democracy in that country. The law must become the Commander above all individual and group interests. Indeed, it must be so if we want the State to be strongly rooted and so that there is no uncertainty inflamed by the many issues that arise in the community.

Leaving basic principles such as those, JSMP is of the view that the State, in this instance the Government and the Parliament, must make the maximum possible effort to create the space and the conditions that enable all competent parties to make the judicial system function well and this includes lawyers. The creation of space means that the government, with the power that it has, drafts an Act on Lawyers that has both public and private characteristics.

11. Recommendations

a) JSMP's Recommendations

In principle, JSMP appreciates very much and salutes the hard work and dedication of the members of Parliament in thinking about the problems that are presently faced by lawyers in the State of Timor-Leste and they will continue to do this without rest. However, so that all of the sacrifices that have been made purposed to and for the benefit of the State of Timor-Leste, JSMP recommends several important matters for the attention of the National Parliament:

a) Not to contemplate just the draft law made by the Government because the draft made by AATL is much more specific in responding to the demands faced by lawyers at this time. Both drafts are important. So JSMP hopes very much that the Parliament will choose between the two drafts with the utmost care so that all of the interests of lawyers who practise law are covered.

b) The government must create a new better mechanism for lawyers to increase their capacity and self-development so that they can appear professional in discharging their duties as proposed in the draft made by AATL in Chapter III Article 8 that contains the purposes of candidate legal practitioners and where it explains that the training period for a candidate legal practitioner has as its purpose the formation of a legal practitioner through development of technical capacity and identity in a way that guarantees that they are able to undertake the duties of the profession and so that they know the actions and conditions that normally attach to legal practice as well as the fundamental rights and obligations that a lawyer has.

c) A lawyer is a person who practises law (provides legal services to the broad community) and the law is a profession that is free⁶, autonomous⁷ and responsible in upholding the law⁸. So Parliament must create legislation for lawyers so that in practising law there is no need for uncertainty in relation to actions taken in defending a client because it is already guaranteed and protected by law in the interest of the implementation of the supremacy of law.

b) Recommendations from AATL

1. For the recruitment process for participating in the training program there should be:

- a. A commission formed that is comprised of:
- 2 persons from AATL

⁶ “Free” means without pressure, threats, obstacles, fear or actions that weaken the rank and dignity of the profession. This freedom is implemented through the professional code of ethics and the applicable legislation.

⁷ “Autonomous” means without assistance from any persons or groups.

⁸ A lawyer has the status of one who upholds the law – this means that a lawyer is an instrument in the justice process who has a position that is equal to others who uphold law and justice in this country.

- 2 independents, 1 national, 1 international
- 1 person from the Judicial Training Centre

b. Portuguese can not become the main criteria for deciding whether a candidate participates in Training or not.

c. The specific recruitment process for lawyers can not be associated with trainings such as those that were given before.

2. Training

a. Materials that must be provided during the training period

- Criminal Code⁹
- Criminal Procedure Code¹⁰
- Civil Code¹¹
- Civil Procedure Code¹²
- Professional Ethics
- Legal Philosophy
- Application of Criminal Law
- Legal Innovations
- Business Law
- Case Management Techniques and Strategies
- Land Law
- The System of Law Enforcement
- Legal Audit and Memoranda Methods
- International Trade Law and International Trade Contracts
- Legal Audit and Legal Memoranda Drafting
- Theory and Philosophy of the Law
- The Politics of Law
- Health Law
- Certain Criminal Actions
- Intellectual Property Rights

3. Evaluation

To grant freedom to the independent commission referred to in no. 1 in relation to the recruitment process for participating in the Judicial Training Centre (PPJ) and to conduct the final evaluation of training participants.

4. Accreditation or Acknowledgment

In relation to the independent commission referred to above, if there has already been an evaluation of all participants who have passed the training during the period mentioned above, this independent commission is to provide a recommendation to AATL so that AATL can issue accreditations to its members.

5. Acknowledgment of the Existence of AATL

⁹ The draft Criminal Code that will be enacted to become the Timor-Leste Criminal Code.

¹⁰ The Criminal Procedure Code was enacted on 1 January 2006.

¹¹ The draft Civil Code that will be enacted to become the Timor-Leste Civil Code.

¹² The Timor-Leste Civil Procedure Code was enacted on 21 February 2006.

- a) Letters of invitation from the Justice Ministry
- b) Letters of invitation from the Prime Minister
- c) The Justice Ministry to order Judicial Training Centre trainers to provide training on the Criminal and Civil Codes for lawyers.
- d) AATL has been acknowledged by the Malaysian Bar Association (MBA), International Bar Association (IBA) in the Bahamas, American Bar Association (ABA), PERADI (Perhimpunan Advokat Indonesia – Indonesian Lawyers Association), Singapore Bar Association (SIBA), Thailand Bar Association (TBA), Portuguese Bar Association (PBA) and it has also established good relations with the Spanish Bar Association (SBA).

AATL proposes and requests the National Parliament and the government to acknowledge AATL because, in fact, there has already been an acknowledgment from the Justice Ministry and the Prime Minister themselves through evidence received so far by AATL such as orders and invitations that have been delivered to AATL. Only external parties have so far acknowledged the existence of AATL. Why has the government of Timor-Leste itself not appreciated what we have already done?

6. The definition of a lawyer must be clear because if it is not, Timor-Leste will become a place or fertile ground for lawyers from outside (international). We must all understand that Public Lawyers, Judges and international Prosecutors come here because of the law but there is still no law regarding international lawyers. There are now many international lawyers who practise illegally. However, the Court itself has not questioned this matter. There must be, therefore, a clear definition so that Timor-Leste does not become a place for international lawyers to undertake practice in accordance with their own wishes. All lawyers, both national and international, have the fullest obligation to obey the lawyers' code of ethics that is adhered to in each of their countries.

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