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**The Asia Foundation**

**Stanford**  
Law School

An Introduction to

**Professional  
Responsibility in  
Timor-Leste**

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Timor-Leste  
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## **Acknowledgements**

Timor-Leste has enjoyed nearly a decade of formal independence. The country's democratic institutions have grown during this period. But, as thoughtful East Timorese are quick to point out, much remains to be done. Building viable and professional state institutions takes time. And growing the human resource capacity within those institutions is always a major challenge to new states.

The capacity building imperative in Timor-Leste is both striking and compelling. Establishing state agencies in the first instance is relatively much easier than filling those agencies with effective professionals that uphold their duties and responsibilities. Building the capacity of a pool of East Timorese who hold, or may hold, positions within legal and other state institutions is crucial. Likewise, building an educated understanding and awareness of the obligations and responsibilities of key actors within legal institutions, and government institutions more broadly, contributes to setting demands and expectations for performance among the polity. Encouraging professionalized capacity within state institutions, on the one hand, and thoughtful and calibrated demands for performance by citizens, on the other hand, are essential dynamics for the development of the rule of law and a democratic state in Timor-Leste. Institutions of higher learning, such as universities and professional training centers, can and should play a key role in stimulating and sustaining this dynamic. Indeed, education is foundational.

The professional responsibility text is the first in a series of law textbooks that will be produced by the Timor-Leste Legal Education Project (TLLEP) to critically engage the reader in thinking about the laws and legal institutions of Timor-Leste. Founded in March of 2010, TLLEP is a partnership between The Asia Foundation and Stanford Law School funded by the United

States Agency for International Development (USAID) through its Access to Justice Program. The project's goal is to institutionalize ways for local actors, in close partnership with The Asia Foundation, Stanford Law School, and USAID, to positively contribute to the development of domestic legal education and training in Timor-Leste. The textbooks received vital input from the National University of Timor-Leste (UNTL) faculty and staff throughout the drafting and review process including comments from Rector Aurelio Guterres, Law Dean Tome Xavier Geronimo, Professor Benjamin Corte Real, and Vasco Fitas da Cruz of the Portuguese Corporation. Feedback from UNTL students themselves on draft text was immensely helpful for the final text.

The authors of the professional responsibility text focused on writing in clear, concise prose, and on using hypothetical legal situations, discussion questions, and current events. Through this style of writing and pedagogy, the aim is to make these texts accessible to the largest possible audience. Published in Tetum, Portuguese, and English, the professional responsibility text and subsequent texts are designed to be broadly accessible to experienced East Timorese lawyers and judges, government officials, members of civil society, East Timorese students of law, and the international community.

The inaugural textbook focuses on the professional responsibilities of magistrates, prosecutors, public defenders, private lawyers, and civil servants. The President of Court of Appeals, Dr. Cláudio Ximenes, suggested professional responsibility as a topic to consider during a meeting that Kerry Brogan and I had with him in December 2009. This text is in direct response to Dr. Cláudio's suggestion.

Three founding student members of TLLEP wrote this textbook: Kathryn Blair (Stanford Law School '11), Loren Carey ('12), Rufat Yunayev ('11). The three students benefitted from

the substantial and extensive guidance provided by Brazilian lawyer Dennys Antonialli (LLM '11) and Geoffrey Swenson ('09), TLLEP's in-country director and legal advisor to The Asia Foundation's Dili office.

The program has also received extensive support from ATJ Chief of Party Kerry Brogan, Country Representative Silas Everett, Deputy Country Representative Susan Marx, Legal Officer Julião de Deus Fatima, and a host of other Asia Foundation staff. During their respective summers in Dili, law students Carrick Flynn and Brian Hoffman ('13) also provided invaluable assistance with nearly every aspect of the text. USAID Timor-Leste's financial and programmatic support has been and is vital to the program's ultimate success, with thanks to USAID Mission Director Rick Scott, former Mission Director Mark White, Cheryl A. Williams who ably served as acting mission director during much of the drafting period as well as USAID staff, Ana Guterres and Peter Cloutier. The US Embassy in Dili, especially former Ambassador Hans Klemm and current Ambassador Judith Fergin, have been incredibly supportive. I also thank Dean Larry Kramer of Stanford Law School for his unwavering support of this project.

Finally, this volume simply would not have been possible without the many thoughtful and critical insights from Timorese judges, educators and lawyers, and those who work within Timorese institutions. Prosecutor General Ana Pessoa, Public Defender General Sergio de Jesus Hornai, and President of Court of Appeals Cláudio Ximenes were extremely gracious in clarifying issues related to their respective organizations and offering constructive suggestions. The Judicial Training Center (CFJ) has also been a source of wisdom and constructive suggestions throughout the drafting process, particularly CFJ Director Marcelina Tilman and UNDP advisers Erika Macedo and Bernardo Fernandes. The text benefited as well from the contributions of AATL Executive Director Maria Veronika, Judge Maria Natercia Gusmao,

Judge Jacinta Coreia, JSMP Executive Director Luis de Oliveira, JSMP Legal Research Unit Coordinator Roberto da Costa, ECM director Lino Lopes, and Sahe Da Siliva. Ariana Almeida and Timotio de Deus worked tirelessly to ensure the translations were technically correct and that the text reflected Timor-Leste's civil law approach.

In addition to the revised textbook, TLLEP has plans to complete first editions of two new textbooks in the summer of 2012 on Contracts and Constitutional Law. TLLEP has also begun preparations for an Introduction to the Law of Timor-Leste textbook and a volume on Criminal Law. All texts are updated as the legal landscape changes. The most recent version in all three languages is always available for download online free of charge on TLLEP's website: [www.tllep.stanford.edu](http://www.tllep.stanford.edu).

To the students, educators, legal and government professionals, and members of civil society that use this book, we sincerely hope that it sparks study and debate about the future of Timor-Leste and the vital role magistrates, prosecutors, public defenders, private lawyers, and government officials will play in ensuring that the country's future is bright.

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# I. INTRODUCTION

## 1. AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY

### Section Objective

- To introduce students to the concept of professional responsibility and its importance to the rule of law.

### What do we mean by “Professional Responsibility”?

Professional responsibility is a broad term used to describe a set of principles and rules of conduct - obligations - inherent to certain professions. Those individuals included in the category of what we might call a “legal professional” have to abide by professional responsibility rules. This includes private lawyers, magistrates, judges and judicial officials. It is anyone who has a law degree and practices law, or provides legal services or advice. Other professionals, such as civil servants, also have specific professional responsibility rules that apply to them. No matter what type of law you might want to practice or what type of job you might hold, you will be constrained by at least some of the rules of professional responsibility.

Professional responsibility also includes “legal ethics.” Normally, the term ethics refers to a philosophy about duties and obligations. It is about what makes a “good person.” Professional responsibility, however, is much more specific. Legal ethics apply only to lawyers and refer to the ideas about right and wrong in that profession specifically. Legal ethics is about what makes a “good lawyer” rather than a “good person.”

For example, it is not normally a problem to talk to your spouse about details of your work. If you were a farmer, you could talk about your fields and crops all of the time and it would not make you a bad person nor a bad professional. But it might be a violation of legal ethics and your professional responsibilities if you are a legal professional and talk to your spouse about certain things. It would not make you a bad person, but it would be a problem for you as a legal professional.

All legal professionals are bound by norms of conduct. These norms are codified in law, which means that violating them is a violation of the law. Some rules are general and apply to all legal professionals, while others are more specific and apply only to certain groups like magistrates, or lawyers working as civil servants. Many general rules are the same across different countries. Often the rules that are more specific to certain types of lawyers depend more on the legal system, and where legal systems are similar, these laws are also similar. For example, the professional responsibilities of magistrates in Timor-Leste and Portugal, both civil law countries, are very similar, but the duties of magistrates in Portugal, a civil law country, and the United Kingdom, a common law country, are not as similar.

### **Why are the rules of professional responsibility important?**

An independent judiciary that functions according to the law is a fundamental component of a democratic state based on the rule of law. Timor-Leste is such a state. The Constitution establishes the Democratic Republic of Timor-Leste as “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.”<sup>1</sup>

What does the rule of law mean? It means that the society is constrained by the law and constitutional principles. In order for this to be true, there must be both a strong legislature to enact good laws, and a good judicial system to enforce these laws. The judicial system must be separate from other branches of the state and able to hold them (or the individuals in office) accountable if they break the law.

The independent judiciary, so necessary for the rule of law, is only possible if it is made up of good legal professionals who act according to the law. Upholding the rules of professional responsibility helps to ensure this by guarding against undue influences in judicial processes that can undermine the basic principles of an independent judiciary. Clear professional responsibilities and obligations, as well as codifying what legal professionals may and may not do, helps protect legal professionals from undue influences, such as political influence.

Norms of professional responsibility are important for the role that they play in governing the administration of the justice system and the state in general. Take regulations of private lawyers for example. These rules help to make sure that the conduct of private lawyers is predictable and appropriate, which helps to protect clients as they rely on these legal professionals. This, in turn, helps to promote a regularized and fair judicial system, as people know that the legal system will address their claims appropriately. Upholding professional responsibilities helps to promote the judicial system in other ways as well. For example, ensuring good practices among all parties, as well as proper professional behavior, helps the courts to arrive at fairer decisions. All of this helps to contribute to the rule of law.

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<sup>1</sup> Constitution, Part 1, section 1 (emphasis added).

## 2. OVERVIEW OF DIFFERENT LEGAL CAREERS

### Section Objective

- To understand some of the different roles lawyers can play in Timor-Leste.

### Legal Careers

There are many different job and career possibilities for those who graduate with a law degree in Timor-Leste. A law degree opens up many opportunities for work with the government, in the legal system, and in many other fields. Many people who graduate with a law degree, inside Timor-Leste and elsewhere, may not want to be a lawyer or practice law. A law degree is a good educational experience and many businesses and organizations may be interested in hiring graduates. For example, some graduates with a law degree may seek a career as a program officer with the United Nations or as a manager with an international corporation. Others may seek a career related to the law, but may choose not to work as a lawyer. For example, a graduate may pursue a career with the police, as a judicial official, or may seek public office. Many politicians in Timor-Leste and around the world, such as Jose Ramos-Horta and Barack Obama, began their careers studying law. Finally, there are many graduates who will choose a career within the legal system. Even within this more limited sphere, there are many opportunities available.

Lawyers play many different roles within the legal system. For example, magistrates apply the law on matters large and small every day. But some graduates with law degrees may prefer non-judicial methods and pursue careers as mediators, who help to resolve disputes outside of the courts.

Public prosecutors play a vital role in representing the state and conducting criminal prosecution. They do this in the courts and in the investigation and prosecution of crimes. They are assisted in their efforts by other judicial officials.

Public defenders, also employed by the government, provide legal counsel and representation to those who cannot afford it. They do this at all levels of the legal system: criminal and civil, before the courts, and in negotiations between parties.

Private lawyers can also provide similar services for those who can pay for them (or free of charge in the case of legal aid lawyers). Private lawyers may work by themselves, with partners or for larger organizations of lawyers called firms. They can provide legal advice on all manner of subjects, such as civil disputes, divorce, paternity disputes, custody cases, business contracts, loans, and criminal cases.

Government agencies and offices are also often in need of legal advice and some government offices have lawyers on their staff to provide this advice full-time. These advisors may represent the government in legal disputes before the courts, or they may simply provide advice in the day-to-day activities so that the agencies and offices are able to comply with the law. For example, part of the duties of a lawyer employed by the Ministry of Infrastructure might be to make sure that all construction contracts for new water systems conform to the law.

All of these various lawyers interact with one another in complex ways and to varying degrees, but all play important roles within the legal system and help to maintain justice and strengthen the rule of law within Timor-Leste.

### **3. OVERVIEW OF PROFESSIONAL RESPONSIBILITIES FOR DIFFERENT LEGAL CAREERS**

#### **Section Objective**

- To understand why there are different responsibilities for different types of lawyers.

#### **Why might certain types of lawyers have different professional responsibilities?**

Because different types of lawyers have different responsibilities in the legal system, they can also have different ethical responsibilities. For example, a defense attorney has a responsibility to his client as well as the legal system. But a magistrate – who does not represent clients – has a primary responsibility to the legal system.

Recognizing these potential differences, many countries have passed laws that outline the professional responsibilities of particular types of lawyers. As of June 2011, Timor-Leste has passed five major laws like this: the Statutes of Judicial Magistrates (Law 8/2002, amended by Law 11/2004); the Statute of Public Prosecutors (Law 14/2005); the Statute of the Civil Service (Law 8/2004, amended by Law 5/2009); the Law on the Juridical Regime Governing Private Legal Profession and Lawyers Training (Law 11/2008); and the Public Defender’s Office Statute (Decree-Law 38/2008). Each of these laws focuses on one type of lawyer and on the civil servants, and codifies the responsibilities of each specific profession. This includes both the ethical duties as well as other professional responsibilities. Sometimes it is not always easy to

draw the line between what is a “professional responsibility” in the sense of an ethical duty and what is another type of responsibility.

Since this book discusses professional responsibilities and ethics, it focuses on those things that have traditionally and internationally been considered key responsibilities. The materials should not be considered a complete analysis of all the duties of each of these jobs. All of the duties described in these laws are important to your future careers and we encourage you to study the entire text of the laws.

## 4. OVERVIEW OF MATERIALS

### Section Objective

- To understand the structure of the book.

### How the book is structured

The objective of these materials is to help you better understand professional responsibilities and the RDTL laws that regulate them. The materials also highlight some difficult situations in which you might face in your careers.

The materials cover some of the general professional duties for private lawyers, as well as specific responsibilities of certain types of legal professionals, for example, magistrates and prosecutors, along with civil servants who often have a legal background. Summaries and excerpts from RDTL laws that help to establish these responsibilities are also provided. Each chapter will be broken into sections on specific responsibilities. They will contain explanations, sections of applicable laws, and hypothetical situations. These scenarios will allow you to think about the law in context and help you to internalize the law. Professional obligations are not just about memorizing the law and the legal mandate for particular professionals, but really understanding how professional responsibility is applied and why it is important. With this, you will be better able to extrapolate what might be an appropriate response to more complex situations in the future. Not every situation is covered in these laws, and sometimes it may seem that there is no right way to apply the principles of professional responsibility. But as you read, practice and internalize these principles, you will be better prepared to face much more complex situations in a professional and ethical way.

We have divided this book into five subsequent chapters, each devoted to the different laws referred to above. Each chapter includes excerpts from the law, explanations, discussions, and hypothetical situations, or case scenarios. Some of these scenarios may appear easy to respond to, and some more difficult. In addition to the hypothetical scenarios presented here, we would encourage you to think further about professional responsibilities. When might these laws come into play? When might you, in your future practice, encounter situations where you might have to apply these laws? How would you resolve these questions? As a legal professional or a civil servant you will definitely face difficult situations. Your ability to respond to these situations will test your professionalism. By abiding by your professional duties you will be contributing to ensuring the independence of the judiciary, the trust of the community in the judiciary, and the development of Timor-Leste.

## **II. STATUTE OF THE CIVIL SERVICE**

### **1. THE IMPORTANCE OF PROFESSIONAL RESPONSIBILITY FOR CIVIL SERVANTS**

#### **Section Objective**

- To understand who is considered a civil servant.
- To explore the importance of professional responsibility for civil servants.

#### **Why is professional responsibility essential for civil servants?**

Professional responsibility is particularly important for civil servants. Civil servants often act as representatives for the government. Their behavior and actions therefore reflect directly on the country of Timor-Leste. It is important for civil servants to uphold these professional obligations, and other laws in order to preserve the reputation of Timor-Leste in the eyes of its own citizens, visitors, and foreign governments, because the government belongs to all of the people of Timor-Leste and officials hold their positions in trust.

#### **Who are civil servants?**

Generally, civil servants are those people that work for and represent the government but are not elected. They implement government policy but are impartial. Civil servants serve the community through delivery of government services to the community and the country overall. The broad term “civil servant” can encompass many types of jobs, including some that require

appointment by elected officials. The Statute of the Civil Service, passed in 2004, deals specifically with the responsibilities of civil servants. This is a particularly important law for legal professionals because the civil service is one of the most frequently chosen careers for Timorese lawyers. Many legal practitioners work in the government as technical advisers to government agencies and to ministers, or in other positions. These legal professionals are therefore bound to ensure that they also abide by the duties stipulated in the Civil Service Statute.

Article 2 of the Civil Service Statute (Law 8/2004, as amended by Law 5/2009) describes whom this law applies to:

Article 2  
Scope of application

1. This Statute shall apply to civil servants and agents of the public administration carrying out their activities with organs and institutions of the public administration in the country and overseas.
2. For the purposes of this Statute, organs of the public administration shall refer to be **ministries, secretariats of State**, and, secondarily, **autonomous agencies**.
3. This Statute shall also apply to **civilian personnel employed by the defense force and the police**, and to **administrative staff assigned to the Office of the President, the National Parliament, the Courts, the Public Prosecutor's Office, the Office of the Public Defender, the Office of the Provedor for Human Rights and Justice** and other public institutions.

This law applies to all agents of the state whether they are working in Timor-Leste, or if they are working for the state of Timor-Leste in another country. It includes anyone working for any of the national ministries, government agencies, civilians working for the police or military, and members of the staff for political branches of the government, such as the President and the Parliament. It also includes civil servants working for *the autonomous agencies* which include:

- Comissão Nacional de Eleições (CNE - National Electoral Commission);
- Rádio de Timor-Leste (RTL - Radio of Timor-Leste);
- Televisão de Timor-Leste (TVTL - Television of Timor-Leste);
- Office of the Provedor for Human Rights and Justice; and
- The staff for the judicial branches of the government, such as the courts, the office of the public defender, and the office of the public prosecutor.

It is important to note that these apply to *staff* of these offices, but not elected officials, members of the military, magistrates, public defenders or public prosecutors.

Article 4 makes this clear, and describes to whom this law does not apply:

<p><u>Article 4</u></p> <p><u>Entities and sectors not covered by this statute</u></p> <p>1. The following entities and sectors, among others, shall <b>not be covered</b> by this Statute and shall be governed by a separate law:</p> <p style="padding-left: 40px;">a) The <b>President of the Republic</b>, the <b>members of the Government</b>, the <b>members of the National Parliament</b> and <b>other personalities appointed or elected to political positions</b>;</p> <p style="padding-left: 40px;">b) <b>Judges and public prosecutors</b>;</p> <p style="padding-left: 40px;">c) <b>Public defenders</b>;</p> <p style="padding-left: 40px;">d) Members of <b>FALINTIL-FDTL</b>, the defense force of Timor-Leste;</p> <p style="padding-left: 40px;">e) Members of the <b>PNTL</b>, the national police force of Timor-Leste;</p> <p>2. <b>Until such a time</b> as separate statutes are approved, this <b>Statute shall apply</b>, with the required adaptations, to the</p>
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members of the **PNTL**, the Office of the **Public Defender**, and the National University.<sup>2</sup>

Many of these positions have their own laws or codes of professional conduct. For example, the Provedor for Human Rights and Justice and the two Deputy Provedors are elected by Parliament. They are governed by the Law establishing the Provedor for Human Rights and Justice. The same applies to magistrates, public defenders, and prosecutors – all of whom are dealt with separately in subsequent chapters.

In general, the division of these professions into groups governed by different laws and ethical regimes reflects the belief that these professions entail their own roles and obligations. It is perhaps easiest to see that public prosecutors and public defenders will have different obligations because their jobs often set them against one another: one embodying the state's duty to carry out criminal proceedings and prosecute criminals (always with the aim of searching for the truth) and the other embodying the state's obligation to ensure everyone a fair trial and representation. However, the state has decided that other civil servants, such as those working for ministries and agencies, share a common set of obligations.

## **Notaries**

### *The Special Importance of the Civil Servants Law to Notaries*

Notaries are the civil servants charged with certifying the legality and truth of documents. When a notary certifies a document, parties lose the ability to question its authority. These documents can then be used to determine legal rights and duties. The notary, therefore, has a power related to the judicial magistrate's power to determine the legal status of certain facts, agreements, decisions,

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<sup>2</sup> In 2010 the Decree-Law 16/2010, that approves the UNTL's Statute entered into force. As a result this article of the Civil Servant's Statute, which before included the National University, was amended. However, the Article 44 of the UNTL Statute determines that the teachers' statute will be ruled by a separate law, which has not yet been approved. Therefore, the lecturers at the UNTL remain subject to the Civil Servant's law.

and almost anything else that can be conveyed in a written document. This is a powerful role than allows the justice system to function more efficiently and more fairly. As the Notaries law states:

**Notaries, Decree-Law No. 3/2004 of 4 February 2004**

...

The notary function is one of the parameters indispensable for the development of national wealth, given the fact that a Notary, more than a mere certifier of signatures, **should strive to ensure the function he or she performs makes him or her a guarantor of security for legal acts and transactions carried out between individuals and between the latter and the state**, thus alleviating the arduous task to be carried out by judicial magistrates.

As a civil servant, the Statute of the Civil Service applies to all notaries just as it does to other civil servants. In the case of notaries, the importance of the law is very clear, particularly its requirements of integrity and honesty. Without these, it is clear that the role of the notary would serve no purpose. A certification must be beyond doubt for the legal system to rely upon it.

As an example, suppose a notary certifies a deed but fails to verify that the land has the dimensions specified on the deed or even certifies a false size to benefit the owner. If the land ownership comes to a court dispute, the judge will rely on the false deed and the other party will be in a weak position to dispute it.

The demand for integrity and honesty is the section of the Statute of the Civil Service that applies most obviously to notaries, but you can see how the other sections examined in this chapter apply as well. Consider, for example, the requirement that civil servants treat all members of the public equally and without discrimination. Of course, that means notaries must be equally honest in all their dealings with the public, but they must also provide the same quality and ease of access to their service to everyone regardless of gender, religion, or race. It also means that notaries must, for example, make it equally easy for men and women to certify their wills.

## Questions

Tomas comes from a very accomplished family of lawyers and has been working in the past as a Judge. He recently stopped work as a judge and became politically involved with a party that has won the election and formed a government. Tomas has been invited to serve as a Minister in the government. His wife is a private lawyer in Dili and his daughter Maria has recently qualified

as a private lawyer and began a job as a Public Defender in Dili. Maria's husband began working for Tomas, his father-in-law, as an advisor on Tomas's staff. Meanwhile, Tomas's son – who works for the Ministry of Foreign Affairs – is posted to the Embassy of Timor-Leste in Washington D.C., USA.

1. What members of Tomas's family are subject to the Civil Servants statute?
2. If Tomas loses the next election and once again secures a job as a magistrate, will he be subject to this law?
3. When Tomas loses the next election, his son-in-law takes a job advising the President. Will Tomas's son-in-law be subject to this law?
4. Maria begins lecturing at the National University, teaching Criminal Law. She also continues to work as a public defender. Is Maria subject to this law?

### **Answers and Explanations**

1. Only two members of Tomas's family are subject to this law: his son-in-law, who is an advisor on his staff, and his son, who works at the embassy in Washington D.C. This is because Tomas, as a Minister in the Government, is not subject to the statute (under Article 4). Tomas's wife, as a private lawyer is not subject to this law, but the Private Lawyer's law, and his daughter Maria, as a Public Defender, is subject to the Public Defender's Statute (Decree-Law 38/2008) rather than this law. Maria's husband (Tomas's son-in-law), however, as a member of Tomas's staff, is subject to the Civil Servant's law. Tomas's son is also subject to this law as a member of staff from the Ministry of Foreign Affairs.

2. No, Tomas will not be subject to this law (see article 4). Magistrates are governed by a separate law.
3. Yes, Tomas's son-in-law will still be subject to the Civil Servant's Law as a member of the President's staff.
4. Until the legislature passes a law to govern the behavior of the teachers of the National University, Maria, as a lecturer at UNTL, would be subject to the Civil Servant's law. Also, as a Public Defender, she would remain subject to the Public Defender's law as well.

## **2. DUTY TO THE COUNTRY OF TIMOR-LESTE**

### **Section Objective**

- To explore the way in which that the Code of Ethics for the Civil Service, and how other provisions in the Statute of the Civil Service, relate to a civil servant's duty to protect the country of Timor-Leste.

### **Code of Ethics for the Civil Service**

The Code of Ethics for the Civil Service can be found as an annex to the Statute of the Civil Service. Article 45 of the statute requires that civil servant shall abide by the code. The code contains fifteen provisions. Many of these provisions relate to one another or to other articles in the statute. We have grouped together different provisions of the code and related articles of the statute to develop a number themes. All of the provisions retain their correct reference numbers and should therefore be easy to locate in the text of the law.

### **Highest obligation**

As previously mentioned, civil servants are often the face of the State as they implement government policy and deliver government services to the community. Their behavior can reflect on Timor-Leste. Civil servants therefore have a special obligation to protect the ideals embodied by the constitution of Timor-Leste. These ideals are reflected in the code.

## CODE OF ETHICS FOR THE CIVIL SERVICE

A civil servant or an agent of the public administration shall:

1. Attend to the **highest interests of the country**, **defend the national independence** proclaimed on 28 November 1975, and **respect the moral and cultural values** of the people of Timor-Leste;  
...
3. Implement and promote **respect for human rights**, the **rule of law** and **democratic principles**;  
...
10. **Oppose any threat**, intimidation or conduct that is directly or indirectly intended to **interfere in the mission of the public administration** of Timor-Leste;  
...
15. Contribute to the consolidation of **national unity** as an essential factor for the **economic and social development** of Timor-Leste.

This provision of the statute provides that a civil servant has an obligation to protect and uphold the interests and moral and cultural values of Timor-Leste and to promote and respect national unity, human rights and the rule of law. At the very least, this means treating everyone fairly under the law and striving to make the nation stronger and more just.

It is important to remember that in most situations civil servants are acting as representatives of the State of Timor-Leste. Their behavior, therefore, reflects on the entire country. This is equally true whether the civil servant is representing the country to its own citizens or foreign visitors while working within Timor-Leste, or whether the civil servant is representing the country to foreigner citizens or governments while working abroad.

Article 41

Special duties of a civil servant or an agent of the public administration

The following shall be **special duties** of a civil servant or an agent of the public administration:

a) To **respect and honour the Constitution, the national symbols, the laws, and the principles of the Government** of the Democratic Republic of Timor-Leste;

...

e) To **place the interests of the Nation above personal or group interests**;

f) To give **emphasis to the dignity of the Government and public administration**;

...

Article 42

Prohibitions

A civil servant and an agent of the public administration **shall not**:

a) Conduct **activities that may affect the honour and dignity of the State**;

...

i) **Be at places that may tarnish the honour or dignity of the civil service**, except when performing his or her official functions;

...

According to these provisions, a civil servant has certain obligations and is subject to certain prohibitions in relation to national and professional interests. Civil servants must honor and respect the State, the government and the laws of Timor-Leste and the civil service, and be willing to place these interests above their personal interests. It is easy to see why it is important

for civil servants to honor and obey the law. The general public considers civil servants to be representatives of the State, and if they see these representatives disobeying or disrespecting the laws of the country, they may lose respect for these laws themselves. They may believe that the State itself does not value the law and that it is therefore not important to obey it. This ultimately undermines the rule of law throughout the country.

Although these provisions are important, they are vague and do not give specific guidance for problems that you, as lawyers working as civil servants, are likely to face during your careers. Sometimes the situations that these provisions govern are not entirely clear and do not have right or wrong answers. Two people, in the same situation, might decide on different courses of action. Sometimes one might be right and the other wrong, but often this is not the case. What is important is that if you are placed in such a situation, you analyze the professional obligations that you are bound by to the best of your ability and ensure that you are confident that you are not violating any of these provisions.

Sometimes, when analyzing situations where these provisions might come into play it is important to use perspective. The code says that it is the duty of a civil servant to “[a]ttend to the *highest* interests of the country.” Sometimes all options are in the interest of the country, but only one can be in the *highest* interest of Timor-Leste. It is not only important to recognize what is good, but what is best.

## Questions

1. Lena is working as an advisor for a Minister in the Government. She has been asked to evaluate a proposed law so that the Minister for whom she works will have some guidance in

voting on the issue in the Council of Ministers. There are many appealing things about this law. It will bring in about two million dollars of foreign investment to the country. But it will take away the jobs of almost a thousand people living just outside of Dili. Based on this information alone, should Lena recommend the law? What else might Lena want to know before making a recommendation?

2. Marcos and Madalena both work for a Minister in the Government, Jorge. They advise him, help him to draft laws, research policy, and interact with his supporters in the community. Recently Marcos and Madalena have become concerned about the Minister. He has become increasingly angry and intolerant of religious minorities. He believes that the best thing for Timor-Leste is to outlaw all religions but his own and he has decided to aggressively pursue a law that would do this. Although Marcos and Madalena are not part of a minority religion, and their lives would not change under this law, they do not agree with Jorge. They believe that all religions should be allowed and that a law outlawing all religions but one would seriously hurt the country. They have both tried talking with Jorge about this. While Jorge usually listens to their advice, he refuses to agree with them on this question.

Madalena's views compel her to tell the Minister that she cannot assist the Minister with drafting the law. The Minister orders her to do so. Madalena decides to resign. Marcos decides that while he does not agree with Jorge on this, he should continue to work for him and try to persuade Jorge that this is not a good law.

Who did the right thing? Did either of them violate the code?

## Answers and Explanations

1. From the information that is given, there is no clear right or wrong answer. RDTL would have a significant gain from the potential investment but at the same time would lose specific jobs. Because there are both significant advantages and disadvantages, two different people might come to two different answers. Lena would have to consider the benefits of the investment against the loss of jobs. She will then need to act in the way that she considers to be in the best interest of Timor-Leste, and all of its people.

Lena would probably, however, have a responsibility to find out more about this law and the potential costs and benefits that it would represent, before making a recommendation. The type of things that she might want to consider could be:

- Who would benefit from the project?
- Was the bidding process fair?
- Was there any corruption involved?
- What is the expected long-term effect of the project?
- How easy would it be for the workers who lost their jobs to find new jobs?
- What is the popular support for this project?

The answers to some of these questions might affect whether or not Lena should recommend the project. If, for instance, she discovered that the investor was corrupt and had paid several government officials so that they would support the project, that should make her less inclined to support the project.

2. Both Madalena and Marcos did the right thing *for them*. They both believe that the law outlawing minority religions in Timor-Leste is against the national interest. It does not matter

whether or not this is objectively true – what matters is that both Magdalena and Marcos believe it to be true. They both acted appropriately according to this law because they acted in the way that they believed best served the national interest. For Magdalena, this was resigning. For Marcos, this was continuing to work for the Minister, but trying to persuade him from pursuing the law against minority religions.

### 3. INTEGRITY

#### Section Objective

- To explore the ways that professional obligations can also be duties under legal ethics.

#### Integrity, honesty, and obeying the law

The statute specifically holds civil servants to ethical conduct. In this context “professional responsibility” does not refer only to legal obligations. It also refers to the more common definition of “ethical” behavior that is acting in a way that is consistent with agreed principles of correct conduct.

#### Section 7

#### Honesty and integrity

In the exercise of his or her functions, a civil servant shall abide by an **honest, integral, and ethical** conduct under penalty of criminal and disciplinary liability.

These are very broad words, and once again the statute does not provide much specific guidance. Furthermore, the word “integrity” can sometimes include different values. It is a term that is used in both ethics and legal ethics. Usually it encompasses honesty, moral accountability, and the idea that no one is above accepted norms of behavior. It is often defined as the *opposite* of corruption and hypocrisy.

While this description still does not provide specific guidance, the code offers us some help. The code lists some of the specific obligations and conduct-requirements under these general terms.

<p style="text-align: center;"><u>CODE OF ETHICS FOR THE CIVIL SERVICE</u></p> <p>A civil servant or an agent of the public administration shall:</p> <p style="text-align: center;">...</p> <p>2. <b>Comply with</b> the law in general and with specific laws on the civil service;</p> <p style="text-align: center;">...</p> <p>4. Be a role model of personal <b>integrity, authenticity and honesty</b>, always seeking to contribute towards the good reputation of the civil service through an <b>exemplary daily behaviour</b>;</p> <p style="text-align: center;">...</p> <p>6. Discharge his or her duties with <b>commitment, intelligence and skill, seeking to improve his or her performance</b> through training and other courses for an efficient execution of the tasks arising from his or her position;</p> <p>7. <b>Abide by directions and instructions lawfully established by his or her superiors and reject any other instructions or attempts</b> from any entity or individual outside the public administration of Timor-Leste to influence his or her official actions;</p> <p>8. <b>Comply with the law and honour personal obligations, abiding by decisions from courts</b>;</p> <p style="text-align: center;">...</p> <p>11. <b>Correctly explain his or her functions and level</b>, as well as the <b>nature of his or her position</b> in the public administration of Timor-Leste to individuals outside the system;</p> <p style="text-align: center;">...</p> <p>13. <b>Use property of the public administration of Timor-Leste or information</b> accessed to in his or her official capacity <b>solely for activities related to his or her functions and official obligations</b>;</p> <p style="text-align: center;">...</p>
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Further explanation can be found in the article prohibiting specific behaviors.

Article 42

Prohibitions

A civil servant and an agent of the public administration **shall not**:

...

d) **Use assets, funds or other property of the State in an abusive manner;**

e) **Illegally possess, buy, sell or lease assets, documents or correspondence** belonging to the State;

...

h) Receive from any person **gifts or mementos** that may be suspected as being connected to his or her official functions;

...

o) **Own shares or capital stock in companies whose activities are carried out in the sector he or she works in;**

p) **Own shares or capital stock in companies whose activities are not carried out in the sector he or she works in, but that allows him or her to exert direct control over such companies.**

Generally, these obligations can be summarized as follows:

- Obeying the law and courts;
- Being honest;
- Being responsible;
- Doing your best at your job.

The provisions of the statute elaborate on many of these obligations. For example, Article 42 specifically says that a civil servant must not abuse state funds or assets, in other words, anything

that belongs to the state. This can be loosely categorized under the duty to obey the law.

While these articles may appear simple and even obvious, they are powerful guidelines and can be used to help resolve some of the more difficult ethical dilemmas you may face in your professional life. Some of the most difficult problems come when a lawyer's sense of integrity conflicts with another obligation under his or her professional responsibilities. At those times it is important to remember that the highest obligation of a civil servant is to Timor-Leste, the profession, and justice. For this reason, all orders given in the name of the state have to be lawful otherwise civil servants have no obligation to abide by it. Indeed, they have an obligation *not* to follow it. Civil servants often face difficult situations, such as a person engaging in political interference or powerful individuals attempting to use state resources to their advantage – but the law protects them against unlawful directions and instructions.

## Questions

João and Miguel work together in the office of the Minister of Justice. Miguel's daughter Mariana is going to get married to a young man named Pedro. Miguel does not like Pedro.

1. Through his job, Miguel has come to hear rumors that Pedro has a criminal record. He uses his work networks to obtain access to Pedro's police record and other confidential documents about him held by the State. He discovers that Pedro has committed many crimes and is not a very nice young man. He goes to Mariana and advises her that she should not marry Pedro. He explains the many crimes that he has committed. Has Miguel violated his duties? How is this different than hiring someone to investigate Pedro?

2. João discovers what Miguel has done. What should he do?
3. Now let's say that Miguel is required to read through many police reports for his job at the ministry. One of them happens to be Pedro's. In this way he learns that Pedro has committed many crimes. Can he tell his daughter that she should not marry Pedro? Can he explain to her why? Can he tell her about Pedro's criminal record?
4. One day João walks in on one of the minister's meetings and sees him taking a bribe from a well-known Australian businessman. The minister tells João that he must not tell anyone what he has seen. He then tells João to prepare a bundle of documents to be sent to the businessman. What should João do?

### **Answers and Explanations**

1. Miguel has violated his duties because he has used his job to access information (Pedro's police record) that he otherwise had no reason or opportunity to access. He has used his job to get information for personal reasons, which is not allowed. This is different than hiring someone to investigate Pedro because anyone in Timor-Leste, who has sufficient money, can hire someone to investigate someone. But only certain people (like civil servants and police officers) can use their job to get this information.
2. Although we have not discussed this, João would have a duty to tell his supervisors about what Miguel has done. According to Article 48 of the Civil Service Statute, civil servants have a duty to report any violations they are aware of to their supervisors.
3. Miguel can tell his daughter that she should not marry Pedro. He is welcome to give his daughter any advice that he wishes. And, of course, he felt this way even before he uncovered Pedro's police reports! What he is not allowed to do is reveal the information about Pedro's

police record to his daughter. This is confidential information that he only had access to through his job, so he must not reveal this, even to his daughter. It would have been different if, for example, he had read a newspaper article about Pedro's crimes during the course of his job. This information he would be able to share with his daughter because it is already available to the public.

4. João has a duty to report corruption. Also, if he feels that these documents are being prepared for something illegal, or as a result of the bribe, he should not participate in their preparation, and would have a duty to report the request. Being involved in corruption is not ethical or moral behavior.

## 4. CONFLICT OF INTEREST

### Section Objective

- To explore the different ways that a conflict of interest might present itself to a civil servant.
- To understand the danger of possible conflicts of interest.

### What is a conflict of interest?

When we speak about conflicts of interest, we mean anytime that someone has multiple interests or motivations, one of which might corrupt another. In other words, someone who has a conflict of interest has two or more obligations that are not, or might not be, compatible. These interests can arise out of many things such as personal relationships, financial investments, or other professional responsibilities.

Not all conflicts of interest present a problem of professional responsibility. Some are just conflicts that we must all face everyday. For example, most of us would rather spend time at home with our families than go to work. This is technically a conflict of interest because we have two obligations (family and work) that might not be compatible (we cannot be in both places at one time). In general we do not worry about conflicts of interest such as this one that almost everyone shares and faces every day. We are only concerned about those conflicts of interest that are not faced by everyone all of the time, and those that might be serious enough to undermine someone's ability to do their job correctly.

The statute and code give specific guidance on how to avoid and resolve certain types of

conflicts of interest.

Article 9

Regime of exclusivity

1. A civil servant shall perform the functions arising out of the level or position to which he or she has been appointed under a regime of **exclusive commitment**, and he or she shall not have various remunerated employments in the civil service nor take up any activity that calls into question his or her independence or that diminishes his or her professional performance as a civil servant.
2. A civil servant may however act as a consultant or advisor to different public bodies, act as a lecturer in his or her area of study, and carry out scientific research, provided that authorization from the respective minister or member of the Secretary of State directly answerable to the Prime Minister is secured in advance under the terms and conditions to be outlined by the Government.

This Article provides that civil servants shall have their positions “under a regime of exclusive commitment.” This means that this will be their primary job. Civil servants cannot hold more than one job in the civil service or any other job that might be in conflict with their job as a civil servant. For example, Maria would be able to teach piano lessons one night a week in addition to her job at the Ministry of Foreign Affairs, but she would not be able to work part-time at the Ministry of Education. The statute does allow civil servants to act as consultants or lecturers for other public bodies, or to teach or do research in his or her field. For example Maria, who works at the Ministry of Foreign Affairs, would be allowed to consult with the Ministry of Education about the foreign policy implications of their new curriculum or of hiring several Brazilian teachers, but she would not be able to take a second job there. She would also be able to lecture part-time at UNTL on international law, while she continued to work at the Ministry of

Foreign Affairs.

Article 10

Conflict of interests

1. A civil servant is barred from having any direct or indirect interest in an organization under the control of, or with commercial relations to, the civil service.
2. A civil servant shall also **refrain from having any direct or indirect interest in a public or private organization, where such interest may cause a conflict between the civil servant's private interests and the duties arising from his or her official position.**
3. Civil servants and applicants to positions in the civil service shall **declare the professional status of their spouses.**
4. In case of suspected corruption, fraud, embezzlement or misappropriation of public assets or funds in general, the civil servant concerned shall, within the respective proceedings, provide access to his or her property by the administrative and judicial authorities, which shall act under the terms of the law and according to their powers of inspection and supervision.

Civil servants must not work for, control, or have any interest in companies or organizations that might be a conflict of interest for them. For example, if Emilio works in a government office that is responsible for issuing building permits, he would not be able to own, or invest in, a construction company that is seeking these permits. This would be a conflict of interest because Emilio might make a lot of money if his company gets the permit, and he might waive some of the safety requirements that are usually necessary before granting a permit, or he might give the permit to his company rather than a company that is actually more qualified in order to make sure that he gets more money.

It is not only other jobs that can be a conflict of interest, but also relatives and their jobs. Let's use the example above. What if Emilio worked in the government office, and his wife ran

the construction company? This would still be a conflict of interest. Emilio might still want to ensure that his wife's company got the permit because money that his wife earns is almost like money that he earns. He might still, therefore, issue building permits to his wife's company when they were not deserved just to get more money. Because of this, civil servants must tell the government about their husband's or wife's profession (Article 10, 3).

Article 11

Kinship

1. People **related by marriage or who are parent and child** between them **shall only be assigned to the same section, department or ministry if one is not directly answerable to the other.**
2. On an exceptional basis and when weighty reasons so justify, civil servants related by kinship under the terms of item 1 above shall be authorized to be work together, even when one is answerable to the other, subject to specific approval from the competent entity.

Kinship can be a conflict of interest even in the workplace. Because of this, close relatives (husband and wife, or father or mother and child) are usually not allowed to work in the same section when one is directly answerable to the other. This means that, in general, a husband cannot be his wife's supervisor, or a father cannot be his son's supervisor. This is because a husband may not treat his wife the same as all of the other people in the office, and this would not be fair.

CODE OF ETHICS FOR THE CIVIL SERVICE

A civil servant or an agent of the public administration shall:

...

5. Serve the public with courtesy and dedication, placing **public**

**interest above any private interest;**

...

12. **Refuse any favor, offer, remuneration or any other gift being given in return for the execution or omission of an official act;**

...

14. **Disclose to the public administration any direct or indirect benefit he or she may derive from any profitable activity, business or company under his or her responsibility or obligations;**

...

#### Article 41

##### Special duties of a civil servant or an agent of the public administration

The following shall be **special duties** of a civil servant or an agent of the public administration:

...

- h) To use his or her **position** in the civil service and advantages arising out of such a position, including information and property, **solely for professional purposes;**

...

#### Article 42

##### Prohibitions

A civil servant and an agent of the public administration **shall not:**

...

- f) Conduct **activities with fellow-workers, superiors or subordinates**, inside or outside the sector they work in, **for the benefit of personal interests** or that directly or indirectly bring disadvantages to the State;

...

m) Use **State secrets** he or she becomes rightly acquainted with **for personal or group advantages**;

Civil servants must put their jobs and professional obligations above any personal gains or benefits. This includes an obligation not to take bribes and not to use secret State information for personal benefit.

The principles of integrity and the idea that a civil servant's highest obligation is to the nation, justice and the profession can help us to understand the importance of a conflict of interest. A civil servant who has a conflict of interest might also be facing an ethical problem. For example, if a civil servant takes a bribe, he is not only putting his own financial interest in conflict with the interest of the country and civil service, he is also acting without integrity. Another example is if a civil servant fails to tell anyone that he is the manager of a company that is applying for a building permit from the office in which he works. Here, he is not only putting his business interests in his company in conflict with his duties as a civil servant, but he is also not acting honestly by failing to disclose this fact.

It is important to learn to recognize conflicts of interest or potential conflicts of interest. Disclosing potential conflicts of interest is also important because by the time that a potential conflict of interest has become an actual conflict of interest, it might be too late to resolve the conflict. At the very least, it might be much more difficult, involving a lot of time or money, to resolve the conflict.

## Questions

1. Ana works as an advisor for a Minister in the Government. She has worked with him for a long time and he often listens to her recommendations on new laws. Ana just married a man who works for an environmental organization that is trying to get a new law passed that will make it harder for oil companies to drill in new locations. Does Ana have a responsibility to tell the Minister about her husband's job?
2. Miguel works for a company that stands to gain dramatically from the government's proposed budget. He approaches Ana and offers her \$10,000 if she will convince the Minister for whom she works to vote in favor of the new national budget in the Council of Ministers. She was going to recommend that the Minister vote that way anyway. Can she take the money because it did not change her behavior?

## Answers and Explanations

1. Yes, Ana should tell the Minister about her husband's job. She might also need to update some of her employment documents. The Minister may still ask for her opinion about the law because he has known her so long, but now he can weigh her opinion appropriately against her other interests.
2. No, Ana should not take the money. Even though this bribe did not change her actions in any way, it could appear to an outsider that it did. It is very important that the public does not believe that the government or the offices of the Ministers of the Government are corrupt in any way. If they begin to believe that the government is corrupt, they will not trust it and may be less willing to obey the laws it establishes. If Ana were to take this money, she would be

placing her own personal interest (the money) over that of the state (not being hurt by the appearance of corruption). She would also be conducting her activities with her superior (recommending this law) in a way that would bring indirect disadvantage to the state (people would trust and obey the government less because they believe it to be corrupt).

## 5. EQUALITY

### Section Objective

- To understand that the government has committed not to discriminate in hiring, paying or promoting within the civil service.
- To understand that a civil servant must not discriminate against the public or in the workplace.

### No discrimination

The State, the government and the civil service have made a commitment of non discrimination based on gender or other factors. This means that as civil servants are hired and promoted, they should be evaluated on their skill and performance, not on their gender, religion, or some other factor.

#### Article 8

#### Equality

1. The selection and recruitment of personnel for the civil service must be done through competitive examination, that shall evaluate the candidate's professional qualifications, experience and competencies on a non-discriminatory basis.
2. Civil servants shall all earn the **same salary for the same work**.
3. No civil servant shall be discriminated against in employment compensations, entitlements, benefits or privileges.

While this places responsibility on the State at an institutional level to ensure that there is no discrimination in relation to employment policies, there is also an individual responsibility for civil servants to ensure that they abide by this policy in any dealings they may have with hiring or promotional activities. Civil servants are also prohibited from discriminating both against members of the public and against their co-workers. This means that they must not treat members of the public or their co-workers differently because of their religion, race, or gender. For example, it would be inappropriate for a member of the civil service to refuse to work with someone simply because she was a woman or was from a different race.

<p style="text-align: center;"><u>CODE OF ETHICS FOR THE CIVIL SERVICE</u></p> <p>A civil servant or an agent of the public administration shall:</p> <p style="text-align: center;">...</p> <p>9. Serve the public <b>without any form of discrimination or intimidation</b>, including sexual discrimination, and without verbal or physical abuse in relations at the workplace;</p> <p style="text-align: center;">...</p>
--

Some cases of discrimination or intimidation are easy to diagnose. Other cases are more difficult to see. If a member of the civil service refuses to help women, and will instead only serve men, it is easy to see that this is a case of discrimination and should not be allowed. But what if someone always helps people who are from their area first, and others later? What if someone is more pleasant and thoughtful when they help people near their own age, but is very cross and short with elderly people? More common experiences – but which are often not recognized as sexual discrimination – are women professionals being expected to take on certain tasks in the office because they are women, rather than on the basis of their formal duties. For example, if a woman colleague was expected to prepare food and drinks for meetings and to clean

up after meetings, even though that was not part of her job description, this would count as discrimination. All of these are cases of discrimination and are not permitted under the Statute.

The importance of having a civil service that treats all citizens equally cannot be emphasized enough. Equality before the law and state are guaranteed in the Constitution and are fundamental principles of a state based on the rule of law.

Article 16 of the Constitution

(Universality and Equality)

1. **All citizens are equal before the law**, shall exercise the **same rights** and shall be subject to the **same duties**.
2. **No one shall be discriminated against** on grounds of colour, race, marital status, gender, ethnical origin, language, social or economic status, political or ideological convictions, religion, education and physical or mental condition.

Article 17 of the Constitution

(Equality between women and men)

**Women and men shall have the same rights and duties** in all areas of family, cultural, social, economic and political life.

As we have said before, the civil service is often the face of the state. The civil service and its employees must therefore do its best to uphold these constitutional principles.

Equality before the law is also a fundamental characteristic of the rule of law, which we discussed in the Introduction. For the law to govern well and fully, it must be applicable equally to all citizens. The law is weakened if it is applied differently in the same circumstances. People can no longer rely upon it, or trust that it will protect them. They therefore lose some of their

incentive to obey the law. This leads to distrust of the state and may contribute to dissatisfaction in the community.

## 6. SPECIAL DUTIES

### Section Objective

- To explore the special duties of a civil servant that have not already been discussed in other contexts.

### Special duties

The following lists of special duties and prohibitions are, for the most part, different than those that we have discussed already. These special duties are described in a more concrete manner and often give more specific guidance on how they should be applied. Certain related articles from the Statute of the Civil Service have also been included here as examples of special duties and prohibitions.

#### Article 41

#### Special duties of a civil servant or an agent of the public administration

The following shall be **special duties** of a civil servant or an agent of the public administration:

...

b) To actively use and **promote Portuguese and Tetum** as the languages of the public administration;

c) To perform functions in an **efficient, impartial, professional and courteous** manner;

d) To report to the workplace dressed as appropriate;

...

g) To act upon the Government's requirements in a timely manner as and when requested;

...

- i) To ensure **transparency** in the performance of functions;
- j) To be **administratively and financially accountable** in the exercise of functions;
- k) To work in an **honest, orderly, competent and efficient** manner in the protection of the State's interests and to strictly observe the **working hours**;
- l) To maintain and improve **unity, integrity, solidarity, and harmony** in the civil service;
- m) To **immediately report to the direct supervisor any and every information that may be detrimental to the State**, especially with regard to security, financial issues, and assets;
- n) To **set an example** for the community and to respect citizens **without discrimination**;
- o) To create and maintain a **good working environment**;
- p) To provide the **best service** to the community;
- q) To act in an **assertive and fair** manner **with subordinates**;
- r) To **provide employees with guidelines** on how to perform their functions;
- s) To **set a good example and to be a role model** for subordinates;
- t) To **give subordinates an opportunity to advance** within their respective careers, in accordance with service interests;
- u) To **comply with all applicable regulations and official instructions** from their respective superiors;
- v) To take **oath of office** and comply with the oath for the civil service;
- w) To maintain **professional secrecy** in order to protect the State's confidential matters;
- x) To examine and consider attentively all reports received regarding disciplinary offences.

Article 42  
Prohibitions

A civil servant and an agent of the public administration **shall not**:

...

b) **Abuse power**;

c) **Become a civil servant of another country without permission** from the Government;

...

g) Conduct wrongful activities with an intention of taking **revenge** on subordinates or other individuals, either inside or outside the working environment;

...

j) Act in an **arbitrary manner towards a subordinate**;

k) **Fail to act or act in such a way that another party may not secure the required assistance**, putting such party at a disadvantage;

l) **Obstruct** the results of the department;

...

n) Act as an **intermediary in favor of traders to win contracts** for the provision of goods or services;

...

p) Hold partisan political activities at the workplace, or during working hours, or in such a way as to interfere with professional activities.

## Article 5

### Discretion and confidentiality

1. A civil servant shall be under an obligation to **maintain professional secrecy** regarding documents, facts or information that he or she may become acquainted with in the course of his or her functions, **particularly** in the following cases:
  - a) **National security, protection of public order, and financial interests of the State;**
  - b) Investigation into acts punishable under law;
  - c) **Medical** secrecy;
  - d) **Rights and liberties guaranteed by the Constitution;**
  - e) Preparation of **decisions by public authorities;**
  - f) Commercial, industrial or intellectual information of a confidential nature;
  - g) **Personal files.**
2. The provisions of item 1 above **shall also apply to civil servants who**, for whatever reason, **are no longer employed by the public administration.**

Many of these special duties simply reiterate some of the obligations that we have already discussed. For example:

- Promote the national interest;
- Obey the law and courts;
- Be honest and act with integrity;
- Be responsible;
- Do your best at your job;
- Avoid conflicts of interest;
- Maintain professional confidentiality;
- Do not discriminate.

But many of these special duties offer more specific guidance than some of the obligations we have discussed earlier. For example, the special duties include specific guidance on *how a civil servant should treat his or her subordinates*. A civil servant, among other things, must be a good example and must not discriminate or arbitrarily prohibit a subordinate from advancing. In cases such as this, where the guidance is more specific, it is easier to predict when these duties or prohibitions will be applicable. Because of this, there will not be as much discrepancy in individual applications of these rules as in, for example, the articles requiring that a civil servant act with integrity. There, two civil servants might behave somewhat differently: one thinking that one course of action is the way to act with integrity, while the other might think a different course of action is the way to act with integrity. It is possible that both will be right. However, if one of them takes the oath of office, as this statute requires, and the other refuses to, it is clear that one failed to uphold a special duty of a civil servant while the other has not. Because of this, we can describe these special duties as more concrete.

Thus, the law prohibits some of the most common types of abuses of office. Civil servants are not allowed to favor anyone, whether inside or outside of government service, based on political affiliation. For example, it would be a clear violation of professional ethics for a supervisor to favor a coworker with similar political views while acting rude and giving only unpleasant tasks to a coworker known to favor a different political party.

Civil servants are entrusted with the power of the state. This allows them to engage in activities not available to people outside of government service. This provides civil servants a tremendous ability to help the people of Timor-Leste. It also provides an opportunity to abuse their power. A civil servant in the ministry of transportation may be in the position to help one company receive a lucrative road construction contract in exchange for money. This is an

obvious abuse of power. Yet, it can be activities on a smaller scale as well, such as receiving unauthorized free or subsidized state services or using a position to ensure that someone the civil servant dislikes does not receive a state benefit he or she is entitled to, such as a pension. All abuses must not be allowed and are subject to strict punishment.

Furthermore, being a civil servant also implies accountability for any personal wrong doing as well as helping make sure coworkers are also acting in an ethical way. Civil servants' true bosses are all the people of Timor-Leste. Thus, they must be held accountable to make sure their behavior comports with the people's will as embodied in the legislation of their representatives.

Confidentiality is also essential. Civil servants, as representative of the state, are privy to important confidential information in order to serve the people of Timor-Leste more effectively. Civil servants cannot disclose information to embarrass professional rivals or individuals they dislike. Information also cannot be used for personal gain. For example, a civil servant may be aware that development planned by the government will lead to a dramatic increase in property values in a certain area. This information cannot be used for the profit of the civil servant. Likewise, a civil servant cannot share that information with his or her family or friends.

## **Questions**

1. Miguel is a civil servant, and supervises several other civil servants at the Ministry of Education. One of his subordinates, Alfredo is not very helpful or respectful. He does not seem to like his job and is often rude. Although Alfredo has been working at the Ministry for several years, Miguel does not feel comfortable recommending him for a promotion. If Miguel does not recommend Alfredo, has he violated a special duty?

2. Francisco is a supervisor at the Ministry of Agriculture. His daughter Marta applies to the Ministry and would like to work in his department. Is this possible?
3. Juan works at the Ministry of Agriculture also. He doesn't like his job and is constantly rude to his co-workers, supervisors, and those members of the public that he must speak to on the phone. He also shows up about an hour late every day, dresses in an unprofessional manner and takes very long lunch breaks. His supervisor has repeatedly warned him about this, but Juan has done nothing to change his behavior. What special duties has Juan violated?

### **Answers and Explanations**

1. No, based on this information Miguel has not violated his duty. Although the statute does require that a civil servant provide subordinates with opportunities for advancement, they must do so with the best interest of the civil service in mind. If Miguel were to recommend Alfredo for a promotion that he was not ready for and did not deserve, he would not be helping the civil service. It is in the best interest of the civil service to have the most competent and capable people possible. Also, it would not set a very good example for other employees if they saw someone who was rude and lazy being promoted. What incentive would they have to do their jobs well if rudeness and laziness are rewarded?
2. Probably not. Parents are only rarely allowed to work in the same department as their children when one would be the supervisor of the other as discussed extensively in the section on conflicts of interest, and not special duties.
3. Juan has violated many of his obligations and special duties as a civil servant. Some of these include:
  - Not acting courteously, orderly or professionally (Article 41 (c) and (k));

- Not providing his best service to the public (Article 41 (p));
- Not observing the working hours (Article 41 (k));
- Not dressing appropriately (Article 41 (d));
- Not complying with his supervisor's appropriate instructions (Article 41 (u)).

## 7. ATTENDANCE

### Section Objective

- To understand the civil service’s policy on absence and when it is or is not acceptable to be away from work.

### Justified and unjustified absence

It is important for any agency, office, or business to have a policy regarding absence to ensure that employees are working the hours that they are required to and that the work of the agency can be completed. The civil service is no different. The civil service divides absences into two categories: justified and unjustified. Unjustified absences could also be considered “unacceptable” absences and are subject to disciplinary action.

#### Article 61

##### Types of absence

Absences by a civil servant or an agent of the public administration shall be **either justified or unjustified**.

#### Article 62

##### Justified absences

1. Absences resulting of the following shall be considered as **justified**:
  - a) **Marriage**;
  - b) **Death of relative**;
  - c) **Maternity**;

- d) Examination by a **doctor**;
- e) On **health** grounds;
- f) Provision of **company to children or relatives admitted to hospital**, where the hospital so determines;
- g) **Summons** by judicial or police authorities;
- h) Taking of a **competitive examination**;
- i) **When authorized in advance or afterwards by a supervisor**, where the absences can be charged to annual leave if they exceed one absence per month;
- j) For inability to perform a service due to reasons that cannot be blamed on the civil servant or agent of the public administration concerned, notably in situations caused by **natural disasters**;
- k) Taking of **mandatory exams for civil servants** and agents of the public administration at teaching institutions;
- l) Discharge of duties of a **political interest**, provided that such duties have been authorised by the competent authorities in advance or after reporting back to the workplace.

2. A civil servant or an agent of the public administration shall **justify the absences** referred to under item 1 above **in writing prior to the absence or within five days after** reporting back to the workplace.

Article 62 specifically lists what qualifies as a justified absence. These include reasons such as: marriage, illness, doctor's visits, sick relatives, death of a relative, or any occasion approved of by a supervisor. This would include vacations that have been planned and approved in advance. Other absences qualify as justified, but are less common. In general, this article and supervisors should be consulted whenever it is unclear whether or not an absence might be justified.

### Article 63

#### Unjustified absences

1. The following shall be considered as **unjustified** absences:
  - a) All absences for reasons not contemplated under Article 62;
  - b) Absences not justified in conformity with Article 62.
2. Unjustified absences, besides the disciplinary consequences they may carry, shall always determine **forfeiture of remuneration corresponding to the days of absence, shall not count towards seniority purposes**, and shall be **deducted from the annual leave** of the following year.
3. A civil servant or an agent of the public administration who invokes **false reasons** as justification for his or her absences may also be **subject to criminal liability** for false statements.

All absences that do not fall under Article 62 are considered unjustified and are subject to disciplinary action. These unjustified absences may be deducted from annual leave, and may not be counted towards seniority.

Attendance for civil servants is particularly important. Civil servants are necessary for the day-to-day activities of the state. Without them, the state would grind to a halt. At the very least, government services would be unpredictable and difficult to access. And by failing to show up for work a civil servant is putting his or her own interests far above those of the country and the civil service. Unjustified absences also reveal a lack of integrity. Failing to show up for work without good reason displays irresponsibility and dishonesty. When a civil servant enlists in the civil service, he or she is essentially signing a contract that he or she will be present. Unjustified absences represent a breach of this contract.

## 8. SUMMARY: DUTIES OF A CIVIL SERVANT

### Section Objective

- To summarize and review the categories of obligations discussed above.
- To explore the ways the obligations we have already discussed relate to Article 40 of the Statute of the Civil Service.

### Review

So far we have looked at six categories of obligations laid out in the Statute of the Civil Service. The first category is the duty of a civil servant to the country of Timor-Leste, and the profession and constitutional principles. These obligations are often stated in vague terms and do not often offer clear guidelines to follow in specific situations. In fact, in any given situation, there can often be many correct applications of these principles.

The second category is integrity. This is a term that has application in ethics as well as professional ethics. It embodies honesty, responsibility, and dedication. It can be loosely described as the opposite of hypocrisy and corruption.

The third category has to do with conflicts of interest. In general, a conflict of interest is anytime that someone has multiple interests or motivations, one of which might corrupt another. It is particularly important to learn to recognize potential conflicts of interest early.

The fourth category is equality. The civil service is committed to equality in hiring, promoting and paying its members. In return, it requires that all civil servants exemplify the constitutional principle of equality and that they do not discriminate against members of the

public that they might serve, or their co-workers.

The fifth category includes the special duties of a civil servant. These include more specific requirements of civil servants and often have to do with helping civil servants do their jobs well.

The sixth and final category is attendance. This requires that civil servants be present at their jobs unless they have a justifiable excuse.

All of these categories of obligations that we have just reviewed are related to the general duties of a civil servant. These general duties can be found in Article 40 of the Statute on the Civil Service. This article contains a list of duties, described in broad terms. In some instances, specific guidelines for application are given. In other cases, it contains more general descriptions, like other sections that we have encountered. It does, however, provide a good summary of many of the ideas that we have been working with in this section. Which duties relate to a civil servant's duty to Timor-Leste, the legal profession, or constitutional principles? Which sections relate to integrity, conflict of interest, equality or attendance? Which sections describe values or responsibilities that we have not discussed?

Article 40

General duties

1. The general duty of a civil servant or an agent of the public administration shall be to **act for the sake of promoting trust by the general public in the actions of the public administration.**
2. The following shall be considered as **general duties** of a civil servant or an agent of the public administration:
  - a) The duty of **loyalty** that consists in performing functions according to institutional service objectives and with the perspective of pursuing public interest;

- b) The duty of **obedience** that consists in obeying and complying with orders from superiors, provided that such orders are consistent with service objectives and given in a lawful manner;
- c) The duty of **zeal** that consists in becoming familiar with the legal regulatory rules and instructions from superiors for an efficient and correct execution of functions.
- d) The duty of **confidentiality** that consists in keeping the professional secrecy covering facts that a civil servant has become acquainted with as a result of his or her functions, and that are not supposed to be in the public domain;
- e) The duty of **probity** that consists in refusing direct or indirect advantages, money or other benefits that result from civil service functions, and in acting independently of particular interests or pressures of any kind from a perspective of respect for equality of citizens;
- f) The duty of **attendance** that consists in reporting to the workplace regularly and continuously;
- g) The duty of **punctuality** that consists in reporting to the workplace within the legally established working hours.

## Questions

1. Describe the relationship between the duty of probity from the above list of general duties, and the duty of integrity that we have already discussed.
2. Francisco, Marcos and João are all brothers. Francisco is a lawyer and works in the office of the public prosecutor, although he is not a public prosecutor himself. Marcos works in a government agency that helps to process building permits. João owns a construction company. The three brothers regularly leave work early to meet at a bar and discuss their workdays. One day, Marcos is telling his brothers about a permit application that he has been working on. A foreign company wants to build an office in an area at the edge of Dili. The brothers agree that it would be an excellent opportunity for João's company to construct this

new office building. Marcos tells his brother João about the results of all of the surveys and other companies that have shown interest in the project. He also gives João all of the contact information for the company and for the people involved in planning the project. Unfortunately, before he can secure the contract for the project, João is arrested for fraud. Francisco advises his supervisor that João is his brother, and his supervisor transfers his brother's case to a different office and orders Francisco not to look at any of the files regarding his brother's trial. As the trial approaches Francisco is accidentally shown a few documents that relate to his brother's case. When he realizes what he has seen, he immediately looks away and does not continue reading. Nevertheless, he read a few documents before he realized what he was reading. The documents seem to show that the state has very little proof against João and may drop the case. Francisco is so excited by what he has read that he rushes out of the office to tell João the good news. What has each of the brother's done wrong? How would you characterize each of their mistakes?

## **Answers and Explanations**

1. The duty of probity is described here as including the following responsibilities:
  - Refusing advantages, money, other benefits or bribes for doing something related to their job;
  - Acting independently and without conflicts of interests;
  - Respect equality and respect for all citizens.

Integrity is used in a more general manner and is not described as explicitly. Integrity is about acting ethically and as a “good person.” It is about doing one's job well, being honest,

respecting the civil service, the country of Timor-Leste, coworkers and members of the public. Integrity could therefore *include* probity, as well as many other duties.

2. Marcos has breached his duty of confidentiality as a civil servant when he revealed the information about the permit application and surveys to his brothers. If it is public knowledge (perhaps published in a newspaper story) that a foreign company wants to build an office building on the outskirts of Dili, then he did not breach his duty of confidentiality by revealing that fact. However, any details that are privileged information from his job should not be revealed. This especially includes the information about the applications and surveys since that will give João an unfair advantage as he tries to get the contract to build the office building. Marcos might also have a conflict of interest working in his office issuing building permits when his brother owns a construction company. Although it is not required to disclose the occupations of one's siblings when applying to the civil service, and we don't normally consider a brother's occupation to be a possible conflict of interest, Marcos is clearly having a difficult time putting his duty to his country and profession over the financial interests of his brother. Because Marcos is not able to do his job correctly (not leaking government information), his brother's occupation poses a conflict of interest *for him*, even though many people would not have this problem.

João is not a civil servant, so his ethical mistakes should not be analyzed under this statute. He has a *moral* obligation not to take information from Marcos if he knows it should not be revealed to the public, but he is not bound to these regulations since he is not a civil servant. He may however be guilty of fraud, although from the facts we only know that he was accused, not whether he was guilty.

Francisco did the right thing in telling his supervisor immediately about his relationship to João. He also did the right thing by complying with his supervisor's instructions not to look at or work on João's case. This allowed Francisco to avoid a conflict of interest. When he saw the files relating to João's case, it was a mistake. We cannot hold him responsible for a mistake. What we can hold him responsible for is what he does after that mistake. Here, Francisco ran out and told João about what he has accidentally read. He should not have done this. In doing so, he breached his duty of confidentiality as a civil servant. The information on João's case was privileged information that should only be used for official reasons and rejoicing with his brother was not an official reason.

## 9. CONCLUSION

This has been an overview of some of the provisions in the Statute of the Civil Service that relate to the duties of civil servants, which often include legal professionals working in the civil service. This text has not attempted to provide an analysis of all possible questions of professional responsibility that a civil servant might encounter, or review the entire text of the law. Our purpose was to highlight some of the most important provisions, and allow you to begin to apply this law. We would encourage you to read the entire text and create and discuss some hypothetical applications of your own. What scenarios might require you to apply certain applications? In what scenarios might certain provisions come into conflict? How might you resolve this conflict? Are there any parts of the statute that help you to resolve the conflict? What provisions help explain one another? What provisions might you need to apply every day?

# III. STATUTE OF THE PUBLIC PROSECUTION SERVICE

## 1. FUNDAMENTAL DUTIES OF THE PUBLIC PROSECUTION SERVICE

### Section Objective

- To understand the obligations of public prosecutors to enforce the law while promoting the Constitution of Timor-Leste and the activities of other state representatives.

### Section Overview:

The public prosecutors have a duty to:

- Enforce the Constitution and all other applicable laws
- Defend democracy and the rule of law
- Promote justice and oppose injustice
- Remain independent and impartial
- Work closely and cooperatively with law enforcement while leading investigations and prosecuting crime, always abiding by the provisions of the Criminal Procedural Code
- Remain independent from the judicial magistracy

## **What is the role of Prosecutors in Timor-Leste?**

The public prosecutor plays a dual role in the civil-law approach that defines Timor-Leste's legal system. First and foremost, it is crucial to understand that the Public Prosecutors' Service is the State body responsible for conducting criminal prosecution from the start of a criminal investigation until a judgment is reached. A prosecutor performs this role as a trustee for the interest of the state in ensuring a just society. Here is where the public prosecutor's dual role is clear, as this means both working to ensure that criminals are punished and ensuring that innocent people are not wrongfully convicted of crimes. Prosecutors have special ethical duties arising from their role as representatives of the state. These duties are codified in the Statute of the Public Prosecution Service, approved by Law 14/2005. This chapter will outline the basic ethical and professional obligations included in the statute and will describe some of the reasons for them. Each section is followed by a series of questions to test the new concepts and build on the section, as well as to serve as a final review.

Specifically this chapter will cover: the basic obligations of the public prosecutor, the exceptional obligation to defend certain parties, duties to avoid conflicts of interest, duties to abstain from professional activities that are incompatible with the public prosecution service, duties to abstain from incompatible political activities, duties to maintain discretion, and finally, the possible penalties if these duties are violated.

## **What basic responsibilities should guide public prosecutors activities?**

Public prosecutors have the specific duty to conduct the criminal prosecution and more general duties as legal representatives of the state of Timor-Leste. They must also uphold the

laws and the Constitution of Timor-Leste. In this spirit, prosecutors must work cooperatively with the police, the Office of the Public Defender, and the judicial magistracy to promote justice for all victims of crimes, defendants, plaintiffs, and the general public. At the same time, prosecutors have independence from the other state agencies and should conduct the criminal prosecution with zeal and impartiality. The Oath of Office for the Public Prosecution Service states:

Article 59  
Oath of office

Upon being sworn in, Public Prosecution Service magistrates shall take the following oath of office:

*“I, (name), (alternatively: swear to God or swear on my honour) that I will respect and faithfully **enforce the Constitution of the Republic** and all other applicable laws, **defend democratic legality** and **promote law enforcement** in an **independent and objective manner.**”*

This oath binds public prosecutors on their honour or to God to serve justice. Each prosecutor must promise to enforce the Constitution. Thus, it is essential that public prosecutors uphold the Constitution and work to make sure that all other organs of the state do so as well.

Prosecutors must also defend **democratic legality**. Democratic legality means that the organs and agents of the state (as well as citizens in general) have to act strictly within the limits of the Constitution and all the laws that are in conformity with it. This means, for example, that the organs of government must be wielded by those legitimately elected by the people and held accountable to them. Without a representative government run by consistent rules that apply to everyone, there cannot be justice. Government officials must conform to the law and the prescribed limitations on their power at all times. The prosecutor must protect the state from

corruption and misuse of power by ensuring that all people in power act within the law and that no one in power is in power without the consent of the people of Timor-Leste.

*Promoting law enforcement* is also a core duty for Prosecutors as this is central to working for a just society. Just as the Ministry of Health seeks to ensure the delivery of health services to the population, public prosecutors seek to ensure the administration of just law, without which rule of law would be undermined.

Independence means that the prosecutor is not influenced by anything other than the pursuit of justice, such as ambition, power, prestige, bonds of affection, or even fear. None of these factors should enter into the prosecutor's decision-making process or interfere with any of his or her duties. The prosecutor should make affirmative efforts to stay out of situations that may compromise his or her independence. For example, the prosecutor must try and avoid forming deep personal relationships with judges or political figures. Such relationships are likely to cause problems given the nature of prosecutorial work. Being objective means that if there is any external influence on the prosecutors' mind, no matter how small, they must not let it affect their behavior. In this case, the prosecutors must imagine what actions they would take if they did not have this extra consideration, and take those actions, even if they conflict with their own personal interests. The prosecutor has a responsibility to perform his functions in the pursuit of justice, without letting personal considerations or other external factors interfere

### **When are prosecutors bound by the public prosecutor statute?**

Public prosecutors become subject to the Public Prosecution Service Statute from the moment they are appointed. The statute emphasizes the broad application of the statute:

Article 28

Scope

Public Prosecution Service magistrates are subject to the provisions of this law, **whatever the situation they find themselves in.**

Prosecutors have these obligations in all situations. Even when they are not on active duty, they must uphold their professional obligations under the statute. As state actors working towards justice, democracy, and the rule of law, prosecutors must defend law and justice and be independent and objective all of the time. Administration of justice is immensely important and citizens must believe that prosecutors are serious about justice. Just as a doctor needs to be available in a medical emergency, the prosecutor needs to be available whenever an issue of justice comes up. During political turmoil, or other emergencies, it is even more important that prosecutors act impartially to ensure that the Constitution is upheld and justice is equally applied to all citizens. The Constitution and democratic legality are what defines the state as being independent of politics or the will of individual people. In times of instability, prosecutors' commitment to their oath is essential to promoting security and stability.

Even in cases where the prosecutor is not on active duty, as in the evenings, on the weekends, or on vacation, he or she should act with justice and impartiality so that people can see that the state has agents working for it who are not corrupt, and who will ensure that democracy and law are ensured as guaranteed in the constitution. If prosecutors do not abide by their legal and ethical obligations when away from work, this may undermine faith in the justice system; since they will not trust the people administering those laws and ensuring justice.

## What is the relationship between prosecutors and judges?

Article 29 highlights the relationship between the Public Prosecutor's service and the judicial magistracy:

Article 29  
Relationship between the public prosecution service and the  
judicial magistracy

1. The magistracy of the Public Prosecution Service is **independent** of the judicial magistracy.

The judicial magistracy is comprised of judges and is the state institution that carries out the administration of justice in the courts of law. While the public prosecutors conduct the criminal prosecution and participate in the proceedings as a representative of the state or of minors, absent and incapacitated persons, judges make decisions on the matters that are under discussion in those proceedings. If prosecutors were not independent or separate from judges, it is possible that judges would not make decisions that would be independent of prosecutors, and could instead make decisions favoring prosecutors. Judges must treat both sides of a case equally and fairly and make decisions based only on the facts and on the law. This equality before the law is guaranteed in the Constitution and is a vital component of justice. How could people feel that a decision was just if one party was favored by the judge? Judges, like prosecutors, have taken an oath to be impartial, and must stand by that oath. It is therefore important that prosecutors are seen as independent from judges so that the public sees that the decisions coming down are fair and are not based on any bias by the judge. Even if, in theory, it were possible for judges to make impartial decisions in a scenario where they were not independent from the prosecutors, it would remain necessary for them to be independent so that the public can be certain that the decisions

were impartial.

Prosecutors sometimes must challenge a judge's decision either by confronting the judge directly in the Court or by appealing the matter to a higher Court. If judges and prosecutors were not independent, prosecutors might be more reluctant to challenge a judge's decisions, even when incorrect. The public must also believe that prosecutors are independent and able to challenge judges. Public prosecutors are, as we have seen, independent from judges (Article 29° of the Statue), and they have an obligation to maintain this independence. However, they also have an obligation to act in an independent manner (according to their oath - Article 59°). This, among other things, includes that they shall not act in collusion with people or entities directly or indirectly involved in the performance of their functions, including the judges, but also the courts' staff, clerks, and other people associated with the judiciary.

### **The Prosecutors' key competencies and their interaction with other state agencies**

The statute describes the functional competencies of prosecutors under Article 3:

<p><u>Article 3</u> <u>Competencies</u></p>
<p>1. It is especially incumbent upon the Public Prosecution Service:</p>
<p>(a) to <b>represent and protect the interests of the State</b>;</p>
<p>...</p>
<p>(c) to <b>take part in the execution of the criminal policy</b> as defined by the organs of sovereignty;</p>
<p>...</p>
<p>(f) to lead the criminal investigation, <b>even when carried out by other entities</b>;</p>

...

**(i) to monitor proceedings by the criminal police agencies**  
in the course of enquiries;

...

The prosecutor represents and protects the interests of the state under Article 3.1(a). One of the ways in which this materializes is in the prosecutors' role in criminal proceedings, where they work to prevent and punish crimes. The prosecutors and the other state agents, including the police, have responsibilities that are linked and interdependent. Therefore, all these agents must work in collaboration, with the aim of serving the interests of the state.

Prosecutors are in charge of conducting the criminal prosecution according to the laws and the policies of the government. They must also actively participate in execution of criminal policy under Article 3.1(c), which includes not only being heard in matters related to criminal policy, but also implementing the policies that are determined by the organs of sovereignty. These institutions set the priorities and distribute the resources to control crime and maintain the rule of law in the state. This means that while the prosecutor is independent from the organs of sovereignty in terms of making sure these do not undermine democratic legality, the prosecutor should cooperate with them to guarantee that the goals, priorities, and guidelines that they define are respected and adopted.. For example, if the organs of sovereignty want to emphasize the fight against gender based violence by passing tougher laws and giving tougher sentences, the prosecutors should cooperate. However, this cooperation is limited by the principle of democratic legality. If, for example, the president was to proclaim himself president for life and the government supported it, the prosecutor would have an obligation to prosecute this as an unlawful act and to not recognize its legitimacy. Prosecutors should only follow the policies of the organs of sovereignty to the extent they fit within the legitimate scope of their authority.

Article 3.1(f) places prosecutors in charge of leading criminal investigations—even when the police, the immigration department, or another agency is carrying out the investigation. Since the prosecutor is in charge of the criminal investigation, if that role is delegated - notably to the police - the prosecutor must determine what should be done. The prosecutor must make sure that the case is well investigated and that all evidence necessary to convict or exonerate suspects is obtained and procedures are duly followed. Therefore, prosecutors should not simply make a generic delegation of competencies. They should orient the police with some level of detail throughout the investigation, indicating for example who should be heard, the sort of questions to ask and the places they should look for clues. It is also incumbent on the police officers to develop and then use their own expertise in investigations. While the prosecutor is in charge, they should focus on setting out the goals that the police are responsible for achieving.

Article 3.1(i) empowers prosecutors to monitor proceedings by the criminal police agencies. The “Police agencies” here refers to the police and the state institutions supporting them. The statute requires that prosecutors ensure that the PNTL investigate cases correctly, abide by the Criminal Procedures Code and do not violate any laws in obtaining evidence.

The PNTL must always conduct their activities in accordance with the Criminal Procedural Code. If police officers act contrarily to the law when investigating a crime, they are violating the Constitution that prosecutors have taken an oath to uphold. Prosecutors must monitor the police to ensure that the Constitution and the law are respected, thus fulfilling their role and their oath. Since the police have a significant amount of power, it also has the potential to cause injustice. This means that the prosecutors must observe their activities closely and be willing to investigate and prosecute them if they commit wrongful acts in the course of their functions.

## Questions

1. How is a public prosecutor's role different from a private lawyer's?
2. Why is cooperation between the Prosecutor-General's Office and other state agencies emphasized in the statute?
3. How can prosecutors act in both the best interests of the state and the best interests of justice?
4. Mario is a district public prosecutor in Baucau. For several months, he has been in charge of a prosecution against a group of men who are accused of setting several homes on fire. He has had several disappointing losses in court recently in which he suspects that guilty parties have been acquitted, so he is keen to ensure that this prosecution succeeds.

Mario analyzed the witnesses' depositions and the physical evidence. Only one person claims to have seen a fire lit, but he described very confidently and in detail what he saw and has positively identified three of the defendants. Two of the men have alibis, which Mario believes are false. However, even if the alibis are false, they may still create enough doubt for the court to acquit the defendants. But based on the existing evidence Mario is convinced that at least one of the three defendants', Carlos, is guilty.

Mario is worried that one or more of the accused or his witness may disappear before the trial. However, Mario feels that one police investigator, to whom the investigation was delegated, has been deliberately slowing down the investigation and the proceedings. Mario suspects that this police investigator is hoping to get a promotion and is trying to appear as if he is important by involving himself unnecessarily and acting as if he is leading the investigation. The process has taken twice as long as it should have as a result. Additionally, the PNTL

investigator has insisted he has a theory that Carlos is not guilty, and keeps demanding Mario do further investigations.

Mario spent a day visiting his family in Dili. They are talking before dinner one evening about what has happened since he last visited. His mother mentions the improvements their neighbors have made on a house on a piece of land next door. The neighbors are the family of Carlos. The improvements happened around the same time as the arson incident. Mario's mother believes she saw Carlos helping out with the repairs.

What should Mario do?

### **Answers and Explanations**

1. The public prosecutor has a duty to conduct the criminal prosecution and to do so in search of the truth. The prosecutors' main duty is to the state, the Constitution and the law, and they have an obligation to act in the nation's best interest. Therefore, the prosecutors' work should not be aimed at getting a conviction but finding the truth and serving justice. This is very different from the role of private lawyers. As we will see in Chapter V, although private lawyers have a duty to the country and the community, their main duty is to their client. Therefore, their main aim is not only to search the truth or serve justice but to defend their clients' interest in order to achieve the best possible outcome.
2. The different state agents, including the prosecutors and the police, have responsibilities that are linked to each other. Therefore, the success of the prosecutors' work is largely dependent on the work carried out by other state agents, notably the police, and vice-versa. Thus, all

these agents must work in collaboration, with the aim of serving the interests of justice.

3. It is in the best interests of the state for justice to be served. The state is based on the Constitution and the Constitution exists to serve as the foundation of a state built on the rule of law and justice. It is never in the best interests of the state to have someone who is innocent convicted or to have someone who is guilty go unpunished, because the state is based on the principle of justice. This is where it is important to differentiate between the interests of the RDTL state as defined in the Constitution – and the interests of particular groups or individuals in the state. It is sometimes the case that someone who works for the state, maybe for political reasons, would benefit from someone guilty going unpunished or someone innocent being convicted, but that is not the same thing as the state benefitting. The prosecutor's oath promises loyalty to the state based on the Constitution and its guarantee of justice, not loyalty to the people who work in the state or to political interests.
4. This scenario raises a number of issues. Even if the trial will be slowed down, Mario must bring what he heard at his family's house to the attention of the police investigator and the rest of his team. It is more important that there be a fair outcome than to ensure that he quickly concludes the trial, or that he does not lose standing with regard to the police. In order for Mario to fulfill his oath, he must prioritize serving the interests of Timor-Leste, in general, and justice in particular, ahead of his own personal considerations. Justice will not be served unless all evidence that is available is made known to the investigators and the court.

It does not matter that Mario was off duty when he learned the information. The statute does not make exceptions for the prosecutor being off duty. Mario has sworn that he will *always* serve justice and he must not ignore information relevant to the case due to being on holiday.

## **2. DUTY TO STEP ASIDE WHEN PROSECUTORS HAVE INTERESTS IN CONFLICT WITH THEIR ROLE**

### **Section Objectives**

- To explore why prosecutors must not be involved in cases in which they have conflicts of interest.
- To learn what conflicts automatically disqualify them from participating in a case.
- To develop mental skills to decide how to act when faced with a potential conflict.

### **Section Overview:**

Prosecutors have a conflict of interest, and must not carry out their functions in a case, when:

- They were involved at an earlier stage of the case in a capacity outside of their role as a prosecutor or when they are or will be witnesses in the proceedings
- The prosecutor, or a close relations, stands to gain or lose depending on the outcome of the case
- A close family member is serving as a prosecutor, judge, or any other court staff
- The prosecutor is unable to maintain his/her impartiality

## **When do a prosecutor's interests or connections disqualify him or her from a particular case?**

Prosecutors have to make many decisions in the course of criminal proceedings, including what prosecutions are more urgent, how many resources to invest in them, how much time and energy to spend on them, if a case should be prosecuted or filed, among many others. Making these decisions gives the prosecutors a significant amount of power. Acting with only the interests proclaimed in their oath of office is crucial to ensure that such power is not abused. However, there are specific situations where those interests might conflict with the prosecutors personal interests. Article 37 outlines the conflict of interest rules provided for in the Statute:

### Article 37

#### Impediments

1. A Public Prosecution Service magistrate **shall not serve** at a court or trial **involving** judicial magistrates, Public Prosecution Service magistrates or court staff to whom he or she is related **by marriage or a de-facto union, kinship or affinity of any degree in the direct line or up to the second degree in the collateral line.**
2. A Public Prosecution Service magistrate shall not act in cases **he or she has somehow been involved in as a lawyer.**
3. The Prosecutor-General and other Public Prosecution Service magistrates sitting on the Superior Council of the Public Prosecution Service shall not take part in the decision-making process of this body **where the decision to be made is directly related to them.**

Article 37.1 clearly states prosecutors may not serve as prosecutors in situations in which a judge, prosecutor, or any other court staff is closely related to them. In such situations, the prosecutor cannot be working in the same court nor in proceedings where those people work.

The terms of kinship may appear confusing in the way they are phrased, but are in fact relatively simple. To be in a de-facto union just means that you live with your boyfriend or girlfriend and that you make a household together, but that you have not legally married. If a prosecutor is married or lives in de-facto union with a judge, prosecutor, or any other court staff, that prosecutor cannot be working in the same court or on the same case where her/his husband/wife or boyfriend/girlfriend is serving. The term “kinship or affinity of any degree in the direct line” means that a prosecutor cannot work in the same court or case where their parent, grand-parent, great-grandparent, great-great-grandparent, child, grandchild, great-grandchild, or great-great-grandchild is a judge, prosecutor, or any other court staff. The term “... up to the second degree in the collateral line” means that the prosecutor’s siblings cannot be the judge, prosecutor, or any other court staff involved in the case either.

In criminal proceedings prosecutors should not influence the case beyond what is inherent to their role, such as the presentation of evidence and other support for the criminal charges. The idea is that a judge, prosecutor, or other staff member of the court might want to favor the prosecutor over the defendant if they are relatives. There is also the risk that even if they are not intentionally trying to favor the prosecutor, they still might trust their opinion on the case more than the opinion of the other side who they do not know personally. Because the Constitution and the principle of justice require that everyone be treated equally before the law, these sorts of influences are not allowed. Even if it were possible that the judges, prosecutors, and court staff would be able to ignore that they were related to that prosecutor and stay completely impartial and objective, it also matters, once again, to the public trusts that all these court actors appear impartial. The public is likely to be suspicious about the court being impartial when one side is related to the people involved in the decision process, even if it is true that they actually are

impartial. It is essential that the public trust the courts to be unbiased, so that justice is really being served.

Prosecutors cannot act in a case that they have been involved prior as private lawyers under Article 37.2. The prosecutors might otherwise already have an opinion on the case that would keep them from treating it equally to other cases that come before the court. Also, if prosecutors have worked on a case before they may favor the arguments that they originally created as being better than those from the other side, or might even have some resentment towards the way the former client treated them or listened to their advice. The prosecutors are also likely to know confidential information from their previous involvement with the case that is inappropriate for them to know in their role as prosecutors.

This does not apply, of course, to a case that the prosecutor has previously been involved in as a prosecutor. Since prosecutors are in charge of overseeing criminal investigations and also leading the prosecution in court, which sometimes involves many different trials, it would not make sense if the prosecutor was barred from continuing to pursue justice on a case that he or she had been working on and developing. It would be a bad policy for the prosecutors who have worked most on a case and developed the most expert knowledge of it and its prosecution strategy to be barred from pursuing it to the end. Such a policy would work against the goal of having prosecutor's enforce justice in Timor-Leste by limiting their ability to do the best job possible when conducting a case.

Article 37.3 covers situations where a prosecutor sits on the Superior Council of the Public Prosecution Service and this body must make a decision that relates directly to that prosecutor. If a particular decision to be made by the Superior Council will affect that prosecutor, he/she shall not be allowed to influence such decision, as it would be very difficult, if at all possible, for

him/her to act with impartiality and independence. That prosecutor can continue to sit on the Superior Council and participate in decisions regarding other matters, but in that particular situation, he/she has an impediment that affects the ability to carry out his/her functions properly and must therefore be excluded from such process.

To understand the issue of conflicts of interests affecting prosecutors it is crucial to go beyond the Statute and make a brief reference to articles 39, 40 and 51 of the Criminal Procedural Code (CPC), and articles 87 and 90 of the Civil Procedural Code (CivPC) as they establish the main rules on impediments and suspicions regarding both judges and prosecutors.

## **Impediments and suspicions in the Criminal Procedural Code**

### Article 51

#### Impediments and suspicions

1. The provisions concerning impediments and suspicions regarding judges are applicable to public prosecutors, with the necessary adaptations.

### Article 39

#### Situations of impediment

The following are situations of impediment:

- a) To be, or to have been a spouse, legal representative, or related by blood or affinity up to the third degree to the victim or to the perpetrator of the criminal offence, or to cohabit, or to have cohabited, with either of the latter in a relationship similar to that of spouses;
- b) To have intervened in the proceeding as a (...), police officer, judicial agent, public defender, or as an expert;

- c) A spouse or anyone related by blood or affinity up to the third degree, or a person living or that has lived in a relationship similar to that of spouses, is taking part in the proceeding, in any capacity;
- d) To be, or ought to be, a witness in the proceeding.

#### Article 40

##### Grounds for suspicion

A judge raises suspicion where there are strong reasons to call into question his or her impartiality, namely, having expressed opinions revealing a pre-judgment in relation to the object of the proceedings.

Articles 39 and 40 specifically refer to judges. However, according to Article 51 of the CPC, the same rules are applicable to public prosecutors, with the amendments that are necessary considering the specificities of each one of these professions.

Similarly to what we saw on Article 37 of the Statute, Article 39 of the CPC establishes the situations where public prosecutors are prevented from performing their functions in certain specific cases, as this would undermine the independence, impartiality and dignity inherent to their functions. This can occur due to kinship (paragraphs a) and c)) or due to their own participation in the proceedings in a position other than public prosecutor (paragraphs c) and d))

Thus, under Article 39 a) of the CPC, if the wife (or even the ex-wife) of a public prosecutor is the victim of a crime and a proceeding is in course, that prosecutor will not be allowed to perform his functions in that proceeding. In fact, how could a public prosecutor keep impartial and independent if the conviction (or acquittal) of the person that committed a crime against his wife is at stake? Since this impediment extends to anyone related to the public

prosecutor by blood or affinity up to the third degree, the same would happen if the victim is, for example, an uncle of the prosecutor, or the uncle's wife. Similarly, it is clear that the impartiality and independence of the public prosecutor would be questioned if the brother of the public prosecutor was accused of committing a crime.

Paragraph c) also refers to situations where there is a blood or affinity relation with the public prosecutor; however, these cases are broader. They cover situations where such family members participate in the proceedings *in any capacity* (not only as victim or perpetrator of a crime), which includes for example judges, witnesses, experts, police officers, and defenders.

Paragraphs b) and d) also aim to ensure the impartiality, independence, and dignity of the public prosecutors' actions. However, the issue here no longer relates to kinship but refers to the prosecutors' own participation in the case, either previously as a judge, police officer, judicial agent, public defender or expert (Article 39 b) or currently as a witness (Article 39 d).

In summary, Article 39 of the CPC, similarly to Article 37 of the Statute, establishes the situations where a public prosecutor is prevented from performing his functions in a specific case, due to kinship or due to the prosecutor's own participation in that proceeding.

Article 40 of the CPC, on the other hand, is a more general provision and it establishes that there is a situation of suspicion where there are strong reasons to question the prosecutor's impartiality regarding a particular case. Although this provision requires us to interpret which situations fall into a case of suspicion and which situations do not, the law clearly states that the reasons to question the impartiality have to be *strong*. Following the example given in the article, we could argue that there is a situation of suspicion if a public prosecutor, in the beginning of a crime investigation with several suspects - Jose, Maria, and Pedro - gives an interview stating that it is obvious the crime was committed by Jose and that he would do anything to make sure Jose

goes to prison for his actions. Making this statement before the end of the investigation seems to reveal that the public prosecutor has already made his decision before having all the information, and it is possible he will be unwilling to change his mind, even if there are reasons to do so.

When there is an impediment or suspicion the prosecutors shall declare it immediately to their superiors. However, even if the prosecutor does not have the initiative to do so, the judge, the victim, or the perpetrator have the power to raise it once they become aware of the situation.

## **Impediments in the Civil Procedural Code**

Regarding the impediments applicable to prosecutors in civil proceedings, Article 90 of the Civ.PC establishes that the agents of the Public Prosecution Service are subject to the limitations provided under Article 87 a), b), g) and i), which refer to impediments applicable to judges:

### Article 87

1. Judges shall not perform their functions:

(a) When they are a party in the proceedings, directly or in representation of a third person, or when they hold an interest that had the potential to make them a party;

b) When a spouse or relative by blood or affinity, in direct line or up to the second degree in the collateral line, is a party in the proceedings, directly or in representation of a third person, or when any of these persons holds an interest that had the potential to make them a main party in the proceedings;

(...)

g) When one of the parties in the proceedings is someone that has filed a claim for compensation for damages or a criminal charge against them, based on actions carried out in the performance of their functions or due to such functions, or when a spouse or relative by blood or affinity, in direct line or up to the second degree in the collateral line, is a party in the proceedings, as long as the claim or accusation has already been admitted;

(...)

i) When a person with whom the judge lives with as a couple is in any of the situations provided for in the previous paragraphs.

The Civ.PC provides for a number of situations in which the prosecutors are barred from performing their functions as that jeopardizes the independence, impartiality, and dignity of the profession. This can result from their interest – or the interest of close relatives, including someone that lives with the prosecutor as a couple – in the decision of the case (paragraphs a), b) and i)), or from the fact that one of the parties in the proceedings has a civil or criminal dispute against the prosecutor or a close relative, including someone that lives with the prosecutor as a couple (paragraphs g) and i).

In conclusion, the Statute has a few specific rules that bar prosecutors from performing their functions in a certain court or proceeding where a spouse, domestic partner, direct progenitor, descendant, or a sibling is a judge, prosecutor or clerk, because it is presumed they will be affected or appear to be affected by this relationship. Similarly, if the prosecutor was involved in the case as a private lawyer, he/she is presumed to be biased or to have some confidential information. The CPC and the Civ.PC have other provisions that establish impediments - due to kinship or to the prosecutor's own participation in that proceeding, and also include situations of suspicion - when there are strong reasons to question the prosecutor's impartiality.

## Questions

1. How does a prosecutor know if there might be a conflict in a specific situation?
2. What if the conflict would only make the prosecutor more eager to prosecute?
3. Ana is a public prosecutor and her superior is asking her to take on a new case. She is trying to decide how to respond. The case is against four young men. They are being accused of beating up two other young men in their community. Ana is from the same community as all of the young men.
  - a. One of the young men accused of committing the crime is a friend of her younger brother. She does not know him well, but remembers that he and her brother used to be quite close and spend a lot of time together. Does this present a conflict of interest for Ana? What should she do?
  - b. What if rather than being a friend of her younger brother, one of the accused was her younger brother. Does this present a conflict of interest for Ana?
  - c. What if one of the staff members working with the judge on this case was her nephew?
  - d. Now assume that Ana does not know any of the young men that have been accused, but rather one of the victims is her younger brother. Does this present a conflict of interest for Ana?
  - e. Ana does not know any of the young men involved, but they have also been accused of destroying goods at a small store run by Ana's parents. The penalty for destroying the goods is a fine. The penalty for beating up the young men is much

harsher and includes time in jail. Does this present a conflict of interest for Ana?

### **Answers and Explanations**

1. First, identify if the conflict is one of those specifically mentioned in the Article 37 of the statute, Article 39 of the CPC or Article 87 of the CivPC: if that is the case, there is a situation of impediment and the prosecutor is automatically disqualified from performing his functions in that case or in that court. If the prosecutor is not specifically barred but there are issues that might affect his/her impartiality the prosecutor should try asking, “What would happen if I decide this one way?”; “What would happen if I decide this the other way?”; and “How would I feel in each situation?” If the answers are different it is possible that this is a situation of suspicion (Article 40 CPC) and the prosecutor should discuss it with his/her superior.
2. The rules on impediments and suspicion aim at guaranteeing the independence and impartiality of the prosecutor, who should work in search of the truth and in the interest of justice, and not aimed at a conviction. If there is a conflict of interest that makes the prosecutor more eager to prosecute a case this certainly affects his/her impartiality, and therefore should not be allowed to continue with the case. It would be unfair to the accused to be treated more harshly than other defendants, or for the victim to have more benefits than other victims due to the special relation of the prosecutor with other parties in the proceedings. Justice is about matching the right amount of punishment to the crime. Basing the prosecution on personal interests or relations corrupts the idea of justice and of a fair trial.

3.

- a. Though this is not an impediment, it may affect Ana's actions. What Ana needs to do is to decide if she thinks she can be impartial towards the suspect. The way she should do that is to think about how she would feel if the case came out one way or another. If she thinks she would have any preference for the outcome one way or another based on something other than the facts and the evidence produced, this would be a case of suspicion and she should not be involved in the case.
- b. Yes, this is an impediment according to Article 39 a) of the CPC. She will not be able to prosecute her brother impartially, and the law recognizes that. A prosecutor without that relationship might act differently. This is the type of conflict the law is aimed at preventing.
- c. If one of the clerks on the court is her nephew, the law considers this an impediment, under Article 39 c) of the CPC, since they are related up to the third degree. In this case, Ana could not act as a prosecutor in the proceedings.
- d. Yes. Under Article 39 a) of the CPC there is an impediment since the victim is Ana's brother (a first degree blood relative). The decision is directly related to Ana since it concerns the health and safety of her family. The law anticipates that in a situation like this Ana would not be able to act impartially.
- e. Once again this is a situation that can potentially affect Ana's impartiality. What happened with her family might make Ana harsher than she would otherwise be or less capable of analyzing the facts and the evidence without a pre-judgment. This appears to be a situation of suspicion, under article 40 CPC. She should therefore discuss the case with her superior.

### **3. DUTY TO NOT BE INVOLVED IN ACTIVITIES THAT CONFLICT WITH THE ROLE OF THE PUBLIC PROSECUTION SERVICE**

#### **Section Objectives**

- To explore why public prosecutors should not be involved in activities that put them, or appear to put them, in conflict with their roles as prosecutors.
- To learn what activities create situations of conflict.
- To explain what to do when there is an activity that may be incompatible with the role of prosecution service.

#### **Section Overview**

Prosecutors may not engage in any job outside of the public prosecution service other than:

- Teaching law (only with permission);
- Researching and writing on the law (only with permission);
- Act as private lawyers in self-representation or representing certain family members in legal cases.

#### **What other professional activities can prosecutors undertake while serving in the Public Prosecution Service?**

As with conflicts of interest, it is important that prosecutors' decisions are not influenced by external concerns or motivations, which could be caused by undertaking other professional activities outside the public prosecution service. Outside employment may reduce the energy and

time the prosecutor dedicates to his or her service in the office of the prosecutor. Furthermore, the independence that is inherent to the role of public prosecutors determines that they shall not be subordinates nor receive orders from any other employer. Thus, the law bars prosecutors from most other professional activities outright, and requires authorization for all others. Article 35 states the ban on activities and provides some limited exceptions:

- Article 35  
Incompatibilities
1. Public Prosecution Service magistrates in office **may not perform any other functions of a professional character**, whether public or private, **other than teaching and scientific research of a legal nature or managerial functions in representative organisations** of the Public Prosecution Service magistracy.
  2. **The discharge of teaching or scientific research functions of a legal nature may be authorised, provided that** they are not remunerated and do not negatively impact the service.
  3. The following are considered functions of the Public Prosecution Service: those carried out by a magistrate who sits full-time on the Superior Council of the Public Prosecution Service as a voting member, is a member of the Prosecutor-General's Office, is a member of a governing board or lecturer of the Judicial Training Centre, or who is responsible for drafting and reviewing legislation under the purview of the Ministry of Justice.

Prosecutors shall not have any other professional responsibilities except in the public prosecution service. But, they may teach or undertake research if they get permission. Any other jobs would jeopardize the independence of the public prosecutors, as well as potentially produce conflicts of interest and would likely detract from the prosecutor's main job. Article 35.1 recognizes that researching and teaching law may reduce the amount of time and energy the prosecutor has, but it is unlikely to jeopardize its independence or create significant conflicts of

interest. Additionally, the prosecutor's work researching and teaching can make up for any losses of productivity because of its high value. In the same way, the value the prosecutor brings to the prosecution service by serving on the Superior Council is likely to outweigh any losses of productivity created by having less time to focus on his/her other functions as a prosecutor.

Under Article 37.2, prosecutors may only engage in research or teaching if they are not getting paid to do it and this does not jeopardize their service by taking time and attention away from their job. And although the article does not expressly say so, such activities can only be carried out provided there is no conflict of interest. . The reason that they are not supposed to get paid is because that would compromise their independence and might create conflicts of interests. If prosecutors have more than one person that they work for, they are less likely to remain and be seen as independent and impartial. This independence is crucial for them to duly perform their functions in general and to pursue criminal investigations or prosecutions in particular. Would a prosecutor be willing and able to conduct a criminal investigation against someone who pays him/her? And if that person would have an interest in the acquittal of, for instance, a business partner, would the prosecutor be capable of maintaining his/her independence and impartiality during the proceedings? Even if he/she could stay impartial, it is likely that the public would not believe that. This could make people think that prosecutors are not working to uphold justice and that could jeopardize the prosecutor's work. The reasons why prosecutors might want to teach or to research and write even though they are not getting paid for it, might include the prestige it can bring them, the benefit it can bring to the country by ensuring better laws and better lawyers, and because it will help them to serve the ends of justice by giving them and others a better understanding of the law and how it should be applied.

Finally, Article 37.3 lists a number of jobs and positions that are recognized as being within

the functions of the Public Prosecution Service. The list includes being a member of the Superior Council, a member of the Prosecutor-General's Office, being on the governing board or being a lecturer at the Judicial Training Centre, or being a legal drafter and reviewer within the Ministry of Justice. All these are acceptable because they can be done without creating conflicts of interest and they either need to be performed by a prosecutor, like serving on the Superior Council, or the state wants to have a prosecutor involved, like drafting laws with the Ministry of Justice. This article recognizes that while prosecutors' primary functions are those listed on article 3 of the Statue, notably to represent the State and prosecute cases, ensuring that justice is served, they are needed in positions such as the Superior Council and can also be very valuable as teachers and researchers.

### **Are there any instances where a prosecutor can serve as private lawyer?**

There is one instance where prosecutors can act as private attorney under Article 43:

#### Article 43

#### Legal practice

A Public Prosecution Service magistrate may serve as a private lawyer in a legal case filed by or against him or herself, his or her spouse or partner with a similar relationship resulting from a de-facto union, a descendent or progenitor.

If a case is filed by or against the prosecutor or an immediate family member, they may serve as an attorney. The limits on how close a family member someone has to be before they can serve them as a lawyer is spelled out in the section that says "spouse or partner with a similar relationship resulting from a de- facto union, a descendent or progenitor." A prosecutor can serve

as a private lawyer for anyone he or she is married to (or partnered with in a serious relationship) and the prosecutor's parents and children.

In conclusion, the statute broadly bars prosecutors from engaging in almost all professional work. There is a small exception for teaching and research, but even this exception must not be remunerated in order to eliminate any impact in the prosecutor's independence and any suggestion of improper influence. There is also a clarification for activities that fall under the public prosecution service, which is there to avoid the nonsensical outcome that a prosecutor cannot serve in a position that must be filled by a prosecutor. Finally, the statute makes an exception to allow prosecutors to act as private lawyers to represent themselves or a close family member if they wish to do so.

## **Questions**

Maria is a public prosecutor. May she...

1. Volunteer at a local community center to assist victims of a flood in an emergency?
2. Volunteer at a local community service center providing legal advice?
3. Lecture at a law school?
4. Give a lecture at a law firm?
5. Research international humanitarian law?

## **Answers and Explanations:**

1. Yes. This is not a "function of a professional character" or even a paying job, but

supporting the community in a situations of emergency. Furthermore, by doing assisting the community in a situation like this, prosecutors can be an encouraging example of civic work that is dignifying.

2. No. Giving legal advice is a type of law practice and is completely different from teaching or doing research. Even though Maria is doing it for free, it is still inappropriate and not allowed for her to practice any sort of private law outside of the one narrow exception for when she is representing herself or close family members.
3. Yes, if she gets approval. This is one of the clear exceptions to the rule spelled out in the law. Would she get approval if she asked to lecture four times a week? Should she? Could she still do her job as a prosecutor effectively?
4. Maybe if she gets approval, since this may be considered teaching, but not if she is paid. Consider whether this is a service the state would want to promote, and if it could create a bias in the public's eyes.
5. Yes, if she gets authorization. This is exactly the kind of work the exception is meant to allow, as it promotes an important field of knowledge. It must be authorized to ensure it falls within the exception provided for in the Statute and to guarantee that it does not interfere with her responsibilities.

## **4. DUTY NOT TO BE INVOLVED IN POLITICS (AND NOT TO APPEAR TO BE INVOLVED IN POLITICS)**

### **Section Objectives**

- To explore why public prosecutors should be clearly removed from politics in fact and in appearance;
- To learn what activities can be considered political;
- To develop judgment about what activities are permissible.

### **Section Overview**

- Prosecutors may not participate in any political activity except if the activity is completely private in nature, or in the case of running for political office, if the prosecutor files a leave request in advance of any campaigning;
- If a prosecutor files a leave request and goes on leave to campaign for, or serves in, a political office, that time will be counted towards their seniority as though they were still actively serving as prosecutors.

### **What political activities must prosecutors avoid?**

Similar to incompatibilities, conflicts of interest, and bars on outside employment, public prosecutors are limited in what political activities they may participate in due to the risk of compromising their independence, as well as the risk of bias and detraction from their duties. At the same time, this risk must be balanced against the value to the republic of having qualified

individuals serve in the state in leadership positions. For this reason, there are procedures to allow public prosecutors to take leave and serve in office.

The risk of bias must also be balanced against the right of all individuals, including public prosecutors, to express and support their political preferences. For this reason, the ban is limited to public political activities. Article 36 states:

Article 36  
Partisan-political activities

1. A Public Prosecution Service magistrate in full exercise of his or her functions **shall be banned from carrying out partisan-political activities of a public nature.**
2. A Public Prosecution Service magistrate in full exercise of his or her functions **who wishes to hold a political post**, save the office of President of the Republic and that of a member of the Cabinet, **must file in advance the leave request** provided for in Article 55 of the Statute of the Civil Service, approved by Law No. 8/2004, of 16 June.
3. Public Prosecution Service magistrates who suspend their functions in order to undertake the activities established in the exception made in the previous paragraph shall not be prejudiced in their carriers, with full time being credited toward their seniority as if they were in full exercise of his or her functions.

The ban in Article 36.1 aims to ensure that prosecutors remain impartial and appear impartial to the public regarding political matters. The reason for this goes back to the distinction discussed earlier between the state of Timor-Leste, and the people currently running the government of Timor-Leste. The state of Timor-Leste is politically neutral and is not based on the preferences or values of any one group. The state in its pure form is composed of the Constitution of Timor-Leste and is based on universal justice, equality, and rule by law. While political parties work in the government and carry out many state functions, they are not the same as the state.

When a prosecutor serves the state of Timor-Leste he or she is not serving any political parties or any particular leaders, but instead is serving the Constitution and its principles. Because of this difference, it is important that prosecutors never become involved in any political activities which might conflict with their service to the state of Timor-Leste and its Constitution. If prosecutors were to become involved in politics, it is possible that their loyalty would become divided and the important distinctions between what is best for the state of Timor-Leste and what is best for the political parties might become blurred. Even if prosecutors could become involved in politics without this line becoming blurred, it would be difficult for the public to believe that prosecutors are actually able to do this. The public might believe that the prosecutor's loyalty is not to serving the Constitution of Timor-Leste, and the neutral state that it forms the basis of, but instead to serving the political parties and politicians that work in the government

The difference between activities of a "public nature" and of a "private nature" is important. Public activities involve doing things publicly such as making political statements, campaigning on behalf of politicians, or running for office. Private activities are things like anonymously donating money to a political campaign, discussing political ideas with close friends and family, and voting. The key difference is that the prosecutor does not let his political beliefs become widely known. It prevents the public from thinking of the prosecutor as just a party loyalist. It also prevents people from trying to manipulate the prosecutor's decisions based on his or her personal political ideals.

The reason that the prosecutor is ever allowed to engage in *private* political activities is because it is very important that he or she still has equal rights of citizenship. Also, if prosecutors were not even allowed to talk with close friends about politics or to vote, some citizens with a deep interest in improving their country might decide not to become prosecutors. Since being a

prosecutor is a very important job that needs to have the best people, this complete prohibition would undermine the quality of the people in the public prosecutor service.

If a prosecutor wants to run for political office or serve in political office, Article 36.2 mandates he or she previously submits a leave of absence without pay from the prosecution service, unless they are running for President or being appointed as a member of the cabinet. The reason for this rule is that, for all the reasons listed in the section above as to why the prosecutor cannot be publicly involved in political activities, not taking a leave of absence would put at risk the independence of the prosecutor.

Article 36.3 ensures that a prosecutor can run for office without damaging his or her career. If prosecutors knew that they would lose standing and seniority in their profession because of their public service, they might not run, and Timor-Leste might not benefit from their good work. Additionally, since holding political office is another way to serve Timor-Leste, the prosecutor is not penalized financially or in career terms.

Thus, Article 36 broadly bans public partisan-political activity. The law allows prosecutors who want to seek office to do so if they file a request for leave in advance for that purpose. Further, this kind of leave time will not harm their progress in seniority.

## **Questions**

1. Julio is a public prosecutor. He is considering entering politics and campaigning in the upcoming election, but does not want to take leave yet because he cannot afford to give up his salary any earlier than is necessary. In what ways may he support his candidacy and his party?

2. What if it is his sister who is considering running for office?

### **Answers and Explanations**

1. As a prosecutor Julio is barred from being part of a political party or engaged in partisan-political activities. He could, however, have private discussions to consider the option of leaving office and running in the election, but all within the limits imposed by the principle of independence.
2. Julio cannot speak publicly for her, nor even simply state his endorsement. In theory he can write anonymous editorials supporting her and he can contribute money to her campaign, as these are not activities of a public nature though they could become public if his role is made public. However, even if his actions stay anonymous, this still has the potential to interfere with his independence so, in practice, Julio should refrain from them and simply vote for his sister.

## 5. DUTIES TO UPHOLD PROFESSIONAL DISCRETION

### Section Objectives

- To explore why public prosecutors must be careful about what information they share or allow others to learn.
- To learn what professional information prosecutors must guard.
- To learn what behavior can violate secrecy.
- To develop judgment about what information is sensitive.

### Section Overview

Prosecutors should not discuss any details of a case except when:

- A superior has authorized it in order for the prosecutor to defend his or her honor;
- A superior has authorized it in order to achieve another legitimate interest;
- It is necessary to do so in the course of an investigation in order to achieve some legitimate end or to get more information.

The reasons above do not allow the divulging of information covered by any other rules demanding secrecy. That information may not be divulged no matter what.

### What information must prosecutors keep secret?

Public prosecutors may acquire a great deal of sensitive information as part of their official role. They should not be permitted to unfairly take advantage of or abuse this

information. The information they obtain may be damaging to the people it concerns, either because they learned it from them or because it is about them. Prosecutors commenting on ongoing cases could bias the public. Public statements by a prosecutor could label the defendants as criminals, even if they have not been found guilty. Article 38 stipulates:

Article 38

Duty of discretion

1. A Public Prosecution Service magistrate **shall not** make statements or comments on a case, **except when authorized** to do so by a superior to protect his or her honour or to realise another legitimate interest.
2. The duty of discretion **shall not apply** to information aimed at exercising a legitimate right or interest, notably access to information, provided that such information deals with matters not covered by the sub judice rule or the professional confidentiality.

Prosecutors must not talk about cases without permission. Their superiors should not give permission unless it is necessary to defend the prosecutor's honor or for another reason important to the pursuit of justice. An exception for defending the prosecutor's honor exists because the honor of the prosecutor is very important. Prosecutors ensure justice in Timor-Leste by being independent, respecting the law, following the principle of searching the truth, prosecuting criminals and by not prosecuting innocent people. If their honor is questioned, people might lose trust in the public prosecutors and fear that their claims are not going to be dealt by people that are honorable and capable. Fear and mistrust undermine people's belief in, and respect for, the state. Prosecutors must ask their superiors because the supervisors are better able to be objective about the importance of defending the prosecutors' honor compared to the importance of not divulging any sensitive information.

Article 38.2 allows prosecutors to discuss some information when it is deemed necessary for them to do their job, except information that is held by other rules to be confidential. This exception exists because of the importance of the prosecutors being able to use their discretion in determining what to tell people when, for example, they need to clarify the public opinion or need to share information about a case in order to protect people's safety, without revealing details of the case.

When deciding what information to divulge, the key is to first make sure it is not confidential, and then if it is not, the prosecutor must balance the value of the information or cooperation they expect to get from divulging the information against all of the potential costs of divulging the information. When the prosecutor is unsure about the costs and benefits, they should ask their superior. Of course, in specific circumstances, prosecutors may be obliged to make some minor comments on a case in the course of an investigation, for example to give sufficient reason to ask questions or otherwise obtain information. The law permits comments of this kind without special authorization.

Therefore, Article 38 establishes a broad duty of discretion. It then allows for exceptions, but only with explicit authorization (Article 38.1). It also provides a wider exception (Article 38.2) that allows the prosecutor to perform effectively without fear of violating the duty of discretion.

## **Questions**

1. Should the duty of discretion for a prosecutor be greater or less than for a judicial magistrate?

2. Why make an exception to the rule?
3. Leo is a public prosecutor stationed in Oecusse. He is assigned to a prosecution of suspected domestic violence by a well-known local businessman, Augusto, who has made a good deal of money selling consumer goods transported from the capital. He is just beginning to gather evidence when he is approached by a reporter from the Timor Post hoping for juicy details about the investigation. Leo responds that he does not want to appear to attempt to influence the case so he will not comment. The reporter then accuses Leo of accepting a bribe from Augusto not to pursue the case vigorously. Leo defends himself by explaining that he has not even met Augusto yet, and that in fact Augusto does not know he is being investigated. The reporter is satisfied with his answer, and offers to help in any way he can. Leo tells the reporter he is trying to figure out whether Augusto was in Oecusse or Dili on the evening in question and hopes the reporter will relate anything he knows that might help. What has the prosecutor done wrong? What has he done right?

### **Answers and Explanations**

1. Both have the same duty of discretion. However, and despite the fact that prosecutors must aim for the search of the truth, they are naturally less neutral than the judge, as they lead the prosecution. Nonetheless, the duty of discretion applies equally to both
2. There may be cases where a prosecutor is being unfairly accused of something, and can defend him or herself without doing much harm. A superior's permission is required to ensure that this exception is not abused or overused. Furthermore, there may be cases where it is necessary to disclose some information regarding a case to guarantee other legitimate rights or

interests as, for instance, guarantee people's safety. If there is a criminal acting in a certain area of Dili, it is important that such information is disclosed in order to allow people to take some precautions. However, this disclosure must be limited and cannot include details such as who are the suspects.

3. Leo should not even have divulged the investigation was occurring, or that he was assigned to it. Also, while his honor may have been at stake against the corruption accusation, he should have asked permission from his superior before he said anything. The superior has more experience with this and can be more objective about it. Also, his request for help from the reporter was probably inappropriate unless he had specific reason to believe the reporter would have relevant information. It is important that the prosecutor exercise careful judgment and only divulge information when there is a good reason to expect that it will be more valuable than the divulging is costly. The reporter was more likely to spread confidential information than to help the investigation, and Leo should not expose information without a larger expected benefit.

## 6. DISCIPLINE AND PUNISHMENT

### Section Objectives

- To understand what happens when prosecutors violate their ethical duties.
- To discover what behaviors result in what penalties.
- To learn how to avoid being punished for implementation of an illegal decision of a superior.

### Section Overview

- Prosecutors have many duties, the violations of which result in penalization of varying degree based on the severity of the offense and other factors surrounding it;
- If prosecutors are told to do something that they think is illegal or incorrect by a superior they must ask to get the order in writing and then may refuse the order in writing.

### What happens when prosecutors violate their duties?

There is a range of possible penalties, from a warning to removal from service or even criminal liability. The violations of disciplinary nature are decided by the Superior Council of the Public Prosecution Service. If there is a criminal violation, the criminal proceeding is autonomous from the disciplinary proceeding and shall be conducted by a judicial magistrate appointed by the Superior Council of the Judicial Magistrates. The disciplinary process is detailed in Articles 69, 70, 71, 72, 73, 74, and 75:

Article 69

Scale of penalties

1. Public Prosecution Service magistrates shall be subject to the following **penalties**:
  - a) warning;
  - b) recorded admonition;
  - c) fine;
  - d) compulsory re-assignment;
  - e) suspension from functions;
  - f) release from duties;
  - g) compulsory retirement;
  - h) dismissal.

Article 70

Penalty of warning

2. A penalty of **warning** shall apply to minor disciplinary offences that should not go without a remark.

Article 71

Penalty of recorded admonition

2. A penalty of **recorded admonition** shall apply to minor disciplinary offences that might **disrupt the exercise** of the functions of a Public Prosecution Service magistrate, or have repercussions thereon, in a way **incompatible with the dignity** that is required of him or her.

Article 72

Penalty of fine

3. A penalty of **fine** shall apply to cases of **neglect or lack of interest** in the fulfillment of the duties attached to the position.

Article 73

Penalty of compulsory re-assignment

3. A penalty of **compulsory re-assignment** shall be applicable to offences that involve **disruption of the prestige** required of the Public Prosecution Service magistrate to remain in the environment where he or she exercises his or her functions.

Article 74

Penalty of suspension from exercise of functions and penalty of release from duties

4. A penalty of **suspension** from exercise of functions or a penalty of release from duties shall apply to cases of **serious neglect or serious lack of interest** in the fulfillment of professional duties or when a Public Prosecution Service magistrate is handed out a **prison sentence**, except where the sentence imposes a penalty of dismissal.

Article 75

Penalty of compulsory retirement and penalty of dismissal

3. Penalties of **compulsory retirement** or **dismissal** shall be applicable where a Public Prosecution Service magistrate:
  - (a) reveals **permanent incapacity** to adapt him or herself to the requirements of his or her functions;
  - (b) reveals **dishonesty, serious insubordination**, or has an **immoral or dishonourable** conduct;
  - (c) reveals professional **incompetence**;
  - (d) has been sentenced for a crime involving a blatant and serious **abuse of his or her functions** or a clear and serious violation of the duties inherent therein.

Because the job of the prosecutor is so important, it is essential that prosecutors be held accountable to do it correctly and ethically. Without the ability to penalize bad behavior and to

correct it, to discourage prosecutors from having bad behavior in the first place, or to dismiss prosecutors once they have shown not to be committed to upholding their oath, the state of Timor-Leste would be unable to function properly as a state based on the rule of law.

Article 70 provides for the lightest penalty, applicable when a prosecutor has done something wrong but his or her action consists of a minor offence. The superior may warn the prosecutor in the course of their work, but Article 70 if different - although the statute determines that in this case there is no need for a formal proceeding, this is a disciplinary action and is more consequential than telling the prosecutor that he did something wrong - the prosecutor has to be heard and to have a chance to defend him/herself. After this verbal warning, a prosecutor must change his or her behavior and act professionally towards their office.

A written admonition is designed for relatively minor offences that are still bad enough to disrupt the functions of the office or that reflect poorly on the dignity and esteem inherent to the prosecutor's functions. Since the admonition under 71.2 is recorded in the prosecutors file, it will be remembered by the institution indefinitely and may have negative effects on the prosecutor's career. Accordingly the possibility of a recorded admonition for ethical violations should serve as an incentive to behave well and uphold all ethical duties.

Prosecutors have taken an oath to serve justice which they can only do if they work diligently. Any laziness or disinterest not only reflects poorly on the office and violates the oath the prosecutor took; it also violates the prosecutor's ethical duties under Article 72.3. It means that an essential aspect of Timor-Leste's administration is being neglected by those sworn to serve their country. Since the government is paying the prosecutors out of its financial resources, if prosecutors are taking money while not working diligently the Timorese people are not getting their money's worth. Accordingly, fining the prosecutors serves as a punishment for the

negligence or disinterest of the prosecutor, and as a deterrent to others who may be tempted to misbehave.

Compulsory re-assignment, under Article 73.3, is applicable to prosecutors who have violated their ethical obligations and oath so badly as to have brought disrepute upon their office. While this is also a serious enough violation as to warrant dismissal sometimes, if it is felt that the prosecutor can still recover from prior bad behavior and become a fully respectable prosecutor again, the Superior Council may choose to re-assign him or her instead of firing that prosecutor. This also serves the purpose of removing the prosecutor from places that may have a bad influence on them and from an area that can no longer respect the prosecutor.

A suspension, under Article 74.4 is either for cases of serious neglect of duties or when the prosecutor is sentenced to prison, but the sentence does not determine the prosecutor's dismissal. The disinterest and neglect of duties are condemned for the reasons mentioned above, and when this disinterest or neglect are serious, they warrant punishing them with the suspension of the prosecutor. The suspension is a serious penalty that not only has a public impact (as people will see the prosecutor is not performing his/her duties for having been suspended) but also results in the loss of some of the prosecutors' benefits, such as remuneration and seniority. Additionally, the time away from the office might give the prosecutors the opportunity to consider their actions and to change their attitude and work ethics.

If a prosecutor is sentenced to prison, the sentence itself may determine that the prosecutor is to be dismissed from office if the crime has been committed with apparent and serious abuse of the prosecutor's functions or in serious violation of the duties inherent to them. However, in other instances, the prosecutors may be able to still serve their role once they finish serving their sentence. In those cases, the prosecutors are only suspended until they can resume their duties.

In circumstances where the prosecutors have shown themselves to either be incapable of doing their job because of a lack of skill or where they have shown insubordination or an immoral character, they are to be dismissed as provided for by Article 75. It is important that these prosecutors be dismissed as they have shown themselves to be incapable of performing their duties and upholding the interests of the State and of justice in Timor-Leste.

### **How is the degree of penalty determined?**

Article 77 explains how penalties should be determined:

<p><u>Article 77</u> <u>Degree of penalty</u></p> <ol style="list-style-type: none"><li>1. In determining the degree of penalty due consideration shall be given to the <b>seriousness of the act</b>, the <b>culpability</b> of the offender, his or her personality and the circumstances in favor of or against him or her.</li><li>2. A penalty may be considerably extenuated, in which case the penalty of the next lower echelon shall be imposed, where previous, subsequent or concurrent circumstances markedly <b>diminish the seriousness</b> of the act or the culpability of the offender.</li></ol>
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Article 77.1 states that the persons taking disciplinary action must apply penalties that are appropriate and adequate to each case, respecting the principles of proportionality and justice. Just as prosecutors are supposed to consider the seriousness of the acts they prosecute, the culpability of the offenders, and the circumstances of each case when determining what the needs of justice demand, so should the prosecutors be penalized justly. Justice requires a very careful balancing of all factors to ensure that the penalty matches the infraction.

Article 77.2 requires all actions surrounding the misbehavior of the prosecutor to be taken into consideration. That means, for example, that if the prosecutor has been working diligently and behaving ethically, and especially if he/she tried to reduce any damages from what he/she did wrong after the fact, that prosecutor should be punished less severely.

### **What can prosecutors do if they believe they are being asked to act inappropriately?**

The process for dealing with potentially illegal orders is addressed in Article 33:

<p style="text-align: center;"><u>Article 33</u> <u>Limits on managerial powers</u></p> <ol style="list-style-type: none"><li>1. A Public Prosecution Service magistrate may ask his or her immediate superior that an order or instruction <b>be issued in writing</b>, and this is the way it should be when such order or instruction is meant to take effect in a certain proceeding.</li><li>2. A Public Prosecution Service magistrate should <b>refuse to comply with an unlawful directive, order or instruction</b> and may refuse it on grounds of a serious violation of his or her legal conscience.</li><li>3. The refusal shall be in <b>writing</b> and include a presentation of the <b>reasons</b> invoked.</li></ol>
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Prosecutors always have the right to ask for an order to be given in writing under Article 33.1. This can be important when the prosecutors are unsure if the order they are being given is ethical or legal. Prosecutors take an oath to uphold the Constitution and justice. They cannot obey an order contrary to those obligations.

A prosecutor asking to get the order in writing is valuable for several reasons. First, it will more clearly set out what the prosecutor's superior wants the prosecutor to do. If there was a

misunderstanding about the order and the prosecutor heard the wrong thing, this may clarify it. Second, it makes the prosecutor's superiors think more seriously about the implications of what they are saying. If the prosecutor's superiors are ordering something that may be unethical, having to think about it for a longer time might make them change their minds. Third, the superior officer may not want to tell the prosecutor to do something unethical on paper, since there will be a record of it. If the superiors wanted to do something unethical, they would probably prefer that they just tell the prosecutor to do it so that when it is done, if someone catches the ethical violation, the superior can simply say that he did not give the order to the prosecutor, but that the prosecutor did it on his or her own. Fourth, it is necessary to have the order down in writing if the prosecutor is going to decline to do it, which must also be done in writing. This is so if there is a hearing about the issue later, the judge at the hearing can see exactly what the order was and what were the reasons invoked for the refusal, while not having to rely on the testimony of those two people which might conflict with one another.

A prosecutor must not comply with unlawful or unethical orders (Article 33.2). The prosecutor's duty is to the state as embodied in the Constitution and not to his or her superiors. Violating the law on the order of the superior does not make the violation any less severe; since it was still a betrayal of the prosecutor's oath.

When prosecutors refuse an order, Article 33.3 states it is necessary to write the reasons why they are unwilling to comply. A compelling written rationale might make the superiors change their mind. Furthermore, as we discussed above, it will be necessary to have the refusal in writing, and the prosecutor's reason for refusal, during a hearing on the issue.

In conclusion, prosecutors are in charge of ensuring that Timor-Leste is a just nation, made of equals, and governed by the rule of law. Because this job is incredibly important, every

possible measure must be taken to ensure it is done well. Prosecutors must be held to the highest levels of professionalism, honesty, and integrity. It also means that if a supervisor is trying to give the prosecutor orders that are contrary to this, it is important for prosecutors to uphold their oaths and to refuse to comply with these orders.

## **Questions**

1. What should prosecutors do if their superior is giving them an order that they do not agree with?
2. What should they do if they think that that order is unlawful or unethical?

## **Answers and Explanations**

1. They should talk politely with their superior about why they think the order is a bad idea and should try to convince them of what they think would be better. Even if discussing the matter with their superior is awkward and difficult, it is important that they do so to make sure that justice is being done as well as possible. However, if the superior's order is not unethical or illegal and does not represent a serious violation of the prosecutor's legal conscience, then ultimately the prosecutor needs to defer to his or her superior's authority and follow the order.
2. In this case they should also start by talking to their superior about why they disagree with the decision. It is important that the prosecutors do this in a polite, professional, and dignified manner. Prosecutors are representatives of the state, so they must always carry themselves with dignity and respect. If the superior still wants to give the order the prosecutors must ask that he or she gives them the order in writing. Then, the prosecutors must write a response in

which they formally decline to follow the order and explain the legal and/or ethical reasons why. Even if it is difficult to go against an order, it is essential that they do so, as their integrity and independence, reflected in their oath, require it.

## 7. REVIEW

This chapter examined the statutory ethical requirements of public prosecutors and the rationale behind them. It described the public prosecutor's basic obligations and how they relate to the fundamental idea of upholding the Constitution of Timor-Leste. We looked at the need to avoid conflicts of interests to ensure no one gets, or appears to get, special treatment before the law. We explained what professional activities are incompatible with public prosecution service because of the potential loss of independence, distraction or conflict of interest they might create. We learned what political activities public prosecutors must avoid in order to maintain - and show the public that they are - impartial, independent and not corrupt. We studied the duty to maintain discretion in order not to abuse information and to preserve independence. Finally we learned the possible penalties if these duties are violated and how one can avoid having to fulfill an unethical or illegal order from a superior.

This text could not hope to provide an analysis of all possible questions of legal ethics that a public prosecutor might encounter, nor could we fully review the entire text of the law. Our purpose was to highlight some of the most important provisions, and to begin to apply this law. Read the entire legal diploma and create and discuss some hypothetical applications of the law. What scenarios might require certain applications? In what scenarios might certain provisions come into conflict? How might this conflict be resolved? Are there any parts of the statute that help to resolve the conflict? What provisions help explain one another? What provisions might a prosecutor need to apply every day?

# **IV. STATUTE OF THE PUBLIC DEFENDERS SERVICE**

## **1. SCOPE OF THE SERVICES OFFERED BY A PUBLIC DEFENDER**

### **Section Objectives:**

- To understand the role of public defenders in Timor-Leste.
- To understand who the public defenders serve.

### **Section Overview**

- Public defenders help to ensure access to justice in Timor-Leste, especially for the poor.
- Public defenders represent and advise citizens on a wide variety of issues and in a wide variety of judicial, extra-judicial and government proceedings.
- Public defenders cannot deny representation or aid to eligible citizens.
- Public defenders are responsible for representing and aiding those who cannot afford a private lawyer.

### **The vital role of the public defender in the Timor-Leste justice system**

The Timor-Leste Constitution guarantees access to the courts regardless of economic means. The Office of the Public Defender plays a vital role in fulfilling this guarantee by providing access to the courts for many indigent citizens. Without public defenders (or court

assigned defense attorneys paid for by the state), only those able to afford the price of a private lawyer could make or defend legal claims. Everyone else would have to go without professional legal representation, which places those people at a disadvantage. The legal system would become systematically unfair, and the rule of law would be undermined. The Office of the Public Defender helps ensure that the Constitution applies equally and for the good of all.

The Constitution also declares that the role of all lawyers is to support justice and the rights and interests of the citizens of Timor-Leste. Public defenders are equally bound to this duty. They serve justice and citizens' rights and interests by performing all their duties zealously and scrupulously while adhering to the limits and responsibilities laid out in the Public Defender's Office Statute.

## **What is the role of public defenders in Timor-Leste?**

The primary responsibility of those who work at the Office of the Public Defender is to ensure that all citizens have access to the courts and the judicial system.

### Article 2

#### Incumbencies

1. It is **incumbent** on the Public Defender's Office **to ensure access to the Courts and access to the law to all that seek it out**, subject to the terms of this statute.

Legal disputes, both criminal and civil, whether pursued through the courts or alternative channels, can be confusing, expensive and intimidating to citizens. The Office of the Public Defender helps to ensure, as much as possible, that the potential confusion and expense of accessing the legal system does not *prevent* citizens of Timor-Leste from accessing the courts and

justice. Public defenders have a special responsibility to those segments of the population that might otherwise not have access to the judicial system because of this confusion and expense, especially the poor and underserved segments of the population.

In order to ensure that all citizens have access to justice, all services of the public defenders are free of charge and the quality of services provided does not depend on the wealth or status of the client.

Article 4  
Gratuitous nature

The services provided by the Public Defender’s Office are **free of charge**.

Article 4 makes it possible for even the very poor to have access to legal counsel, advice and representation because services do not depend on ability to pay.

In ensuring public access to justice, public defenders have a role in a wide variety of judicial processes.

Article 2  
Incumbencies

2. It is **incumbent** on the Public Defender’s Office to exercise and practice the following, subject to the terms of this statute:

- a) Legal representation of individuals that seek it out **in any Court** in East Timor, **regardless of the type of legal action** ...
- b) Legal representation of citizens that seek it out **in any mediation or arbitration** proceeding in East Timor;
- c) Legal representation of citizens that seek it out **in any extra-judicial proceeding that would tend to settle legitimate interests in litigation**;
- d) **Legal representation of citizens that seek it out in any judicial or extra- judicial proceeding that would tend to**

**promote conciliation** of the litigating parties;  
e) The representation of citizens that seek it out, **before any State agencies or services**, namely the police force, the prison system, the tax service, the Customs service, the Immigration service, the Social Security service, the registry services, the Notary Public services, and the consumer protection services;  
...  
g) Legal **consulting** services.

As you can see from this provision of the statute, public defenders have a role in representing citizens in most aspects of the judicial system, as well as, other aspects of public life in Timor-Leste. First, public defenders are responsible for representing individuals at all levels of the judicial system, including both the trial and appellate level. Moreover, public defenders adopt all types of court case: civil or criminal; divorce, paternity, murder, theft, or any other case.

Second, public defenders are responsible for representing citizens in many types of disputes that are handled outside of the courts. This includes those cases that are pursued and resolved through extra-judicial channels, such as negotiation, mediation or another system. These processes are important ways of resolving disputes in Timor-Leste for cultural as well as other reasons. For example, negotiations are usually much cheaper and faster than a trial.

Third, public defenders represent citizens before a variety of state agencies. Public defenders can provide a valuable service to citizens seeking to protect their rights before these agencies and to receive benefits that they are entitled to. Several examples of these state agencies are listed in the statute, such as the police force and the tax service. An example of this would be a public defender being present while the police question a murder suspect. Another example would be a public defender helping an elderly woman, who is entitled to a pension, get those payments.

Finally, public defenders are also responsible for providing legal counseling. This counseling can be on a variety of topics. For example, a public defender may meet with a client to decide if he or she has any legal right of action, in other words, whether the client can bring a case or legally petition the government in some way to get what he or she deserves. This could include a public defender meeting with an elderly woman to discuss whether or not she is entitled to a pension. A public defender might also advise citizens on whether or not they are entitled to representation by a public defender, what possible legal routes they may pursue, legal strategies, and so on.

### **Who do public defenders represent?**

Public defenders are responsible for advising a wide variety of citizens, groups and organizations. At the most fundamental level, a public defender must help all those who properly request their aid and do not have the financial means to pay for another lawyer, and all those whom the courts require them to represent.

#### Article 5

#### Beneficiaries

1. Except as provided in law to the contrary, **all those who request it from this institution and declare that they do not have the means to bear the expense of a lawyer have a right to the assistance of the Public Defender's Office**, subject to the terms of this statute.  
...
3. **All those who are referred by the Court for assigned representation** also enjoy the right to aid from the Public Defender's Office.

As you can see from Article 2, the services of public defenders are reserved for those that cannot afford a lawyer. The Office of the Public Defender bears a special obligation towards the neediest citizens of Timor-Leste in helping to ensure them access to the legal system and justice. When a public defender believes that someone has the means to afford a lawyer, he or she should inquire into the financial status of that person using a process outlined in Article 6.

Article 6

Means test for users

1. **When it is suspected that the user has the means to bear the expense of a lawyer**, the Public Defender's Office **invites him/her/it to prove the lack** of economic and financial means.
2. **When**, in view of the proof submitted, **the Public Defender's Office still has well- founded suspicions regarding the user's lack of means and the latter continues to insist, the matter is referred to the judge**, who shall decide in a non-appealable decision, after requesting other supplementary proof if deemed necessary.
3. The user **may employ any evidence-finding procedures allowed by law**.
4. **Under the circumstances set out in No. 1 above, the obligation of the Public Defender's Office to intervene is suspended, except in the case of a person who is imprisoned or detained**.
5. The provisions set out above **do not apply to those referred by the Court** for assigned representation.

Let us use the following example to illustrate this process. Pedro is a public defender in Dili. He is approached by Francisco, a local landowner, about a land dispute he is having with his neighbor over a two square kilometer patch of land between their houses. Francisco would like to

sue his neighbor for possession of the land and for the money he believes the neighbor earned by illegally growing coffee on that land. During their first interview, Pedro discovers that Francisco also owns a large area of land with a new housing development where many foreign diplomats live. Because of this, Pedro believes that Francisco is actually relatively wealthy and could afford a lawyer. Pedro’s suspicions wouldn’t matter if a judge assigned the Office of the Public Defender to represent Francisco. But, let’s assume that a judge did not assign him and that Francisco approached the Office of the Public Defenders on his own. The first step Pedro should take is to ask Francisco to prove that he cannot afford a lawyer. Francisco provides a bank statement and the statements of his friends and family, saying that he quite poor. Pedro, however, believes that Francisco must have another bank account because there is no reference to any of the money he has earned from the housing development. Pedro should then refer the decision to a judge to decide. Whatever the judge says on the issue is final. Until the judge makes a ruling on this, Pedro is not required to take any action on Fransisco’s case. If the judge decides that Francisco is in fact able to pay for a lawyer, the Office of the Public Defender is no longer obligated to represent him. If, however, the judge decides that Francisco cannot pay for a private lawyer, the Office of the Public Defender is again obligated to represent him.

The Office of the Public Defenders cannot deny service to those who are qualified to receive it.

Article 3  
Mandatory nature of the services

The Public Defender’s Office **may not refuse to provide its services if it is requested to do so.**

Requiring that the Office of Public Defenders not deny aid to those qualified does not mean that individual public defenders must participate in all case they are assigned. There are some times, which we will discuss in a later section, when an individual public defender must not represent someone because of a conflict of interest. Nonetheless, Article 3 does mean that the Office of the Public Defender cannot deny aid.

The law also specifically lists certain individuals and groups that public defenders may represent and advise. These lists are not meant to identify specific types of possible beneficiaries, but instead, to help ensure comprehensive representation and to prevent confusion. In some cases, these lists identify individuals or groups whose status under the law might otherwise be ambiguous. By listing them individually, the statute ensures that they may receive aid from the Office of the Public Defender. For example, the statute specifically lists privately held, non-profit organizations as being eligible.

Article 5  
Beneficiaries  
**2. Privately held, non-profit organizations may benefit from the assistance of the Public Defender’s Office.**

The statute also makes clear that public defenders are responsible for representing either, and potentially both, parties in civil disputes. Public defenders are a resource for all citizens, and are there to ensure that everyone receives equal access to the courts. It would not be fair if, for example, only defendants in civil cases had access to the services of public defenders. If this were true, a poor farmer in a rural area would not be allowed to use the services of a public defender to sue his rich neighbor who had been cutting trees on his land. The opposite, where

only plaintiffs have access to the services of the Office of the Public Defender, would be equally unfair.

Public defenders are also responsible for representing those who are not present, cannot be located, or who have been declared incompetent. Those that cannot be present or cannot be found are unable, for obvious reasons, to find and hire a lawyer, but they must still be given a fair trial. Those that have been declared incompetent are often among the poorest citizens, and therefore, are unlikely to have the means to find and hire their own lawyer.

Article 2

Incumbencies

2. It is **incumbent** on the Public Defender's Office to exercise and practice the following, subject to the terms of this statute:
  - a) Legal representation of individuals that seek it out in any Court in East Timor, regardless of the type of legal action and **regardless of whether the parties are in the plaintiff or defendant position**;
  - ...
  - f) The functions of **representative of one who is absent, whose whereabouts are or incompetent**, taking the place of the Public Prosecutor's Office, in those cases provided for in law;

## Questions

1. Assume that the Office of the Public Defender is approached in each of the following situations. Is it appropriate for a public defender to represent the person in these situations?
  - a. Madalena asks for a public defender's help in getting a divorce from her husband.
  - b. Emelia would like to sue her former boyfriend for child support.

- c. Julio cannot find his son.
  - d. Victor owns a clothing store in downtown Dili. He has a shipment of clothing waiting at the port, but the government will not release it to him. He does not understand why he cannot get his clothing.
2. Jacinta is a public defender. In deciding whether or not to represent João, who appears to be able to afford his own lawyer, how should she deal with each of the following?
- a. A judge mandates that she represent João.
  - b. João is accused of committing murder and is imprisoned until the trial.
  - c. Jacinta did not believe João when he claimed that he could not afford a lawyer and referred the case to a judge. The judge ruled that João could not afford a private lawyer. Jacinta believes that the judge was wrong.

## **Answers and Explanations**

- 1.
- a. It would be appropriate for a public defender to help Madalena with her divorce. A public defender can represent someone in civil, as well as criminal matters, and can represent the plaintiff as well as the defendant.
  - b. It would be appropriate for a public defender to help Emelia for the same reasons in part A.
  - c. Locating missing people is the responsibility of the police, not a public defender. It is not appropriate for a public defender to represent or help Julio to find his son, although he may aid him in finding the correct office.

d. It would be appropriate for a public defender to help Victor get his shipment of clothing, or to at least discover why it is being held. This would likely be a dispute before customs officials or the port authority, which a public defender can be called upon to do. Bear in mind that the defender could ask Victor for proof that he cannot afford a lawyer, since he runs a business.

2.

a. If a judge mandates that a public defender represent someone, he or she must do so. In this case, João's ability to pay for a private lawyer does not matter and Jacinta should simply proceed with the case without further inquiry on this matter.

b. Jacinta may inquire into João's financial situation. She may also refer the issue to a judge for a final ruling. Until the judge makes a ruling, however, Jacinta must continue to represent João. This is because he is in prison. If this had been a civil matter, or João had not been imprisoned or detained, Jacinta's obligation to represent João would have been suspended until the judge ruled.

c. It does not matter that Jacinta believes that the judge is wrong. The judge's ruling here is final and Jacinta must continue to represent João fully and zealously.

## 2. THE PUBLIC DEFENDER CAREER PATH

### Section Objectives:

- To understand the requirements for becoming a public defender.
- To understand the career path of a public defender.

### Section Overview

- In order to qualify for the Public Defenders career path, a candidate must:
  - Be a citizen of Timor-Leste;
  - Have full enjoyment of all of his or her civil and political rights (for example, he or she could not be in prison or legally incompetent);
  - Have a license to practice law in Timor-Leste;
  - Pass the training course at the Legal Training Center;
  - Speak and write Portuguese and Tetum;
  - Comply with the requirements to be a civil servant.
- Public Defenders enter the career path as Public Defenders 3<sup>rd</sup> class and may be promoted over time to Public Defenders 2<sup>nd</sup> class and Public Defenders 1<sup>st</sup> class.

### Who may qualify?

The Public Defender's Office is comprised of Public Defenders 1<sup>st</sup> class, 2<sup>nd</sup> class, and 3<sup>rd</sup> class. In addition, there may also be Intern Public Defenders. Intern Public Defenders are not

part of the career path and are only serving temporarily. Those who wish to enter the Public Defender's Office and be on the career path enter as Public Defenders 3<sup>rd</sup> class. The Public Defender's Law describes who may qualify as a public defender. Intern Public Defenders, because they are not eligible for the career path, do not necessarily have to meet all of these requirements.

Article 19

Access to the career of defender

1. The following are the **requirements** for entry to the career path of public defender:
  - a) Be a **Timorese citizen**;
  - b) Be in **full enjoyment of one's civil and political rights**;
  - c) Be **licensed to practice the Law**;
  - d) Have successfully completed the **training internship** provided for in Decree-Law No. 15/2004 of September 1;
  - e) Have **writing and speaking knowledge of the two official languages** of East Timor;
  - f) Comply with the **other requirements set out in the Civil Service Statute**

In order for someone to be eligible to become a Public Defender 3<sup>rd</sup> class, he or she must:

- Be a citizen of Timor-Leste;
- Have full enjoyment of all of his or her civil and political rights (for example, he or she could not be in prison or legally incompetent);
- Have a license to practice law in Timor-Leste;
- Pass the training course at the Legal Training Center;
- Speak and write Portuguese and Tetum;
- Comply with the requirements to be a civil servant.

## **Promotion**

All public defenders enter the career path as Public Defenders 3<sup>rd</sup> class. After three years, good performance reports, and if there is an opening, a Public Defender 3<sup>rd</sup> class may be promoted to Public Defender 2<sup>nd</sup> class. After another four years, good performance reports, satisfactory grades on specific tests, and if an opening is available, a Public Defender 2<sup>nd</sup> class may be promoted to Public Defender 1<sup>st</sup> class.

Given the fact that public defenders are part of the public service and do not profit from their cases individually, it is important to offer them an attractive career path. The possibility of being promoted and advancing in the career path keeps the defenders motivated to deliver high quality work and serve their clients in the best way possible.

### 3. DUTIES OF PUBLIC DEFENDERS

#### Section Objective

- To explore the duties that a public defender has to his or her clients, particularly the duty to **inform** the client of his or her rights and obligations and the duty to **secrecy**.

In particular:

- To learn how and why to inform clients of their rights and obligations;
- To explore why public defenders must be careful about what information they share or allow others to learn;
- To learn what professional information defenders must guard;
- To learn what behavior can violate secrecy; and
- To develop judgment about what information is sensitive.

#### Section Overview

Public defenders have the duty to defend their clients with their fullest efforts and with the highest standards of care. The two core elements of a defense lawyer meeting the high standard required by the law are that, first, the defender must inform the client of their legal rights and obligations, and second, to maintain secrecy regarding the client's case. Both are essential. A failure to fulfill either of these duties may cause the defender to face debarment or even possible criminal penalties.

## What duties do public defenders have?

The Public Defender's Office Statute outlines the many duties of a public defender. In addition to the duties owed to specific entities within the legal system, most especially clients, a defender has a more general duty to the whole of the judicial system. Because of the important role that a defender plays within the legal system, a defender must respect his role within that system as well as the ideals of justice that the system seeks to uphold.

### *Duties to the client*

While a private lawyer owes duties to many parties and the judicial system, his or her primary focus is the client. Similarly, a public defender exists as an advocate and representative of his or her clients. No one else in the system has the same responsibility towards the client. Therefore, the public defender is the client's primary ally within the judicial system and must devote all possible efforts to the client. Because of this special relationship, it is particularly important that a public defender is aware of and understands his or her duties towards clients.

Article 46  
Duties of defenders

1. The following are the duties of the defenders:

...

c) To clearly and objectively **inform users regarding their rights and obligations and about the foreseeable results** of various legal options that might be chosen in the particular circumstances;

d) Act **assiduously and zealously**;

e) Scrupulously respect professional **secrets**;

...

Article 48

Guarantees and prerogatives of public defenders

2. The State also guarantees public defenders the following:

...

**d) Respect for professional confidentiality in relations with users**, as well as protection of sources;

**What information must a defender inform his or her clients of and why?**

The public defender serves the client when the client has no one else to represent him or her. This means the defender has a special role towards the client and acts as the intermediary between the client and the legal system. The client, then, has only the defender to explain what others are required to do for the client, what others are barred from doing to the client, and what the client is required to and barred from doing. For example, a client may not realize that an opposing party trying to bully, bribe or blackmail the client into pleading a certain way is against the law. In such a scenario, the law would be unable to protect the client unless the public defender informs the client of the opposing party's illegal conduct. A client might also not be aware that he or she should not try to influence opposing witnesses. If a public defender does not make the defendant aware of the limits placed on him or her by the law, he or she may break those limits without realizing, and still be held responsible. The public defender is also the only person who can explain to the client what the client's legal options are and what consequences may flow from each option. The client has no other way of receiving this information and must depend on the defender to adequately explain.

This information is important because if the client does not know the rights the legal system guarantees, others may be able to harm or take advantage of him or her, or the client may

go without benefits the Constitution guarantees. If the client does not know the obligations the legal system requires of him or her, he or she may fail to perform them and face punishment because the client simply did not know what was required. The defender must inform the client in such a way that the client gets all the information, and also *understands* it. This will likely require the defender to use plain language rather than legal terms. For example, in a criminal case, the defender should inform the defendant that he or she has a right to remain silent instead of testifying when testifying would incriminate the defendant. The defender should explain this without using legal terms, for example, telling the defendant that he or she does not need to answer a question when the answer would make the judge or jury believe the defendant was guilty (of course, the defender should also explain any disadvantage to this strategy, such as the risk that the judge or jury will infer the defendant is hiding something).

The defender must inform the client of *all* rights and obligations. These are usually straightforward because they are categorical, limited in number and always relevant. On the other hand, it may not be practical for the defender to inform the client of *all* possible legal options and *all* possible consequences of different actions. The defender must then judge which are the most important options and consequences to the client. The defender should ask him or herself, “What information would *I* like to have if *I* were the client? What information would help the client make an informed decision?”

### **What information must defenders keep secret from everyone other than the client?**

The contents of communications between a public defender and client are, and must be, kept confidential. The state “guarantees..[r]espect for professional confidentiality,” under Article

48. This confidentiality is both a right and a responsibility. It is a right because the police and courts cannot compel a defender to reveal what a client has said. It is also a responsibility because a defender must maintain this secrecy in order for it to be meaningful, and thereby, protect the defendant. Public defenders have a duty to maintain secrecy “scrupulously,” under Article 46.

Public defenders, whether engaged in a civil or criminal matter, may acquire a great deal of sensitive information as part of their official role. They should not be permitted to unfairly take advantage of or abuse this information. The information they obtain may be damaging to the people it concerns, either because the defender learned it from a client or because it is about a client. For example, a piece of information if made public may be embarrassing to a client (such as an alibi that places the client in an extramarital affair); implicate a client in a crime (another crime may come up in discussions of the crime at issue); or if the information becomes public, another party, such as a former co-conspirator of the client, may realize the information originated with the client and retaliate (see the hypotheticals at the end of this chapter for more detail).

It is important for a public defender to maintain confidentiality because it helps to bring stability and predictability to the legal system. It also helps to ensure that clients will trust and rely on their lawyers, which is important to the rule of law in Timor-Leste. For example, let’s say that Juliao is a public defender and Mauricio is a client. The owner of the land on which Mauricio has been squatting with his family is trying to evict him. What would happen if Mauricio is afraid that he has no legal claim to the land, and he suspects that Juliao will tell the government anything that he tells him in his capacity as public defender? He might be afraid to talk to Juliao at all, as doing so might hurt his chances of staying in his home. Lacking representation, Mauricio would not be able to find out whether his case was strong, and therefore, might fear investing additional

resources in the land by, for example, improving his house or planting crops. Without knowing the details of Mauricio's situation, Juliao would not be able to tell him whether or not he had a right to the land. In other words, without confidentiality, there would be no real reason for Mauricio to go to Juliao at all. And perhaps without his guidance he would not be able to figure out what he must do in order to fix the situation. You can begin to see the importance of confidentiality in the legal system in supporting the use of and reliance on lawyers.

### *Exceptions*

While confidentiality can be very important to the client, it is not practical for a public defender to keep absolutely all information he or she acquires secret. As a result, there are some limits to the duty of confidentiality. The right to secrecy is not absolute. Article 46.1(e) does not force defenders to keep absolutely *all* information related to a case secret. Instead, the text says to "respect **professional** secrets," not to keep perfectly silent regarding a case. Professional secrets only extend to professional matters that were disclosed while the defender was *acting* as the client's defender, and the client may waive even this right.

In other words, in order for information to be subject to the confidentiality provision here two things must be true: 1) the defender must be representing the client (not just a friend); and 2) the facts to be kept secret must relate to their relationship as defender and client. Let's return to Juliao and Mauricio. Now say Juliao is a friend of Mauricio's, and that Mauricio has not yet been evicted. He is worried about the potential for eviction and begins talking to Juliao one day when they run into each other at the market. In this situation, no formal relationship yet exists between Juliao as a lawyer and Mauricio as his client, and further, Mauricio is not asking Juliao to consider taking his case or asking for his advice as a lawyer. Defenders only need to keep secrecy

about facts they are told in a lawyer-client relationship; not in the context of friendship in an informal environment. Therefore, anything that Mauricio tells Juliao about his land troubles is *not* subject to the confidentiality provision.

Now let's assume that rather than discussing his problems casually, the owner of the land Mauricio is living on indeed tries to evict him and he comes to the public defender's office where Jorge is assigned to Mauricio's case. Mauricio then relates all of the history of the land dispute to Jorge. This information is now subject to Article 46. It must be borne in mind that there should be a relationship of trust between the defender and the client. In many circumstances, a client might reveal other sensitive information to the defender. All this information must be kept secret even if they are not related to the case since they were shared within this relationship of trust. For example, Mauricio might tell Jorge he has not been paying the due taxes of his property or even that he has committed another illegal activity. Jorge is obliged to treat this information as confidential, regardless of whether it is related to the case he is taking care of as a defender.

### *Waiver of confidentiality*

It is sometimes necessary for defenders to discuss information to do their job. If defenders could never say anything to anyone, they would not even be able to question potential witnesses because that would indicate that they were defending a case. Private information may also be positive for the client, for example, evidence that proves the client is innocent. The client may want this information public. On the other hand, making such information public could give the prosecution an advantage in designing their case strategy. When deciding what information to divulge, the defender must present the reasons and possible consequences of divulging the information, ask the client's permission to waive secrecy, and then the defender must balance the

value of the information or assistance they expect to get from divulging the information against all of the potential costs. The effect on the client and the client's privacy and safety in particular should always be kept in mind. When the defender is unsure about the costs and benefits, they should consult their superior in addition to their client.

## Summary

Article 46.1(e) establishes a broad duty of discretion. This duty allows sharing some information with others or the public, but only in cases where the need outweighs the risks of divulging the information. Article 46.1(c) establishes a duty to inform a defender's client of his or her rights, obligations, and legal options. It is vital to the proper functioning of the judicial system for the defender to perform this duty fully and effectively; informing the client of all rights and all obligations and of all relevant legal options and their consequences, in such a way that the client is able to understand and make informed decisions.

## Questions

1. Should the duty of discretion for a defender with respect to the client's information be greater or less than for a judicial magistrate?
2. Why make exceptions to the rule of discretion?
3. *Hypothetical 1*: Lino is a public defender stationed in Suai. He takes on the case of a client named Alia who has a dispute with a neighbor over a sale of a cow. The cow is the sole property of Alia. An important court date is tomorrow, and the neighbor is offering a (very favorable) settlement today, and today only. Lino cannot reach Alia to get her permission to

accept the settlement; Lino doesn't have her mobile phone number. When Lino decides to walk all the way to Alia's house to try to find her before the offer expires, Alia's husband answers the door. He says Alia is at her mother's house, hours away in Bobonaro, but that she has told him all about the case and he is happy to help. Lino asks Alia's husband for permission to settle the case for the amount offered by their neighbor. Alia's husband readily accepts the settlement and Lino executes that decision. What has Lino done wrong? Think of at least three things.

4. *Hypothetical 2*: Luis is being prosecuted for stealing cash and a television from a private home. Esmeralda has been assigned to defend Luis.
  - a. Luis tells Esmeralda he has an alibi for the night of the theft: He was with Jose and Sahe. Sahe, incidentally, had illegally entered the country without a visa from Indonesia. Luis does not know how to reach Jose or Sahe. When Esmeralda cannot reach a witness directly, she sometimes puts out a newspaper or radio advertisement asking for the witness to contact her. What should Esmeralda do?
  - b. Luis instead tells Esmeralda his alibi is that he was at school. As the court date approaches, Esmeralda cannot reach Luis because he is travelling, and Esmeralda still needs proof of Luis's alibi, like an attendance record. She thinks Luis's family might know where to get it. What should Esmeralda do? Why is this question harder than question 4(a)?

## Answers and Explanations

1. Stronger. Defenders are less likely to need to make a public statement on a case for any reason, and more likely to have private information about their client with whom they have a close relationship.
2. There may be cases where a defender needs to divulge some amounts of information to move forward on a case, for example in discussions with potential witnesses for the client. It may also be of benefit to their client in terms of how the public sees them; a public statement of evidence exonerating the client may help the client's case and situation, perhaps bringing the case to a faster conclusion. If it is a civil case, for example, it might encourage settlement. On the other hand, it might allow the other side to have an advantage in designing their strategy, prompting the prosecutor or plaintiff to look for countering evidence. Or the information may simply embarrass the client for some reason. The defender should discuss these situations with the client and inform them of the benefits and costs of sharing the information.
3. Lino has done at least the following wrong:
  - a. First: Lino has potentially put Alia at risk by sharing information about the case with Alia's husband. Lino should not even have divulged the case was occurring, or that he was assigned to it. Lino has no way of knowing whether the husband has been fully included in the case by the wife. Informing the husband of the case may cause problems for Alia. Perhaps the husband objects to her selling the cow and will hurt her once he finds out, or perhaps Alia just preferred he find out from her with her explanation. It is not the defender's decision what information Alia's husband should or should not have, or how he gets it, and Lino doesn't know Alia's preferences

(though he probably should have asked). If Alia had given explicit written consent for her husband to be informed, the situation would be different and Lino could share information with him.

- b. Second: The husband's consent to settlement would not be enough. Under Article 46.1(c), the defender must inform the *user*, in this case Alia, of all the legal options and their consequences. In this case, a settlement forecloses the chance of a victory at trial. Although the settlement presents a certain gain and going to trial gives only the chance of a gain, it is up to the client to decide.
- c. Third, Lino should have made arrangements to make sure he could reach Alia in case of a settlement offer or any other case development. He is not meeting the minimal standard for following the statute's requirement to represent his client "assiduously and zealously" if he does not have her contact information. Lino should have anticipated that not knowing how to reach Alia would prevent him from adequately following his duty to inform his client. Likewise, he should explain the situation to the opposing party and try to get more time for the client to have a chance to make a decision regarding the settlement offer.

4.

- a. Esmeralda must do two things:
  - i. Esmeralda must, as always, ask permission before publicizing the case through an advertisement. Permission is even more important than usual here because information will be shared with the public at large, not just one or two people.

- ii. It is not enough for Esmeralda to ask permission—Esmeralda must also think through the consequences of advertising or not advertising: What other evidence might prove Luis is innocent? Will Sahe infer from the advertisement that Luis told others that Sahe was in the country, perhaps angering Sahe and causing him to retaliate against Luis? What possible sentence could Luis receive if there is no alibi and no other way to prove Luis’s innocence? You will notice some of these questions are legal, and some are practical. Esmeralda must think through all of these and explain them clearly to Luis before taking any action regarding the advertisement.
  
- b. This question is trickier because although it is obvious Esmeralda needs to inform Luis of the options and get permission to share information, Esmeralda has no way to do that here. At this point, Esmeralda cannot betray Luis’s trust by sharing information without permission, no matter the consequences. What if Luis’s family does not know Luis is attending school and objects? This puts Luis at risk without his knowledge or consent. The situation does seem not to have a solution. However, Esmeralda should have anticipated this problem earlier and impressed on Luis the importance of being available during the period leading up to trial, and then the problem wouldn’t have arisen.

## 4. Duty of Defenders to Avoid Conflicts of Interests

### Section Objectives

- To explore why defenders must not be involved in cases in which they have conflicts of interest.
- To learn what conflicts are automatically disqualifying.
- To develop judgment on how to act when faced with a potential conflict.

### Section Overview:

Defenders have a conflict of interest, and must not take a case, when:

- The defender has another benefit or loss that depends on some aspect of the case, besides the fulfillment of serving justice well or the fear of an unjust acquittal of a guilty party or conviction of an innocent party that runs counter to justice.
- A close family member is a party to the case, or the defender is a party to the case.

### **When do a defender's interests or connections disqualify him or her from a particular case?**

A conflict of interest is when a public defender's personal, including familial, interests run counter to his or her professional responsibilities. Defenders have to make many decisions in the course of a defense, including which cases to prioritize, how many resources to invest in each, how much time and energy to spend on each, and many others decisions—can you think of some others? Defenders must have only the best motives in the decisions he or she makes on a case,

otherwise he or she may abuse their discretion and power. A conflict of interest is when a personal, family, or other interest exists that might tempt (or appear to tempt) a defender to make decisions about their job based on any criteria that is not the search of justice. If a defender would make decisions differently without the interest, the defender is facing a conflict or a bias. When such a conflict exists, the defender must recuse him or herself from the case, that is, the defender must stop working on the case and pass it on to a different defender.

Even if the defender is able to withstand the temptation to make different decisions, the public may become aware of the interest and lose trust in the defender, and therefore, in the judicial system. Further, the defender must look ahead and avoid creating situations where a bias or conflict might arise, based on what information is available on the cases that the defender is or may become involved in. For example, if a defender is aware he or she might be assigned to a case involving the owner of a store, he should avoid investing in that store or one of its competitors.

Articles 46 and 47 announce the conflict of interest rules:

<p style="text-align: center;"><u>Article 46</u> <u>Duties of defenders</u></p> <p>1. The following are the duties of the defenders:</p> <ul style="list-style-type: none"><li>a) To defend the legitimate rights and interests of users impartially, diligently and equitably;</li><li>...</li><li>d) Act assiduously and zealously;</li><li>...</li><li>f) Recuse themselves from cases where they consider it appropriate;</li><li>...</li></ul>
---

h) Avoid future conflict situations;

...

Article 47  
Prohibitions

Defenders are prohibited from:

...

b) Performing in a case or taking part in proceedings in which s/he her/himself is a party, or in which her/his spouse or companion, relative, etc. is a party, to the second degree of direct or collateral kinship;

c) Requesting, advocating or performing acts, in Court or outside it, that in any way conflict with the functions inherent to the position they hold or with the ethical principles of their job;

...

### *Conflicts generally*

Article 46.1(a), (c), and (f) cover all potential biases and these provisions require defenders to use their judgment to determine whether or not they would be, or would appear to be, partial or biased in a case. The way to determine this is if the defender has something to gain or to lose based on the outcome of the case, beyond of course, the satisfaction of achieving justice for their client, and whether they would make different decisions regarding the case if the interest were not there. This requirement is underlined by the duty to act “zealously and assiduously,”(Article 46.1(d)). This duty must be upheld for *all* clients. If the defender has an interest in one of his or her cases, he or she cannot act equally zealously and assiduously in all of them, or may appear to have a reason not to act equally zealously and assiduously.

If the defender does have an interest in conflict with a case, Article 46.1(f) says it is normally the right thing to do to recuse him or herself from the case, that is, to pass it along to another defender who has nothing extra to win or lose, and therefore, no conflict. It is up to the

defender's judgment to assess whether what is at stake for the defender is very small, and therefore the potential bias or appearance of bias is low. Moreover, the defender should compare the likelihood of bias or perceived bias to the cost of moving the case, in terms of expertise lost and other costs. If the risk is low and the cost high, it may be appropriate for the defender to proceed.

The statute goes further, in Article 46.1(h), and asks defenders to avoid *future* conflict situations. In other words, defenders must think ahead and anticipate what conflict situations may arise and avoid them. For example, if a defender knows he or she may be assigned to defend a person who owes money to a landlord, that defender should not go into business with that landlord. Can you see what conflict would arise if the defender were defending a person who owed money to someone the defender shared a business with?

Recusing him or herself from a case where there may be a conflict or avoiding a future conflict situation is, once again, important not only because of any actual bias but because of the risk of *perceived* bias. The public may lose trust in the judicial system if the public believes representatives of the government, especially those involved in the administration of justice, are using their power for private benefits. Without trust, the decisions of the judicial system lack legitimacy, and citizens may seek other means to resolve their conflicts. Since the damage done to society, trust in the government, and the stability of the country is at risk if there is even a hint of bias, injustice, or unfairness perceived by the public, it may be better to pass on a case than to risk a loss to the country. Again, the defender must weigh the costs and benefits of recusal in order to decide the appropriate action.

## **When must a defender automatically recuse him or herself?**

There are many situations where a public defender will have to make a judgment whether a conflict exists regarding a certain case. However, there are some kinds of situations involving family members that the law says will *always* create a conflict (or a perceived conflict). This part of the Statute recognizes that most people tend to have strong feelings towards their family members, and will not be able to make decisions in the same way if family members are involved in a case as in a case where family members are not involved. Article 47(b) clearly states defenders may not serve as defenders in a case in which a party is closely related to them. There is no weighing of costs and benefits in this narrow set of situations.

The terms of kinship may appear confusing in the way they are phrased but are in fact relatively simple. To be a companion just means that you live with your boyfriend or girlfriend, but that you have not legally married. If a defender lives with their boyfriend or girlfriend he or she cannot defend a case if their boyfriend or girlfriend is a party to the case. The term “kinship or affinity of any degree in the direct line” means that a defender cannot defend a case if their parent, grand-parent, great-grandparent, great-great-grandparent, child, grandchild, great-grandchild, or great-great-grandchild is a party in the case. The term “... up to the second degree in the collateral line” means that the defender’s siblings cannot be a party in the case either.

The public is likely to be suspicious about the court being impartial when one side is related to the people making the decisions, even if it is true that they actually are impartial. It is essential that the public trust the courts to be unbiased, so that justice is really being served.

## Summary

In summary, the statute bars defenders from becoming involved in a case where there is a conflict for the defender, that is, when a defender may experience or appear to experience bias or partiality towards one of the individuals involved in a case based on interests unrelated to the general public good. The statute specifically bars defenders from involving themselves when the case involves a spouse, domestic partner, direct progenitor, descendant, or a sibling because it is presumed they will be affected or appear to be affected by this relationship. Furthermore, the statute requires defenders to think about what situations might arise in the future and avoid situations that would create any of the conflicts barred by the statute.

The appropriate action to take where there is a conflict or where a conflict will arise that is unavoidable is for the defender to recuse him or herself from the case and pass it on to another defender. The defender must weigh the seriousness of the conflict against the effects of recusal.

## Questions

1. How does a defender know if something might be a conflict?
2. What if the conflict would only make the defender more eager to defend, for example, if the plaintiff or prosecutor on the other side of the case is a person the defender actually hates?
3. *Hypothetical 1:* Antonio is a public defender assigned to defend Leo and Monrique on charges of embezzlement. Both Leo and Monrique are employees at an oil drilling company. During the course of developing the case, Antonio discovers that whoever embezzled the money had deposited the sum in person in a bank in Singapore. Leo has never been to Singapore, and doesn't even have a passport. Monrique goes to Singapore monthly for business. While Leo

and Monrique could have conspired together, it appears that the money was never shared and no other consideration was passed on to Leo, so if this evidence is presented it is likely Monrique will be convicted and Leo will be freed. What should Antonio do?

4. *Hypothetical 2*: Odete is a public defender. Alcino owns a popular Indian restaurant in Dili. A local hotel is suing Alcino for failing to fulfill a catering contract. If successful, the amount is large enough to potentially bankrupt Alcino's restaurant.

a) Odete's family owns a Japanese restaurant next door to Alcino's restaurant. The two restaurants compete closely for customers. Odete knows that if the hotel's suit succeeds, Alcino will probably have to close his restaurant. Must Odete recuse herself?

b) Odete's family owns a pharmacy and is thinking of opening a second location but is having trouble finding a suitable plot. Alcino's restaurant space might suit their needs. Must Odete recuse herself?

## **Answers and Explanations**

1. First, identify if the conflict is specifically mentioned in the statute: If a family member is involved, it is a conflict and the defender is automatically disqualified. If it is not specifically barred but might be "directly related" to them, they should try asking themselves, "What would happen to me if we decide this one way?"; "What would happen to me if we decide this the other way?"; and "How would I feel in each situation?" If the answers are different, there is probably a risk of conflict that the defender should discuss with their superior or colleagues.
2. There is no conflict in this case. The fact that the defender hates the other party would not have any negative consequences for the client's defense. Just like private lawyers need not

like the opposing party, public defenders are also not prevented from litigating against such parties. Conflict of interest rules exist to avoid a biased defense and not to ensure “fairness” of the whole system. That is the role of the judge and other institutional actors.

3. This is a conflict since a defender shall not represent more than one party per case. In this case, Antonio should present evidence from his perspective as Leo’s representative, but should not from the perspective of Monrique’s representative. In other words, it would be in Monrique’s interest to suppress the evidence and in Leo’s interest for the court to see it. Antonio cannot satisfy both clients at once. Antonio should inform Leo and Monrique and pass one of their cases onto another defender.

4.

a) Odete should recuse herself in this case. Her family’s restaurant is likely to gain if the Indian restaurant is forced to close, which may happen if Odete loses her case. Knowing this, Odete may not be adequately zealous in defending Alcino, or at least the public may believe she has a good enough reason not to adequately defend Alcino. When there is a clear conflict, it does not help to have the client’s authorization. It is beneficial for the system that clients are not subject to biased defenders

b) The answer depends on how likely Odete’s family is to benefit from Alcino losing the case. In this case, it seems tenuous, and Odete may not even be aware of the potential benefit, and the public may not have any reason to believe there will be a conflict. Within a community that is small like much of Timor-Leste, there are going to be connections among parties to a case; not every connection is a conflict. The defender must compare the costs and benefits of recusing him or herself.

## 5. RIGHTS OF PUBLIC DEFENDERS

### Section Objectives:

- To explore the rights of public defenders under the Public Defender's Law.

### Section Overview

Public Defenders have special rights, which include:

- Independence
- The right to communicate with clients
- The right to respect for confidentiality
- The freedom of opinion, association and assembly
- The right to state assistance and access to necessary public documents and records
- Personal protection when security requires

### What rights do public defenders have?

The Public Defender's Law outlines many responsibilities and obligations, but it is also important to remember that public defenders are ensured certain rights under this law. It is vital for the functioning of the entire judicial system that public defenders are able to do their jobs well. For this reason, the government must respect and help the public defenders in carrying out their duties. This does not mean that the state must do a public defender's job for him or her, nor

does it mean that it must give the public defenders special access over public prosecutors or private lawyers. It does mean, however, that the state must remain neutral towards parties in a dispute and must provide access and information legally available to the public defenders even when a government department or official is named as another party in the dispute.

Article 48  
Guarantees and prerogatives of public defenders

1. Public defenders enjoy the **same guarantees and prerogatives that other lawyers enjoy**.
2. The State also guarantees public defenders the following:
  - a) **Independence** in the performance of their functions...;
  - b) **Freedom of opinion, association, and assembly**, including the freedom to participate in public debates on issues relating to the law and the administration of justice;
  - c) **Unrestricted access to their clients**;
  - d) **Respect for professional confidentiality** in relations with users, as well as **protection of sources**;
  - ...

Public defenders share all of the constitutional and legal rights of all other citizens of Timor-Leste. The Public Defender’s Law also specifically guarantees public defenders the freedom of opinion, association and assembly, even in matters relating to the judicial system. This is a right afforded to all Timorese citizens, but sometimes the law requires some government officials and members of the judicial system, such as magistrates, to abstain from practicing these freedoms in order to ensure an impartial judicial system. Public defenders, however, do *not* have to abstain. They are even free to participate in debates and conversations, even those dealing with the law and the judicial system. Of course, they must always conduct themselves with civility and decorum. They must also ensure that their activities do not compromise their clients’

interests, consume too much time as to preclude them from working on pressing matters, or prevent them from serving as an effective public defender.

Public defenders also share all of the rights of other lawyers. This includes the protections afforded private lawyers, under the Private Lawyer’s Law, for special measures to protect client correspondence and files when a public defender’s office is searched. (Private Lawyers Law, Art. 32). Some of the rights shared by other lawyers, such as independence, access to clients and respect for confidentiality are repeated in this law.

Repeating these rights in this statute helps to emphasize their importance in relation to the Office of the Public Defender. It is especially important to show that public defenders act independently and in the interest of their clients and justice, and are not a puppet of the government. This is because public defenders are in the unusual position of being employed by the government, but often serve to represent people *against* the government (such as in criminal cases). This makes it important for everyone involved: clients, public defenders, and other government officials and offices, to understand their special role.

In addition to not hindering a public defender’s work, the government must also help defenders to carry out their duties. In particular, a public defender has the right to access government documents or files, such as police reports, that he or she may need to represent a client.

Article 48  
Guarantees and prerogatives of public defenders  
...  
2. The State also guarantees public defenders the following:  
...  
f) **The acquisition of any documents, certificates or information held to be necessary or useful in performing**

**their functions from any public authority** or its agents, including the police;

...

3. All **State authorities must cooperate** with the Public Defender's Office **in the pursuit of its purposes.**

But public defenders are also ensured certain *additional* protections. These protections help to further ensure the integrity of the public defenders' work and the impartiality of the judicial system.

Article 48

Guarantees and prerogatives of public defenders

...

2. The State also guarantees public defenders the following:
  - a) ... **personal protection whenever strong reasons of security so require;**

...

According to this provision, public defenders have the right to personal protection, such as a police escort or guard, whenever there are sufficient security concerns. This can protect the integrity of judicial proceedings in some cases. For example, a public defender may be threatened if he continues to represent a certain client. By providing police protection, the public defender may feel secure enough to continue working on that case, which in turn helps to ensure representation for that client and overall fairness in the case.

## Questions

Emilia is a public defender in Baucau. She is representing Fernando, a young man who has been accused of killing his neighbor Pedro. Pedro and Fernando had been arguing over who owns a stretch of land between their farms for five years.

1. The police are holding Fernando prior to his trial. Emilia tries to visit him several times, but the police refuse to let her see him. In preparing the case, she also requests his police file and several complaints that Fernando and Pedro had filed with the police and other government offices about one another. When she receives the documents and reports she finds that they are missing several pages and some are so poorly written that they are completely illegible. Have the police or any other government offices acted improperly?
2. Pedro's family is very upset about the case and sends Emilia a threatening letter. Should the government provide her with protection until Fernando's trial is complete?
3. While Emilia is preparing for the trial, a new bill is presented in Parliament about the length of prison sentences for various crimes. The bill proposes significant decreases in prison time for violent crimes, such as assault, but significant increases in prison time for those found in possession of drugs. Emilia feels that both changes are too extreme and that the members of Parliament have not discussed very important problems with the bill, such as how much these changes might cost the prisons and the judicial system, whether or not the bill reflects public concerns about crime, and whether or not the new prison sentences relate to the seriousness of the crimes. She agrees to answer questions for a reporter and relates all of these opinions to him. A few days later, a newspaper quotes another public defender, Artur, in Dili, as saying that her interview and opinions are "unprofessional" and that she should not have done so and

she must be fired. Is Artur right? Did Emilia have a right to say what she did to the reporter? Did Artur have a right to say what he did?

## Answers and Explanations

1. The police acted wrongly in denying her access to her client Fernando. This is a fairly clear case. A public defender has the right to communicate with his or her client and here the police were clearly preventing her from doing so. It is more difficult to determine whether or not the police and government offices acted improperly when they sent her the files relating to her client. Even if they did not violate *this* law, they may have been acting incompetently, which is improper behavior. But let's focus on illegal activity under *this* law. If the missing pages are truly missing, and were not removed to prevent her from obtaining information, then the police and government offices did not act wrongly. They could not send her something they did not have. The same is true for the illegible pages. If this is the state of their files then, again, they cannot send Emilia information (cleanly typed pages) that they do not have. If, however, they deliberately smeared the pages with ink before sending them to her, they violated the law.
2. Whether or not the government should offer protection for Emilia depends on several things. Ultimately, this decision rests with the police and other government offices, but there are several things that might enter into their decision. First, what is the nature of the threat? If Pedro's family threatens to kill Emilia or her family, this is much more serious than if they threaten to throw garbage at her home. Second, how serious is the threat? If the threat came from Pedro's seven-year old son, then the government is unlikely to consider it a real threat

and probably does not need to provide Emilia with protection. Third, how does Emilia feel about the threat? If she is truly frightened and considers passing the case to a colleague, then this might make the government more likely to consider providing protection. This might not matter if Pedro's seven-year old son is the one making threats (the government would still not provide protection), but it may influence their decision in a borderline case.

3. Emilia has a right to opinions and to participate in public debates such as this. She did not do anything unethical or unprofessional by explaining her opinions to the reporter. This would have been very different if she had divulged confidential information from a client in this interview, but there is no indication that she did. Arturo was therefore wrong in his opinion that she must be fired. He does, however, have as much right to express his opinion as Emilia does. While Emilia's interview was not unprofessional according to the laws of Timor-Leste, Arturo may still believe that Emilia's interview was unprofessional according to his own standards.

## 6. Review

### Section Objectives:

- To review:
  - The services offered by the Office of the Public Defender.
  - The career path of public defenders.
  - The duties of public defenders.
  - The specific duty of public defenders to avoid conflicts of interest.
  - And rights of public defenders.

In this chapter, we discussed the various services of the Office of the Public Defender. We also discussed the career path of public defenders, and some of the rights and duties of public defenders.

The primary service of the Office of the Public Defender is to provide free legal representation to those citizens who cannot afford a private lawyer. It is incumbent on all public defenders to ensure that their clients cannot actually afford a private lawyer (unless a judge referred the client to the defender). Public defenders represent eligible clients in both civil and criminal cases. They also represent clients in extra-judicial processes, such as mediation and arbitration, and also provide general legal advice to their clients. It is important to remember that these services *cannot* be denied to any citizen who is eligible to receive them.

The requirements for hire and promotion of public defenders are straightforward. To be hired as a public defender, one must: 1) be a citizen of Timor-Leste; 2) possess full enjoyment of all civil and political rights; 3) be licensed to practice law in Timor-Leste; 4) pass the Legal

Training Center's mandatory course; 5) speak and write Tetum and Portuguese; and 6) comply with all requirements to be a civil servant. Classes of public defenders, from lowest rank to highest rank, are 3<sup>rd</sup> class, 2<sup>nd</sup> class, and 1<sup>st</sup> class. All new hires start as 3<sup>rd</sup> class public defenders. After three years a 3<sup>rd</sup> class defender may be promoted to 2<sup>nd</sup> class. After an additional four years, and the successful completion of a series of tests, a 2<sup>nd</sup> class may be promoted to 1<sup>st</sup> class. However, all promotions are subject to good performance reviews and availability.

The duties of public defenders, discussed in this chapter, include the duty to: 1) inform clients of all their rights *and* obligations; 2) explain to clients the likely consequences of various legal options; 3) act assiduously and zealously for every client; and 5) respect the confidentiality of all professional secrets. Each of these duties is essential to the effective representation of a client, and public defenders must take great care to make certain each is met.

A specific duty of all public defenders, discussed separately in this chapter, is the duty to avoid conflicts of interests. Often times, determining whether or not a conflict of interest exists requires a weighing of several factors. In short, a defender possesses a conflict of interest if he or she stands to receive personal gains from the result of representing a client. Other times, such as the case of family members, conflicts of interest are automatically present. It is important for public defenders to avoid such conflicts in order to preserve public trust in the judicial system.

Finally, this chapter discussed the rights of public defenders. These include the right to: 1) independence within the government; 2) communicate with clients; 3) respect for confidentiality; 4) freedom of opinion, association and assembly; 5) assistance and access to public documents and records; and 6) personal protection when security requires. Similar to the duties of public defenders, these guaranteed rights help to ensure that public defenders can effectively carry out the purpose of the Office of the Public Defender.

Each of these discussions relies primarily on the Public Defender's Office Statute of 2008. As this chapter provides only an introduction to the laws regulating public defenders, it does not cover the 2008 statute in its entirety. We encourage all those interested in learning more about public defenders, and their unique role in the judicial system, to read the entire statute.

# V. PROFESSIONAL RESPONSIBILITIES FOR MAGISTRATES

## 1. THE COMPOSITION AND FUNCTIONS OF THE JUDICIAL MAGISTRACY

### Section Objectives

- To understand the importance of the magistracy in Timor-Leste.
- To explore what judicial professionals make up the magistrate service of Timor-Leste.
- To learn the role of magistrates in the justice system of Timor-Leste.
- To determine under what circumstances a magistrate must apply the law.

### Why are magistrates essential to Timor-Leste's justice system?

Magistrates play a vital part in administering the law in Timor-Leste. Magistrates, as representatives of the state of Timor-Leste, adjudicate innocence and guilt as well as individual rights under the law. They have the duty to apply the law accurately and conscientiously. Their important role creates an equally important duty that they adhere to the regulations of their work in order to respect the law and ensure fair proceedings for the parties before them. The core duties of the magistrate are to respect the secrecy of judicial proceedings, not to abuse and to maintain respect for their privileged position, to act impartially so as to make all individuals equal before the law, and to refrain from activities that may come into conflict with their ability to

fulfill their duties fully. The duties and responsibilities of magistrates are stipulated in Law No. 8/2002 (Statues of Judicial Magistrates) and Law No. 11/2004 (Amending the Statues of Judicial Magistrates). This section examines the most important of these duties.

## How is the magistrate service of Timor-Leste composed?

The judicial magistracy is made up of professional judges from all the courts in Timor-Leste. Judicial magistrates may also be hired from other countries if they meet certain qualifications and are judged suitable. Articles 2 and 111 provide more detail:

Article 2  
Composition of the judiciary

The **judiciary** shall be composed of **professional judges of the Supreme Court of Justice, the High Administrative, Tax and Audit Court and other judicial courts** provided for by law.

Article 111  
International judges

1. By comparing different CVs, the **Superior Council for the Judiciary may**, whenever deemed necessary and convenient, **select international judges** with at least 5 years' experience and coming from a civil judicial system, or having a specialisation in comparative law, **to enter the judiciary of Timor-Leste on a provisional basis.**
2. The provisions of this law shall apply, with the necessary adaptations, to international judges exercising functions in the judiciary of Timor-Leste.

The Magistrates Law recognizes the need for judges of general jurisdiction. These courts can hear all types of matters, including civil and criminal matters. The law also provides for specialized courts where the judge is particularly knowledgeable, for example, about tax or audits,

as taxes can be very complex it makes sense to have a judge who is an expert in tax in the tax court.

As a new country with the justice system still in the process of being formed, the law recognizes that Timor-Leste can benefit from the services of experienced international judges from a civil law country. Under Article 11, these international judges are able to serve as magistrates despite not being citizens of Timor-Leste.

### **What basic functions do magistrates perform?**

The judiciary performs a number of crucial functions codified in Article 3:

<p style="text-align: center;"><u>Article 3</u> <u>Functions of the judiciary</u></p> <ol style="list-style-type: none"><li>1. The functions of the judiciary shall be <b>applying the law, administering justice and enforcing its decisions.</b></li><li>2. Judicial magistrates <b>shall not refrain from judging on the grounds of absence, vagueness or ambiguity of the law, or on the basis of insurmountable doubt.</b></li><li>3. The <b>duty of compliance with the law shall not be put aside on the pretext that a rule is unfair or immoral.</b></li></ol>
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Judicial magistrates preside over civil and criminal trials in Timor-Leste. Magistrates hear arguments and evidence from both the plaintiffs and defendants or the prosecution and defense attorneys. Afterwards, they apply the law of Timor-Leste to reach a decision that is in accordance with the law and that aims to serve justice. Their decisions are legally binding. If any of the parties believes there has been an error, the decision may be appealed to the Court of Appeals.

Magistrates are the only figures with the power to resolve disputes definitively and to determine innocence and guilt conclusively in accordance with the law. Consequently, they form the backbone of the judicial branch of the state.

### **When must a magistrate make a decision?**

Judicial magistrates have the sole authority to resolve civil disputes and to decide criminal charges in a court of law. Therefore, under Article 3.2, magistrates must make a decision even in the most difficult of circumstances such as “absence, vagueness or ambiguity of law, or on the basis of insurmountable doubt.” Frequently coming to a decision will be difficult, such as in situations where it is not clear how the law should be applied or where the evidence does not seem stronger in favor of either side. In these instances, magistrates must make a decision regardless. The parties may then appeal the decision, within the limits and according to the criteria established in the law. But if there is no decision in the first place, the parties have no other way to resolve their dispute in a civil case or to achieve finality regarding criminal charges within the formal justice system.

The sections below highlight that there are many circumstances where making a decision is difficult. When you consider these dilemmas, you should bear in mind that even with a very difficult problem that leaves the magistrate unsure what to do, he or she must resolve the question to the best of his or her ability by applying the law.

## How should a magistrate apply the law?

Magistrates must apply the law as it is written. The legislature writes the law, as the elected representatives of the people of Timor-Leste, not the magistracy. Furthermore, the law is to be applied the same way to all cases, not altered for individual cases, even if there seem to be special circumstances. If the law is clear, the magistrate may not decide against the law, even if the he or she personally believes the result is “unfair” or “immoral”, as it is expressly stated in article 3, (3) of the statute. The law must be the same for all individuals; from the poorest citizens of Timor-Leste to the highest ranking government officials.

## What are the requirements to join the judicial magistracy?

Judicial magistrates fulfill a vital role in the administration of the state of Timor-Leste. It is a position of significant authority and responsibility. Thus, the law stipulates certain minimum qualifications:

<p><u>Article 25</u> <u>Requirements to enter the judiciary</u></p>
<p>1. <b>Requirements</b> to be appointed as a judicial magistrate are as follows:</p> <ul style="list-style-type: none"><li>a) to be a <b>national citizen</b>;</li><li>b) to be in <b>full exercise of one’s civil and political rights</b>;</li><li>c) to be <b>older than 25 years</b> of age;</li><li>d) to have a <b>University degree in law</b>;</li><li>e) to have gone through a <b>probationary period with at least a “Good” rating</b>;</li><li>f) to have sat and passed <b>specific exams</b>;</li><li>g) to meet <b>other requirements that are established by law</b> for appointment to the public service;</li></ul> <p>...</p>

To be a candidate for the judicial magistracy, it is necessary at least to be a national citizen. Why is this? The nationality requirement reflects that the role of magistrates is essential to the functioning of the state of Timor-Leste. Thus, parliament believes that only a citizen of Timor-Leste can be trusted with the responsibility. However, it is important to note, that the role is open to all citizens, not simply those individuals who were born in Timor-Leste.

Moreover, candidates must have shown commitment to the Constitution and upholding the law and have full civil and political rights. In other words, they cannot have been engaged in criminal or other activities that would have lead to them losing any civil or political rights under the law.

As experience and education are key traits for magistrates, successful candidates need to be older than twenty five and have successfully completed university with a degree in law. Even candidates with the best qualification, however, may not turn out to be well suited for service as a magistrate. Thus, career magistrates must have passed a probationary period with a sufficiently high rating as well as have passed specific exams (not specified in the Magistrates Statute). Judicial magistrates must also comply with the other requirements established by law for the appointment of public servants. For more information, see Part II of this book on the Civil Service. Overall, the law seeks to provide the flexibility needed to ensure the best candidates are able to join the magistrate service, while also establishing a minimum threshold of quality.

## **Questions**

1. A case comes before Leopoldo, a magistrate in Suai. In this case, a tenant is suing the landowner of a house for unlawful eviction. The tenant has been living in the house for six months. Considering the evidence presented by each side, the magistrate believes that the

eviction was legal based on the lease agreement and the owner should win. In which of the following situations should the magistrate change his decision?

- a. A member of the legislature approaches the magistrate privately to support the tenant, saying that the state is trying to support tenants against landlords in as many situations as possible.
  - b. The tenant is unemployed and will be left homeless if evicted while the landlord is well off.
  - c. The magistrate considers that the law permitting the eviction is unconstitutional.
2. Why do you think that magistracy candidates must be in full exercise of their political rights? And why do you think the legislature requires a minimum age?

### **Answers and Explanations**

1. Only in situation (c). In regards to (a), no outside influence, even a senior representative of the state, can tell a magistrate to act against the law in any way. Intervention by legislators or other state figures in an individual case is not permitted. The national parliament, however, could change the law to make it more difficult to evict tenants. But until the law is changed, Leopoldo and all other magistrates must apply the law as it is written.

In regards to (b), this is surely a regrettable situation, but making exceptions to the law is not permissible. Consider why this would create problems if judges felt they could change the law when they wanted to help someone?

In regards to (c), the Constitution supersedes all other law and is a valid reason for the magistrate to change his decision, refusing to apply the law permitting the eviction based on its unconstitutionality.

2. Magistrates must make well-reasoned, conscientious decisions that accord in all cases with the Timorese Constitution. A citizen who can exercise his rights shows respect for the Constitution and a willingness to take responsibility for the health of the democratic system in Timor-Leste. Individuals who have had their rights suspended due to criminal activity or other misbehaviors are deemed insufficiently trustworthy to exercise the important responsibilities entrusted to magistrates.

## 2. THE DUTY OF JUDICIAL SECRECY, CONFIDENTIALITY, AND DISCRETION

### Section Objectives

- To explore why magistrates must be careful about what information they share or allow others to learn.
- To learn what professional information magistrates must guard.
- To learn what behavior can violate secrecy.
- To develop judgment about what information is sensitive and what is not.

### What subjects and information must magistrates keep secret?

Magistrates are responsible for ensuring that the law of Timor-Leste is applied uniformly and without any bias. In order to ensure their decisions are as fair, accurate and impartial as possible, access to all relevant information however sensitive or potentially embarrassing is required. Article 37 and 80 provide details on magistrates' obligation to keep information confidential:

Article 37  
Special duties

Judicial magistrates shall specially have the following duties:

...

b) to **maintain professional secrecy** in accordance with the law;

...

f) to **refrain from giving out** by any means **opinion on a case pending trial or decision, or judgment on judicial orders, advices, votes, sentences by judicial bodies, except censure in records of a lawsuit** in the exercise of

judicial duties or in judicial and technical works.

Article 80

Confidential character of the disciplinary proceeding

1. **Until a final decision is reached, disciplinary proceedings shall have a confidential character.**
2. The issuance of certificates of parts of the proceeding at the substantiated request of the defendant shall be allowed, when designed for the defence of legitimate interests.

Magistrates have a duty to maintain the information revealed in the course of the proceedings confidential. Magistrates may acquire a great deal of sensitive information as part of their official role. They should not be permitted to unfairly take advantage of or abuse this information in any way. The information they obtain may be sensitive or damaging to the people it concerns. For example, in the course of a civil suit against a company, the magistrate may learn details of its business operations that would harm the business if its competitor learned them.

Magistrates must be especially cautious about the public statements they make. If magistrates comment on ongoing cases, it could bias the public opinion regarding the case. Public statements by a magistrate could label the defendants as criminals, even if they are not found guilty or have not yet been convicted. Magistrates are official representatives of the state of Timor-Leste, and even further, they have the power to declare what the applicable law is and what it requires in a particular case. Maintaining professional secrecy and refraining from making comments regarding cases is crucial to ensure people will trust the magistrates and rely on their ability to decide cases with impartiality and independence.

A ban on public comments also makes it less likely the judicial process will be politicized. Public comment could be used as a means for targeting opponents, as well as a forum for

grandstanding. As discussed in section three below on the duty of impartiality, it is important that magistrates maintain an appearance of neutrality – and actually are so. Likewise, a magistrate who has been vocal about a case may be less likely to change course in light of additional facts that may arise, and thus his or her judgment may be affected by the prior comments.

In short, the Magistrates Statute establishes a broad duty of confidentiality. The duty extends to any kind of expression of opinion about any kind of proceeding. Despite this broad rule, there are minor exceptions to allow for obligatory judicial action (censure) in Article 37 (f), and in the case of disciplinary proceedings for a specific action for defendants to promote their lawful interests in Article 80 (2).

## **Questions**

Ismenia is presiding over a trial involving a high-level government official's role in a well publicized corruption scandal. The official has a grandstanding personality and has spoken frequently and freely in the press regarding the proceedings. He is unrepentant about his actions which he claims to have been in the best interest of the country, and has vocally defended his testimony to that effect. A reporter from the Timor Post contacts Ismenia to confirm that the official had admitted to the corrupt actions.

1. May Ismenia confirm the statement?
2. May Ismenia confirm to her husband, in the privacy of their home?
3. May Ismenia discuss the case with the reporter once the trial is concluded?

## Answers and Explanations

1. No, even if the official's admission was public, the magistrate should not breach her duty of discretion. The statement may be taken differently coming from Ismenia as an official representative of the state of Timor-Leste. Ismenia's opinion will therefore probably be more credible or seen as conclusive. It even may be read as Ismenia confirming the official's guilt. Such a statement could bias the public towards thinking the official was guilty before the trial was finished, or allow the defendant to call into question the magistrate's impartiality on appeal.
2. No, the duty is absolute and does not allow for exceptions for family or close friends. Ismenia's husband could potentially repeat the statement, perhaps even by accident. But even if he does not, the duty is inflexible and the law permits no exceptions. If Ismenia disclosed confidential information to her husband, she should be subject to disciplinary measures as described in detail later in this chapter.
3. Technically yes, if the decision is final and not subject to any further appeals. Once the case has concluded, the judgment has already been reached; the decision cannot be influenced inappropriately. Ismenia may discuss the public facts, but should be hesitant to do so for fear of being seen as a political actor. If she does, she should be careful to not disclose any information other than that which is in public domain and omit any personal opinions regarding the case.

### 3. DUTY OF IMPARTIALITY AND INDEPENDENCE

#### Section Objectives

- To explore why magistrates must not be involved in cases in which they have conflicts of interest.
- To learn what conflicts automatically require magistrates to remove themselves from a case.
- To develop tools to decide how to act when faced with a potential conflict.

#### What considerations can and cannot affect a magistrate's decision?

Magistrates have the utmost duty to act with impartiality and independence, a duty that is emphasized in the Statute of Judicial Magistrates, including in the oath of office:

Article 4  
Independence

Judicial magistrates shall **adjudicate in accordance with the Constitution, the law and their conscience** and they **shall not be subject to orders, instructions or directions, except for the duty of lower courts to obey to decisions awarded by higher courts** on cases appealed against.

Article 7  
Guarantees of impartiality

Judicial magistrates **shall not intervene in cases where a judicial officer is a person to whom they are related by marriage, communion of life, family or kinship of any degree in the direct line or up to the second degree in the collateral line.**

Article 32  
Oath of office

Upon being sworn in, judicial magistrates shall take the following **oath** of office:

*“I, (name), swear to God and I swear on my honour that I will respect and faithfully enforce the Constitution of the Republic and other applicable laws, and administer justice in an impartial and detached manner.”*

Article 37  
Special duties

Judicial magistrates shall specially have the following duties:

- a). to discharge their duties with **honesty, detachment, impartiality and dignity**

The only proper consideration in deciding a case is the accurate application of the law in such a way that adheres to the Constitution and the relevant law. In the decision making process a magistrate may review the relevant opinions of esteemed authorities on the matter. However, a judge is not allowed to listen to the views of any political actor regardless of their seniority or prestige. Even if the prime minister or president were to offer an opinion on a pending judicial case, the magistrate would be compelled to follow the applicable law even if it was different from the stated views of political leaders.

### **How should a magistrate deal with potential conflicts of interest?**

Another improper consideration in the deciding of a case is if the magistrate has an interest in the outcome of a trial aside from the pursuit of justice. If there is such an interest, he or she may not be able to make a decision based solely on the law. The magistrate may not even be

aware that his or her decision is affected, but even subtle biases can undermine the equal application of the law to all people.

Furthermore, even if the magistrate is able to act neutrally, he or she is a representative of the state who must have every appearance of integrity in the eyes of the public. If the public knows a family member or other interest of the magistrate is involved, people are likely to suspect that the individuals involved in the judicial process have not been treated equally. For these reasons, the law provides for limits to the performance of the magistrates' functions. One such limit is found in Article 7 of the statute which bars their involvement in proceedings when certain relatives to the magistrate are involved in the case as court staff. However, most of the limits applicable to magistrates are provided for in the Criminal Procedural Code (CPP) and the Civil Procedural Code (CivPC).

As for the limitations found in the CPC, the provisions on impediments and suspicion applicable to prosecutors and previously discussed in Chapter III apply equally to magistrates when performing their functions in criminal proceedings.

Article 39

Situations of impediment

The following are situations of impediment:

- a) To be, or to have been a spouse, legal representative, or related by blood or affinity up to the third degree to the victim or to the perpetrator of the criminal offence, or to cohabit, or to have cohabited, with either of the latter in a relationship similar to that of spouses;
- b) To have intervened in the proceeding as a prosecutor, police officer, judicial agent, public defender, or as an expert;
- c) A spouse or anyone related by blood or affinity up to the third degree, or a person living or that has lived in a relationship similar to that of spouses, is taking part in the proceeding, in any capacity;
- d) To be, or ought to be, a witness in the proceeding.

In summary, magistrates are barred from performing their functions in a case when they have a relation with the victim or the perpetrator of the criminal offense (Article 39 a), when their spouse or other relative participate in the proceedings in any capacity (Article 39 c), and when the magistrate had participated in the case, either previously - as a prosecutor, police officer, judicial agent, public defender or expert (Article 39 b), or currently as a witness (Article 39 d). Furthermore, magistrates shall not intervene in proceedings when there are strong reasons to question their impartiality. If that is the case, the magistrates shall declare such suspicion immediately (Article 40 and 41, 1).

The rules on impediments and suspicion applicable to magistrates in civil proceedings are provided in Articles 87 to 101 of the CivPC. This regime will not be analyzed in detail in this text, but it is crucial to highlight Articles 87 e 92 of the CivPC:

Article 87

Impediments applicable to judges

1. Judges shall not perform their functions:

- a) When they are a party in the proceedings, directly or in representation of a third person, or when they hold an interest that had the potential to make them a party;
- b) When a spouse or relative by blood or affinity, in direct line or up to the second degree in the collateral line, is a party in the proceedings, directly or in representation of a third person, or when any of these persons holds an interest that had the potential to make them a main party in the proceedings;
- c) When they had an intervention in the proceedings as a representative or as an expert or when the matter in dispute has been addressed by them in a legal opinion or orally;
- d) When their spouse or other relative by blood or affinity in direct line or up to the second degree in the collateral line has acted in the proceedings as judicial agent;
- e) When the proceedings regard an appeal of a decision from another court where they acted as judges, either deciding the issue

under appeal or in any way revealing their position on matters addressed in the appeal;

f) When the proceedings regard an appeal of a decision made by a relative by blood or affinity in direct line or up to the second degree in the collateral line, or of a decision that regarded the ruling made by any of those relatives by blood or affinity;

g) When one of the parties in the proceedings is someone that has filed a claim for compensation for damages or a criminal charge against them, based on actions carried out in the performance of their functions or due to such functions, or when a spouse or relative by blood or affinity, in direct line or up to the second degree in the collateral line, is a party in the proceedings, as long as the claim or accusation has already been admitted;

h) When they were or are to be heard as witnesses;

i) When a person with whom the judge lives with as a couple is in any of the situations provided for in the previous paragraphs.

(...)

The CivPC provides for a number of situations where magistrates are barred from performing their functions in certain cases that would jeopardize the independence, impartiality and dignity of the profession. Those situations can be divided in four types: due to their interest or the interest of close relatives in the decision of the case (paragraphs a) and b)), given their previous actions, or those of close relatives, in the proceedings (paragraphs c), d), e) and f)), due to the fact that one of the parties in the proceedings has a civil or criminal dispute with the judge or a close relative (paragraph g), and when the judge was or is going to be heard as a witness in the case (paragraph h). If any of these situations occur, judges shall declare the impediment immediately, under Article 88 of the CivPC.

#### Article 92

##### Situations of suspicion

(...)

a) If there is a blood or affinity relation not covered in article 87, in direct line or up to the fourth degree in the collateral line, between

the judges or their spouse and the parties or a person that has an interest in the matter of the proceedings which could make them a main party in the case;

(...)

d) If the judges or their spouse, or any relative by blood or affinity in direct line or up to the fourth degree in the collateral line, has a credit over or a debt to any of the parties in the proceedings or has a legal interest to see the case being ruled for one particular party;

(...)

f) If the judge has received any gifts before or after the beginning of the proceedings and because of them, or if the judge has provided for the payment of expenses in the proceedings;

g) If there is serious hostility or great intimacy between the judge and any of the parties.

(...)

Cases of suspicion occur when there are strong reasons to question the impartiality of the judicial magistrate. Thus, if judges are given a case where one of the situations provided for in Article 92 of the CivPC rises, they may not declare themselves under suspicion but should, according to Article 91 of the CivPC, request to be dismissed from the case. Likewise, if there is a case where none of the situations provided for in Article 92 is applicable, but the judge believes there are strong reasons for his/her impartiality to be affected or questioned, then the judge should request to be dismissed from such case (Article 91, 1 CivPC).

The statute emphasizes that magistrates are to make decisions based on the Constitution, the law and their conscience, not any other influence, including personal and family interests. The law outlines the only considerations that may lawfully affect a magistrate's decision and the Criminal Procedural Code, the Civil Procedural Code and the Statute clearly bar the magistrates from acting as such in cases where their impartiality could be, or appear to be, affected.

## Questions

1. Recall the situation in the first question to Section 1 above: A case comes before Magistrate Leopoldo in which a tenant is suing the owner of the land for unlawful eviction. Considering the evidence presented by each side, the magistrate believes that the eviction was legal and the owner should win. Now that you have learned about the duty of independence, what situations should result in a different decision:
  - a. A member of parliament intervenes and says that the correct outcome is that the tenant wins.
  - b. The tenant appeals from a ruling made by the judge during the proceedings and the higher court's decision on the matter is favorable to the tenant and has an impact in the final decision.
  
2. Magistrate Hugo is a native of Baucau, and after completing his law studies in Dili and successfully working as a legal aid lawyer in Dili for five years, he returns to Baucau to preside over the Baucau District Court. A case comes before him involving a dispute over the ownership of a parcel of land. The defendant is currently farming the land, on which she has made substantial improvements, including adding a second house for her oldest son and his family to occupy. The plaintiff claims ownership of the land, seeking to displace the defendant and take up occupancy, and has produced what appears to be an old title to the property. May Hugo preside over the case if:
  - a. The defendant is Hugo's daughter?
  - b. The defendant is Hugo's daughter, and there are no other magistrates with time to take on the case?

- c. Hugo has invested in the business the defendant is operating on the property?
- d. The plaintiff has previously offered to sell him the land, and likely will go forward with the sale if he achieves ownership?
- e. Hugo has a personal grudge against the plaintiff?

## **Answers and Explanations**

1.

- a. Magistrate Leopoldo should not change his decision. This is not a proper action for a member of parliament to take and the magistrate must firmly resist any such pressure.
- b. This is a higher court ordering the magistrate to act in a certain way. Therefore, magistrate Leopoldo must follow its order. This is how the appeals process works.

2.

- a. No. Given that one of the parties in the proceedings is Hugo's daughter this is a situation that is strictly barred by the CivPC, in Article 87, 1 b). The independence - and appearance of independence - of magistrates is crucial for the judicial system to function properly. Ruling on a case that involves the magistrate's daughter is something that can clearly affect such independence and the legislator expressly provided for those situations, barring the intervention of the magistrate. Therefore, Hugo should declare this impediment immediately and be removed from the case.
- b. No. The law allows for no such exception. Hugo should declare the impediment and this case would have to be distributed to another magistrate.

- c. No. This is another situation where the ability to be impartial in the ruling of the case is questionable. If the defendant wins, Hugo's investment is guaranteed but, if she loses, that investment might be compromised. Thus, Hugo has an interest in the decision of this case, which is a strong reason to question his impartiality. This is therefore a case of suspicion, under Article 92 d) of the CivPC, which must be raised by Hugo, who should request to be dismissed from the case.
- d. No. Again, Hugo's interest in the outcome of the case is clear. This is another case of suspicion, under Article 92 d) of the CivPC.
- e. This is a harder question, because a "grudge" is a vague concept. Article 92 g) of the CivPC establishes that there is a situation of suspicion when there is *serious hostility* between the judge and any of the parties. So, in this case, Hugo should think about the seriousness of the grudge, whether it might affect or appear to affect his impartiality in this case. If his feelings towards the plaintiff are not of serious hostility but he still believes there are strong reasons for his impartiality to be affected or questioned, then Hugo should still request to be dismissed from this case, under Article 91, 1 CivPC.

## 4. INCOMPATIBILITIES IN THE JUDICIAL MAGISTRACY

### Section Objectives

- To understand what activities judicial magistrates may and may not engage in while they are magistrates.

### **Why does the law strictly limit public and private activities carried out by magistrates?**

Magistrates, because of their special position and powers, cannot take on other activities that could potentially interfere with their independence or come into conflict with their duties. For this reason, judicial magistrates are very limited in the types of activities, including employment, which they may take on in addition to their judicial duties. Similar to conflicts of interest, it is important that the magistrates' independence, integrity and commitment are not jeopardized and also their decisions are not influenced by activities and roles carried out outside of the magistracy.

### **What other activities can magistrates undertake while in magistracy?**

For the reasons noted above, the law bars magistrates from most other activities outright, and requires authorization for all others. The only additional activities they may take on are research and teaching, which they must first have approved by the Superior Council. As we will see below, the only exception to this established in the statute is that magistrates may provide legal advice on their own behalf and for immediate family members.

Article 34  
Impediments

Judicial magistrates in office **may not perform any other functions**, whether public or private, **other than teaching and scientific or legal research, subject to prior authorisation by the Superior Council for the Judiciary.**

Article 34 permits active magistrates to engage in teaching and scientific or legal research in certain instances. Why would the legislators permit these exceptions? Most likely legislators felt allowing magistrates to teach or engage in research may benefit Timor-Leste substantially. These activities serve the important public values of promoting education and legal knowledge. Such activities also generally do not jeopardize the independence of the magistrates nor do they impact ongoing cases, so they do not create the risk of actual bias or its appearance.

Even these generally beneficial activities may, however, detract from a magistrate's time and could in some cases affect the magistrate's ability to make decisions neutrally. Furthermore, even teaching and research could create a conflict with the magistrate's duty of discretion (see section two above). They therefore must be authorized by the Superior Council of the Judiciary.

### **Is a magistrate ever allowed to serve as a private lawyer?**

In general, a magistrate is strictly prohibited from serving as a private lawyer. This is first of all to ensure their independence and full commitment to their duties – judges perform a role that is based on their impartiality so they should not be allowed to serve as private lawyers, an activity that is primarily based on partiality. Additionally, if such prohibition did not exist, the

judges – and those they would represent – could potentially benefit from the position of authority of the judges, which is unacceptable in a state based on the rule of law. Finally, this prohibition also aims to avoid creating situations of impediment and suspicion, as discussed in section 3 above. However, the Magistrates statute does provide one exception:

Article 36

Legal practice

**Judicial magistrates may not serve as private lawyers** other than in self-representation or in representation of their spouse, descendant or ancestor.

Article 36 envisions the exceptional situation where magistrates can act as private lawyers. For the reasons discussed above, this exception applies to two cases only: legal practice in self-representation and in representation of close family members, namely the magistrate's spouse, parents and children. A magistrate can, for example, offer his/her daughter advice on how to structure a contract or his/her father advice on whether his land claim is potentially valid. But, although this article is written in very broad terms, the exception should be read in line with the duties that are inherent to the position of a magistrate. Thus, even in the situations provided for in this exception, magistrates should consider carefully if their action as a private lawyer is appropriate. If, for instance, the magistrate's intervention has the potential to influence the case simply due to his/her position of authority and prestige, then the magistrate should refrain from intervening.

## Are magistrates allowed to participate in political activities?

The Magistrates Statute forbids magistrates from engaging in political activities given their duty of independence and impartiality, which makes it of vital importance that the magistrate is, and is seen as, politically neutral. Political activity is banned under Article 35:

Article 35  
Political activity

It shall be **prohibited** for judicial magistrates **to take political positions or be active members of political parties**, or to **make public statements of a political nature**.

As the duty of independence and impartiality are of utmost importance, magistrates cannot appear to be influenced by their political beliefs. For this reason, political activity of any kind is banned under Article 35. Similar to conflicts of interest and bars on activities unrelated to their functions, magistrates are strictly limited in what political activities they may participate in due to the impact on their independence and the risk of bias and detraction from their duties. Magistrates represent the state of Timor-Leste, not the government or political opposition. Their public behavior must always reflect their political neutrality and uphold the non-partisan dignity of the state.

The risk of bias must be balanced, however, against the right of all individuals including magistrates, to play an active part in Timor-Leste's democratic system. For this reason, the ban is limited to taking *public* positions or political activities. Magistrates are surely entitled to vote for their preferred candidate or engage in political discussions with close friends in the privacy of their home.

The line between public and private is sometimes difficult to determine. Magistrates should always act with discretion, and when in doubt, favor keeping things private and not engaging in activities that could be seen as a political endorsement or other public political act (even if that is not the magistrate's intention).

Even an ostensibly private conversation can be potentially public. For instance, imagine a magistrate engaging in a vigorous debate regarding the government's national development strategy during his niece's wedding. In the course of the conversation with a close friend, he expressed his vehement support for the government's national development strategy and questioned how any sane person could disagree with the government's plan or any of the government's major initiatives for that matter. The wedding has hundred of guests. Many overheard the magistrate expressing his views. In this situation, while the magistrate was at a private function, the fact that many may have heard him suggests that he was not expressing his views privately.

Magistrates, in other words, must always conduct themselves with discretion and civility but especially when their words or actions could easily be seen as public. If a magistrate believes that he or she must become more active with partisan politics, it is his or her duty to resign as a magistrate.

## **Questions**

Rosalia has been a magistrate in Dili for many years. In the course of her career, she has become an expert in cases involving disputes over oil resources. Roberto has long been a social acquaintance of Rosalia and is the manager of an investment firm that has substantial investments

in an Australian fuel extraction firm (Treeside Petroleum). Roberto's company has recently run into some difficulties in its contracts with the government. Roberto believes the disputes stem from his firm's investment in Treeside, which has a longstanding dispute with the government over the location of a fuel processing plant. The issue comes up in a conversation at a dinner party Rosalia and Roberto are attending. Recognizing Rosalia's significant expertise in this area, Roberto asks her if she could take a look at the contracts to give Roberto some advice.

1. May Rosalia accept? Does it matter if Rosalia receives compensation or not?
2. What may Rosalia say in response to Roberto's inquiry about the contracts?
3. What if Roberto is Rosalia's son?
4. Could Rosalia present a lecture on oil contracts law to Roberto's firm?
5. Could Rosalia lecture on oil contracts law at UNTL?

### **Answers and Explanations**

1. No. This advice is barred by the magistrates' statute. Providing legal advice is included in legal practice and Rosalia is therefore barred from giving such advice, under Articles 3, 34 and 36. Furthermore, considering Rosalia's position as a judge, her advice could be taken as an expression of the law, or at least an indication. Thus, it does not matter whether Rosalia received monetary or other compensation from Roberto. Finally, what would happen if Rosalia later had to adjudicate a dispute involving the contract? Could she be neutral? Would others believe she could be neutral?
2. While she is not allowed to comment on the matter, Rosalia is allowed to refer Roberto to a lawyer. She should stress, however, that the referral does not constitute agreement with any advice the attorney may provide about how Roberto should pursue any potential claims.

3. According to Article 36, if Roberto was Rosalia's son she would be allowed to give him advice on this matter. However, given her special position of authority and her duties before the state, Rosalia should ensure that her action would not affect negatively or inappropriately both her duties and the case in particular. This means, for example, that she should not make any public statements about the contract.
4. No. This type of activity does not qualify as scientific or legal research or teaching, and it goes to the benefit of a private corporation rather than benefiting the public. Additionally, such activity could jeopardize Rosalia's independence and impartiality.
5. Yes, but Rosalia must seek approval from the Superior Council of the Judiciary. She should only pursue the activity if she believes this will not conflict with her duties and that she can still give her full energy and allegiance to her position as a magistrate. During the lectures, moreover, Rosalia shall not comment on Roberto's dispute or any other concrete matter that is or may end up in court.

## 5. DISCIPLINE

### Section Objective

- To understand what happens when magistrates violate their ethical duties.

### What rules of conduct are magistrates subject to?

Public acceptance of, and support for, the judicial system depends greatly upon public confidence in magistrates' integrity and independence. This, in turn, depends upon the magistrate upholding a high standard of conduct inside and outside court. The law explicitly provides for sanctions for blameful "acts and omissions of their public life, or with repercussions thereon." The magistrate should, therefore, demonstrate and promote a high standard of conduct at all times.

The law recognizes, however, that judges may engage in improper, even criminal behavior from time to time. This behavior may range from rather minor, but nevertheless not appropriate for a magistrate, to serious misconduct. Article 63 provides that, if the conduct of the magistrate is criminal, the disciplinary proceedings run independently from criminal proceedings. Furthermore, if during a disciplinary proceeding a criminal action comes to light, this shall be reported to the Superior Council immediately.

In other words, magistrates that commit crimes are, like all other persons in Timor-Leste, subject to the criminal law as codified in the Criminal Code, but they can also face disciplinary proceedings for misbehavior, which are under the responsibility of the Superior Council. At the same time, leaving disciplinary matters to the purview of Superior Council is important as it helps

preserve judicial independence. This chapter focuses on the unique disciplinary rules facing magistrates, but it is essential to always remember that all criminal laws apply to magistrates.

Article 61

Disciplinary infraction

**Disciplinary offences** are facts which, even if merely blameful, are **committed by magistrates in violation of professional duties, as well as acts and omissions of their public life**, or with repercussions thereon, that are **incompatible with the propriety and the dignity indispensable to the exercise of their functions**.

Article 62

Subjection to disciplinary jurisdiction

1. A **dismissal** or change of status of a magistrate **shall not prevent his or her punishment for violations** committed in the exercise of his or her functions.

...

Article 63

Autonomy of disciplinary jurisdiction

1. **Disciplinary proceedings are independent** from criminal proceedings.
2. Where a disciplinary case discloses the existence of a criminal offence, the case shall be notified to the Superior Council for the Judiciary forthwith.

**What kinds of disciplinary actions do magistrates face?**

Article 64

Scale of penalties

1. Judicial magistrates shall be subject to the following penalties:

- a) Warning;
- b) Recorded admonition;
- c) Fine;
- d) Compulsory reassignment;
- e) Suspension from functions;
- f) Inactivity;
- g) Compulsory Retirement;
- h) Dismissal.

...

A potential violation is investigated through a proceeding before the Superior Council of the Judiciary.<sup>3</sup> The law further clarifies what penalties should apply, from warning all the way to dismissal, in Articles 65-70:

Article 65

Penalty of warning

2. A penalty of warning shall apply to **minor disciplinary offences** that should not go without a remark.

Article 66

Penalty of recorded admonition

3. A recorded reprimand penalty shall apply to **minor breaches that may disturb the exercise of functions** or have repercussions thereon in a manner incompatible with the **dignity required from a judicial magistrate.**

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<sup>3</sup> The procedure for disciplinary hearings as well as further information on the scale of penalties is laid out in detail in the Statute of Judicial Magistrates, Chapter VI.

Article 67

Penalty of fine

3. A penalty of fine shall be applicable to cases of negligence or disinterest in fulfilling the duties inherent in the office.

Article 68

Penalty of compulsory reassignment

1. A penalty of reassignment shall consist of assigning **the judicial magistrate to a position of a similar category outside the area** of jurisdiction or service in which he or she used to exercise his or her functions.
- ...
3. A penalty of **compulsory reassignment shall be applicable to offences that involve disruption of the prestige required from the judicial magistrate to remain in the environment where** he or she exercises his or her functions.

Article 69

Penalty of suspension from exercise of functions and penalty of removal from active duty

1. A penalty of **suspension from exercise of functions** and a **penalty of removal from active duty shall consist of the complete removal from service** for the duration of the penalties.
- (...)
4. A penalty of suspension from exercise of functions and a penalty of removal from active duty **shall apply to cases of serious neglect or serious lack of interest for the fulfillment of professional duties or when a magistrate is sentenced to prison**, except where the sentence imposes a dismissal penalty.

Article 70

Penalty of compulsory retirement and penalty of dismissal

1. A penalty of compulsory retirement shall consist of the imposition of retirement **and shall imply immediate separation from service.**
2. A penalty of dismissal shall consist of the definitive removal of the judicial magistrate, with cessation of any links to his or her functions, and shall imply the loss of the status of judicial magistrate, but shall not imply the loss of the right to retirement, under the terms and conditions provided for by law, nor shall it prevent the magistrate from being appointed for public office or other offices that may be exercised, as long as he or she meets the conditions of dignity and trust necessary to the office from which he or she was dismissed.
3. Penalties of compulsory retirement and of dismissal shall be applicable where the judicial magistrate:
  - a) **Reveals permanent incapacity** to adapt him or herself to the requirements of his or her functions;
  - b) **Reveals dishonesty, serious insubordination**, or has an immoral or dishonoured conduct;
  - c) Reveals **professional incompetence**;
  - d) Has been **sentenced for a crime committed** in flagrante delicto and for serious abuse of his or her function, or for a clear and serious violation of the duties inherent therein.
4. **Dereliction of duty** shall always **correspond to a penalty of dismissal.**

...

Magistrates are held to high standards of ethical behavior. Discipline can be triggered by actions that are not committed with an intention to violate the law but that are merely “blameful” under Article 61. This can indicate disregard for any of the rules governing magistrates that are provided for in the statute.

Magistrates are essential for applying the law of Timor-Leste. Magistrates must be held accountable for any improper actions that violate their duties and obligations under the Statute or that violate the law. The state of Timor Leste tries to deter violations through the provision of penalties for such actions. When, however, violations do occur, it is the responsibility of the Superior Council to apply the respective penalties. These penalties, while being a punishment for the violation committed, also serves as a way of deterring future violations. The penalties range from relatively minor to quite significant and depend on the gravity and frequency of misconduct.

If a magistrate commits a minor fault it is reasonable to expect that the superior addresses that directly and does not start a disciplinary process. However, under Article 65 a penalty of warning shall apply to minor disciplinary offences that should not go without a remark. This is a disciplinary action and is more than telling the magistrate that he/she did something wrong - the magistrate has to be heard and to have a chance to defend him or herself. After this verbal warning, magistrates must change their behavior and act professionally towards their office.

A written admonition is designed for relatively minor offences that reflect poorly on the dignity and esteem of the magistrate's office. Written admonition remains in the magistrate's personnel file and can adversely impact his or her prospects of promotion.

The magistrates' functions are to apply the law, administer justice and enforce decisions, all of which are crucial in a state based in the rule of law. To fulfill their duties, duly serving the state and the people of Timor-Leste, magistrates must act diligently. Therefore, if a magistrate is negligent or disinterested, the law provides for a fine as a punishment of his/her action. This is also as a deterrent to others who may be tempted to misbehave in the performance of their duties.

Compulsory re-assignment is reserved for magistrates who have significantly violated their ethical obligations and oath to the point that it has brought disrepute upon their office in that

particular area. While this can sometimes also be a serious enough violation to warrant dismissal, if the Superior Council believes that, based on the seriousness of the violation, the guilt, the personality of the magistrate and the circumstances of the case, the magistrate can be reformed and continue to perform his or her duties and abide by the law, he or she they may be re-assigned rather than fired. This also serves the purpose of removing the magistrate from places that may have a bad influence on them and from an area that can no longer respect them as independent, impartial and worthy appliers of the law.

A suspension is either for cases of serious neglect or serious disinterest in the fulfillment of duties, or when the magistrate is sentenced to prison and the sentence does not impose the magistrate's dismissal. Serious neglect of duties is serious because of the vital importance of the judges' role and the duties noted above, and as such, warrants punishing it with suspension. The suspension is a serious penalty that not only has a public impact (as people will see the magistrate is not performing his/her duties for having been suspended), but also results in the loss of some of the magistrates' benefits, such as remuneration and seniority. Additionally, the time away from the office might give the dismissed magistrate the opportunity to consider his/her actions and to change his/her attitude and work ethics. If a magistrate is sentenced to prison, the sentence itself may determine that the magistrate is to be dismissed from office, if the crime has been committed with apparent and serious abuse of the magistrate's functions or in serious violation of the duties inherent to them. However, in other instances, the magistrate may be able to still serve in their role once they finish serving their sentence. In those cases, the magistrates are only suspended until they can resume their duties.

When magistrates prove incapable or unwilling to fulfill their duties or where they have demonstrated themselves not be of the highest moral character, they should be subject to

compulsory retirement or dismissed. Magistrates who have engaged in serious misconduct or a pattern of misbehavior must be removed from the magistrate service because they have demonstrated their inability to perform their duties and to respect their oath, which means they are incapable of implementing the law of Timor-Leste in an independent, fair and impartial manner.

In short, a judge must not only be a “good judge”, but must also behave with dignity, respect, and professionalism in public and private matters. A magistrate has explicitly pledged to serve the ideals of justice and truth on which the rule of law and the foundations of democracy are built, and to work in and for a professional judicial system. Accordingly, the personal qualities, conduct, and image that a magistrate projects affects those of the judicial system as a whole, and, therefore, the confidence that the public places in it. The public demands from a magistrate a conduct that is above what is demanded of their fellow citizens, standards of conduct much higher than those of society as a whole; in fact, virtually irreproachable conduct. It is as if the judicial function, which is to judge others, has imposed a requirement that the magistrate remain beyond the judgment of others.

### **How should disciplinary measures be determined?**

Article 72

Degree of penalty

In determining the degree of penalty due consideration shall be given to the **seriousness of the fact**, the **culpability of the magistrate**, his or her **personality** and **the circumstances** in favour or against him or her.

Article 73

Special mitigation of the penalty

A penalty may be **specially mitigated, resulting in the application of a lighter penalty, when there are circumstances, anterior, posterior, or contemporaneous with the violation, that considerably reduce the seriousness of the fact or the responsibility** of the judicial magistrate.

Magistrates must be punished for misconduct, not only to punish the magistrates' action in particular but also for the integrity of the legal system to be upheld. At the same time, justice requires that the magistrates' punishment is itself just. Justice requires a very careful balancing of all factors to ensure that the penalty matches the infraction under Article 72. Likewise, Article 73 requires all actions surrounding the misconduct be examined. That means, for example, that if the magistrate has been working diligently and behaving ethically and the misconduct represents a minor once off mistake that should be taken into account. Alternatively, if the magistrate attempted to engage in a cover up of his or her inappropriate behavior, punishment should be more severe.

## Questions

Martino is a magistrate based in Dili. One day, he visits a local store to buy a new mobile phone and a SIM card. The employee asks him about his profession. Martino gives the correct information. A moment later, the store manager comes along and offers Martino the mobile phone for free. The manager explains that his company is interested in many "VIP" customers because they want other people to understand that successful individuals use their services. Martino hesitates to agree, among other things because he knows that judges in district courts sometimes have to adjudicate civil suits of this phone company against stores knowingly selling faulty electronic goods, including cell phones. The manager, however, takes Martino's hand and gives

him the phone and the SIM card with the words, “Take them both as a sign of our deep appreciation of your service to the people of Timor-Leste.” Martino thanks him and leaves. Martino has no intention of allowing the free cell phone to influence his actions now or in the future.

On the drive home, he realizes that he forgot to buy an anniversary gift for his wife, who is returning that evening from a visit to her family in Ermera. He also remembers that he is not prepared at all. He calls up his clerk. He asks the clerk to purchase a gift for his wife, pick up his suit from the cleaner, and watch his children while he takes his wife out to dinner.

1. Has Martino done anything wrong? If so, what?
2. What type of disciplinary action, if any, would you suggest?

A few weeks later, one of Martino’s colleagues notices his new phone. Martino explains the “VIP program.” Martino has not been involved in any litigation regarding the store in question. The coworker suggests that accepting the free phone likely violates the Magistrates Law.

3. What should Martino do at this point? What actions are likely to increase or decrease punishment?

## **Answers and Explanations**

1. Martino’s behavior violates the high ethical standards for magistrates in at least two ways. First, he has received a significant gift from a potential litigant due to his position as a magistrate. Martino should not have accepted the phone even if he believed that it would not

influence his actions. Moreover, even if Martino never heard a case involving that store, it is inappropriate that the store is able to claim Martino as a member of the VIP program. Being associated with the store, or being known to accept gifts, presents a serious concern regarding magistrates' duty to appear, and actually be, independent. Martino's request for his clerk to buy his wife's anniversary present and watch for his children constitutes an inappropriate use of court staff. It is an abuse of judicial authority that places the employee in an extremely difficult situation. Court staff should not be directed to perform inappropriate and excessive personal services for a judge beyond minor matters that conform to established conventions.

2. There is a range of potential disciplinary actions that may be justified here. Considering the available information, a simple warning could be the appropriate penalty given or, potentially, a written admonition given the infractions committed and the need to deter Martino. A fine might also be justified as there seems to be negligence in the fulfillment of his duties as a magistrate, especially if this is a common occurrence. These offenses should also weigh in favor of stiffer punishment in the event of future misconduct.
3. Martino should immediately inform his superior about his activities. It is possible that Martino did not know he was violating his duties (in which case he should immediately review the Magistrates Law and this book), but ignorance of the law is no excuse. Especially for a magistrate. He should also take steps to undo his previous wrong actions by either paying for the phone or returning it to the store and should make it clear in the store that they must not use him as a way to advertise. Likewise, he should refrain from asking the clerk to perform any non-work related tasks. The fact that Martino attempted to undo the impact of his misbehavior should serve as a mitigating factor. Punishment must be stronger in the event that

he attempts to cover up his wrong doing, for example, by threatening the clerk or the store owner that there would be severe consequences if they told anyone about him breaking the rules. In this case, Martino would be attempting to subvert the justice process and committing additional wrongs in the process. Likewise, he should be punished more severely if these misdeeds are part of a pattern of misbehavior that would suggest Martino has not been deterred by previous disciplinary actions.

## 6. Review

In this chapter, we have looked in turn at each of the statutory ethical requirements of judicial magistrates and the reasoning that can help to understand them. We studied the duty to maintain discretion in order not to abuse information and to preserve neutrality. We studied duties to avoid conflicts of interests in order to make sure no one gets special treatment before the law. We explained what activities are incompatible with the judicial magistracy because of the need to preserve independence and impartiality and to ensure the magistrates are fully focused on their functions. Finally we learned the possible penalties if these duties are violated.

This text could not hope to provide an analysis of all possible questions of legal ethics that a judicial magistrate might encounter, nor could we fully review the entire text of the law. Our purpose was to highlight some of the most important provisions, and allow you to begin to apply this law. We would encourage you to read the entire text and create and discuss some hypothetical applications of your own. What scenarios might require you to apply certain applications? In what scenarios might certain provisions come into conflict? How might you resolve this conflict? Are there any parts of the statute that help you to resolve the conflict? What provisions help explain one another? What provisions might you need to apply every day?

# VI. THE PRIVATE LAWYERS LAW

## 1. PRACTICING THE LEGAL PROFESSION

### Section Objective:

- To understand what it means to practice the legal profession and to be a private lawyer.
- To understand the duty to register in order to practice as a private lawyer.

### Section Overview:

- A private lawyer is a lawyer who is not a permanent employee of the state and can be hired by individuals or organizations. They can work for private citizens, companies, non-governmental organizations, and even state institutions.
- Only people who are trained, qualified, and licensed to practice law may do the jobs which are exclusively set aside for lawyers to do.

### What does it mean to practice the legal profession?

The term “private lawyer” generally refers to all those lawyers that practice law and are not employed by the state. Private lawyers play a very important role in the judicial system as they represent the interests of different parties before the courts and the state. Along with the courts and government officials, they facilitate the activities of private citizens, such as drafting

wills and negotiating divorces, and of business, providing advice on contracts, disputes, and ways to conform to laws and regulations.

The Law on the Legal Framework Governing Private Legal Profession and Lawyers Training, or the Private Lawyers Law, was passed in 2008. It deals specifically with the responsibilities of private lawyers. This law describes the many duties that a private lawyer has. Before discussing the most important of these duties separately, we must establish what it means to be a private lawyer. Article 22 of the Private Lawyers Law describes what it means to practice the legal profession, and, therefore, what lawyers are subject to this law.

Article 22

Activities exclusive to private lawyers

1. Unless otherwise stated, **only those who are authorized to practice law under the terms of the present law can carry out activities that are exclusive to private lawyers** before any jurisdiction, court, public or private authority or entity.
  
2. Without prejudice to provisions included in other legislation, **the following are activities exclusive to private lawyers:**
  - a) The **exercise of the judicial power of attorney;**
  - b) **Legal advice;**
  - c) The **exercise of the power of attorney, with powers to negotiate the establishment, alteration or termination of legal relations;**
  - d) The **drafting of contracts** and the practice of preliminary actions **leading to the establishment, alteration or termination of legal transactions**, notably those made at the registries and notary offices;
  - e) The **negotiation leading to the collection of credits;**
  - f) The **exercise of the power of attorney within the scope of a complaint or objection regarding administrative or tax acts, or before any public-law legal person, or respective bodies or services**, even if

only matters of fact are raised or discussed;

g) Those **acts resulting from the exercise of the right of citizens to be accompanied by a lawyer before any authority.**

3. The provisions of the previous numbers **do not refer** to the following:

a) The practice of the **public defender's** functions;

b) The preparation of **written opinions by law school teachers or by other legal professionals of recognized merit;**

c) The **practice of legal advice by legal professionals of recognized merit and by Masters and Doctors of Law,** whose degree is recognized by the Ministry of Education.

This section describes those acts that can be classified as practicing the legal profession, or practicing law. Since most of these descriptions are not intuitive, we will discuss each in turn.

The first activity listed is the exercise of the judicial power of attorney. This is explained more fully in Article 23 as a “the legal power of attorney conferred, according to the law, to be exercised in any court, including arbitration tribunals or commissions.” This description, however, does not do much to actually define a forensic mandate. This can be better understood as the power an attorney or lawyer holds in the courtroom to act for and on behalf of another. In such instances, when a lawyer acts on behalf of client, he or she is exercising a judicial power of attorney. An example of this would be when a judge asks the parties to make their final statement. When the attorney makes that concluding statement regarding the matters of fact and law, he or she is exercising a judicial power of attorney conferred according to the law. The same would be the case if an attorney were to represent his or her client in a business arbitration, which happens when the parties establish that their disputes are settled by an arbitration tribunal. In these situations, the attorney is acting with the judicial power of attorney and, therefore, practicing law.

Providing legal advice is explained in Article 24 as “the activity of giving legal advice which consists of interpretation and application of legal provisions at the request of a third party.” This means interpreting or advising someone else on the law, such as offering advice on how to open a restaurant in compliance with relevant laws and regulations. Article 24 also provides an exception for those who hold a bachelor’s degree in law and give legal advice or are legal consultants purely within a public or private institution. This is not considered legal advice for the purposes of what is considered an activity exclusive to private lawyers and, therefore, that person would not necessarily have to register as a private lawyer. An example of this would be someone who graduates with a law degree and is hired to work for an oil company. If she advises her boss that he must file certain permits before exporting the oil, she would not be offering legal advice as defined by this provision. That is because the advice she is giving (to file permits before exporting) is being given only within the private institution (to her boss at the oil company).

Third is exercising a mandate with powers to entail negotiations to establish, change or terminate legal relationships. Some examples of these activities include a private lawyer negotiating a new labor contract in the name of his/her client (establishing a legal relation) or negotiating a divorce agreement (terminating a legal relationship).

The fourth activity listed is preparing contracts and preparatory acts for establishing, changing, or extinguishing legal transactions. Legal transactions are voluntary and intentional actions (unilateral or bilateral) that are based on the will of the parties. Examples of these activities include preparing the documents needed to enter into an agreement to sell a property to another person and drafting the property contract, drafting a will, or preparing the documents for a client to be able to make a donation of assets.

Negotiating for the collection of credits will be encountered most by those lawyers working in litigation, finance and bankruptcy, but other lawyers may encounter this situation as well. Since having a credit means having the right to demand that the other party fulfills its obligations, examples of these activities may vary from very simple to extremely complex cases. An example of a simple case is a contract where a party supplies good and the other pays the price. The supplier delivers the goods, fulfilling his part of the agreement. He now has a credit before the buyer. However, the buyer does not pay so the supplier may hire a private lawyer to negotiate the collection of this credit. Another, more complex, example is where a company has declared bankruptcy. If a company does not do well and must declare bankruptcy, its creditors (suppliers, employees, banks that have granted the company loans, even the state if the company has failed to pay its taxes, etc.) might not get all of the money that they are entitled from the company. However, any money and assets the company still has must go towards paying off these creditors. Often, this takes negotiation to determine what the creditors are willing to accept, and in what form. For instance, one creditor might be willing to accept some of the left over inventory or supplies of the company for payment, or they may be willing to accept the land that the company was on. The process of negotiation between the creditors and the company (in private proceedings and in court) is an activity exclusive to private lawyers.

The sixth activity described in the statute is the exercise of the power of attorney in a complaint or a claim relating to an administrative or tax act or before a public-law legal person or service. This refers to administrative or other proceedings inside or outside a traditional, formal court. An example of this might be representing someone before a government agency to secure their pension or a type of government subsidy. Another example of an activity exclusive to private lawyers is where a private lawyer is representing someone in a tax dispute, whether this is

done before the administration - such as someone who believes he is entitled to a tax rebate - or in court - if there is a proceeding against someone for tax evasion.

Finally, acts resulting from a citizen exercising the right to be accompanied by a lawyer are those situations when the law allows or requires the presence of a lawyer. In those situations, it is not just anyone that a citizen can request to accompany them. Only a registered and authorized private lawyer can do so. A typical example is when someone is being questioned about, or charged with, a crime. In these cases, someone who is being questioned can request the presence of a lawyer, while if someone has been charged the law requires the presence of the lawyer. With the exception of public defenders, these lawyers must be registered and authorized.

## **Questions**

In each of the following situations, say whether or not the activity is exclusive to private lawyers according to the Private Lawyers Law.

1. Pedro has recently graduated from law school and is looking for a job. He has not yet registered to become a private lawyer and is waiting to begin the training course at the Legal Training Center, which he must complete before being able to do so. Before he begins this course his neighbor's home is robbed. The police ask Pedro to come in for questioning since someone saw a person that looked very much like Pedro outside his neighbor's door near the time of the robbery. Since Pedro has completed his law degree, he decides not to ask to have a lawyer accompany him as he is being questioned. Instead, he relies on what he has learned in law school to know whether or not to answer certain questions that the police ask him. In effect, he is acting as his own lawyer.

2. Nina's mother was hurt seriously in a car accident over a year ago. She will not be able to work ever again and will have to use a wheelchair when she leaves the house. Nina believes that her mother qualifies for benefits from the government because she is disabled. Nina has never been to law school and works as a hairdresser in her town. Her mother decides to take the case to the government to try to secure benefits. This involves an administrative hearing, and Nina's mother asks her to represent her.
  
3. Marco has just started his third year of law school. His older brother Francisco has a very successful business as a plumber. Francisco would like to buy the business of his competitor, who is getting older and would like to retire. Francisco asks Marco to help him write the sales contract to buy the competitors business. Marco sits down with his brother for many hours and helps him to write the contract.

### **Answers and Explanations**

1. Pedro has not practiced the legal profession. In this case Pedro is only providing legal advice to himself. Article 24, which helps to define what it means to offer legal counsel, says that it must be "at the request of a third party." In this case, there is no third party, only Pedro. Indeed, the law does not require everyone to have a private lawyer present in these situations; it just requires that everyone have the option to have a private lawyer in these situations. It would be ridiculous to allow someone who is not a lawyer to speak for himself, but not allow a lawyer to speak for himself. Nevertheless, despite his law training, it still may not be wise for him to be questioned without the presence of a private lawyer in this situation. But that is up to Pedro to decide.

2. Nina can do this. If her mother gives her such mandate she can represent her to make this claim. Nina is not representing her mother as a private lawyer but acting on her mother's behalf. The law is not made to prevent people from representing themselves and force them to hire lawyers - they might not even have money to do so. It is done to ensure that when there is legal representation that is done by people that are qualified to do so.
  
3. Marco is not carrying out an activity exclusive to private lawyers. Sometimes it is difficult to draw a line between what is just giving advice (which anyone can do) and giving legal advice (which only registered lawyers can do), but in this case Marco is not practicing law since contracts can, and often are, drafted by non-lawyers. If Francisco had come to Marco and said, "I want to buy this business and I think I should have someone write a contract to arrange the sale. The other owner doesn't think that's necessary. He thinks a verbal agreement is enough. What do you think?" Marco would also be okay to answer with the recommendation that his brother have a lawyer draw up a contract. In this situation, he is offering an advice that any member of the family could give. He is not required to draw on specialized legal knowledge.

## Who may qualify?

Article 2 of the Private Lawyers Law describes who may qualify as a private lawyer. Both those who have been to law school and trained in Timor-Leste and those who have been to law school and trained elsewhere are potentially eligible to become private lawyers. However, the requirements for becoming a private lawyer in each of these situations are slightly different.

The first part of Article 2 outlines the requirements for those lawyers who have been trained in Timor-Leste.

<p style="text-align: center;"><u>Article 2</u> <u>Requirements for registration</u></p> <ol style="list-style-type: none"><li>1. Unless otherwise provided, the exercise of the legal profession and the use of the respective title shall be <b>limited to those individuals registered</b> in that capacity <b>with the Legal Training Centre until such time as the Bar Association is established</b> and starts its functions.</li> <li>2. <b>Registration</b> with the Legal Training Centre to exercise the legal profession shall be <b>open to any individual who, cumulatively:</b><ol style="list-style-type: none"><li>a) Holds a <b>bachelor's degree in Law</b>;</li><li>b) Has a written and spoken <b>command of at least one of the official languages</b> of Timor-Leste;</li><li>c) Has attended and successfully <b>passed the training course</b> provided for in the present statute;</li><li>d) Is an <b>adult</b>, according to the civil law in force;</li><li>e) <b>Presents a certificate from the criminal register, in order to guarantee the lawyer's moral suitability to practice law.</b></li></ol></li></ol>
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In order for someone to be eligible to register as a private lawyer, if he or she went to law

school and trained in Timor-Leste, he or she must:

- Be an adult,
- Have a law degree,
- Speak and write either Portuguese or Tetum,
- Pass the training course,
- Present a criminal record to show that he or she is not barred by having been convicted of an intentional crime and having served a prison sentence.

The article then goes on to explain the requirements for registration for national lawyers that have practiced as judges, prosecutors or public defenders and for international lawyers.

<p><u>Article 2</u> <u>Requirements for registration</u></p>
<p>3. <b>Registration</b> to exercise the legal profession shall <b>also be open to whom, cumulatively</b>, proves:</p> <ul style="list-style-type: none"><li>a) To hold a <b>bachelor’s degree in Law</b>;</li><li>b) To be <b>fully qualified for exercising the legal profession in Timor-Leste or in another civil law country</b>;</li><li>c) To be <b>acquainted with the legal system</b> applicable in Timor-Leste;</li><li>d) To have a written and spoken <b>command of at least one of the national languages</b>.</li></ul>
<p>4. To the end of paragraph b) of the previous number, the national professionals who have effectively <b>practiced as judges, public prosecutors or public defenders, for a minimum period of four years</b> are considered to be fully qualified to practice law.</p>
<p>5. To the end of paragraph b) of no. 3, international <b>lawyers who have practiced law for a minimum period of five years</b> are</p>

considered to be fully qualified to practice law.

...

7. In order to certify the requirements referred to in subparagraphs c) and d) of no. 3 above, candidates shall have to undergo and be approved in public examinations organized to that end by the Legal Training Centre Pedagogical Board.

Besides the cases provided for in Article 2, no. 2, in order for someone to be eligible to register as a private lawyer he/she must:

- Have a law degree;
- Speak and write either Portuguese or Tetum. It is up to the Legal Training Centre Pedagogical Board to determine this;
- Be acquainted with the legal system of Timor-Leste. It is up to the Legal Training Centre Pedagogical Board to determine this;
- Be qualified to practice law in Timor-Leste or another civil law country, which includes international private lawyers who have practiced law in another civil law country for at least five years or national legal professionals who have been magistrates, public prosecutors or public defenders for at least four years.

In addition to these requirements, there are some further restrictions on who may qualify as a private lawyer. These restrictions can be found in Article 3 of the Private Lawyers Law and include ethical violations, such as criminal convictions or having been dismissed from certain positions for ethical reasons.

### Article 3

#### Restrictions to the right to register

1. **Registration shall not be open to whom:**
  - a) Has been **convicted by a final sentence of imprisonment for committing an intentional crime;**
  - b) Is **not able to fully exercise his or her civil rights;**
  - c) Has been declared by a final sentence to be **incapable of administering his or her own person and property;**
  - d) Is in a situation of **incompatibility with, or is inhibited from, the exercise of the legal profession;**
  - e) Has been **dismissed**, retired or made inactive as a **magistrate, public defender or civil servant, because of lack of moral suitability.**
2. Private lawyers and trainee lawyers finding themselves in any of the situations referred to in paragraph 1 above may, depending on the situation, have their **registration suspended or cancelled.**

This article outlines five situations where people are ineligible to become private lawyers. First, anyone convicted by a final sentence to imprisonment for an intentional crime are ineligible. In order for this provision to bar someone from becoming a private lawyer, three things must be true: 1) he or she must have been convicted; 2) by a final sentence of imprisonment; 3) for an intentional crime. In order to be barred, a person must be convicted, not just accused or tried for a crime. This provision also requires that the conviction be by a final sentence of imprisonment. If someone is convicted, but the conviction is overturned on appeal, then he or she would not be barred from being a private lawyer because the conviction was not the final sentence. Also a person would not be barred if he or she was sentenced to prison but the court determined that the sentence should be suspended since the statute says they need a final sentence of actual

imprisonment. Finally, the crime must be an intentional crime. An intentional crime is one in which the perpetrator means to commit the crime. This means that crimes committed with negligence do not qualify.

Second, those who are not able to fully exercise their civil rights are barred from becoming private lawyers. This means that the person has been restricted from fully participating in civil activities such as voting. Someone's civil rights may be restricted for a number of reasons including insanity or because the person has been convicted of certain crimes. The restriction of civil rights does not necessarily overlap with being sentenced to imprisonment, meaning that this situation does not necessarily overlap with the provision discussed above.

Third, this article bars those people who have been declared incompetent to administer their own affairs, from becoming private lawyers. This would include, for example, anyone who has been declared insane. It is clear to see why we would not want people who have been declared incapable of administering their own affairs from becoming private lawyers. If someone cannot take care of himself or herself, we certainly do not want to trust him or her with the power to administer the affairs of *other* people. This would be potentially dangerous and probably violate the law. A private lawyer has a duty to contribute to the proper administration of justice and to defend the rights and interests of the citizens - this is something that a person in such situation would not be able to do.

This article also bars those who find themselves in a position that is incompatible with being a private lawyer. We will discuss incompatibilities in much more depth later, but generally, incompatibilities are other obligations a lawyer has, such as family or financial ties, that might be a conflict of interest.

Finally, those who have been dismissed or forced to leave a position as a magistrate,

public defender, or civil servant because of moral or ethical problems. For example, if a magistrate is discovered to be taking bribes and is removed, he cannot then become a private lawyer. This provision does not bar a magistrate, public defender or civil servant from becoming a private lawyer if he or she left his or her job voluntarily or for other reasons. For example, a public defender that is dismissed because of budget cuts would not be barred. Similarly, a civil servant with a law degree that simply did not like her job and wanted to become a private lawyer would also not be barred.

It is also important to note that anyone who wishes to practice law must register with the Legal Training Center. It is strictly prohibited to practice law as a private lawyer without being authorized and registering with the Legal Training Center. Article 65 of the Private Lawyers Law makes it a crime to do so. It is easy to understand why we would want this restriction. Lawyers hold a certain amount of power in the legal system, and we only want those people who are qualified to be able to exercise this power. It helps to protect citizens against incompetent or immoral people who might claim to be a lawyer.

## 2. LIMITATIONS IMPOSED ON A PRIVATE LAWYER

### Section Objective

- To understand what other obligations might be incompatible with being a private lawyer or might prevent a private lawyer from fully performing his job.

### Section Overview

- There are certain incompatibilities with being a private lawyer. This means that there are certain things that someone is not allowed to do while serving as an attorney.
- There are also impediments, which are things that can prevent a private lawyer from being able to work on a specific case but which do not stop him or her from being able to work on other cases.

### Why are incompatibilities and impediments important?

The Private Lawyer's Law devotes two articles to incompatibilities and impediments to being a private lawyer. We will deal with each of these separately as well. First, however, it is important to understand why incompatibilities and impediments are relevant.

Incompatibilities generally refer to other activities, positions or functions that private lawyers cannot hold because they represent, or might represent, a conflict of interest. Impediments are more limited. They refer to a conflict of interest in a particular case or a particular type of case and usually are due to a special relationship with one of the parties.

The rules on incompatibilities and impediments are important because they aim at guaranteeing the independence and dignity of the profession. At the core of our concern about incompatibilities and impediments we are worried that our legal system may not be able to function correctly, and justice may not be served, if private lawyers do not perform their role with rectitude and responsibility. Although private lawyers, contrarily to magistrates and prosecutors, do not serve the state, the crucial role that they play in the judicial system also requires them to act in the service of law and justice. Therefore, if for instance private lawyers disregard their duties and represent a client in a case where they have a conflict of interest, this might raise concerns to the client, whose best interests might not be protected. However, there is also a wider concern since being a private lawyer is a respectable profession, and it needs to remain so to have great esteem in the community in order for people to trust the legal system of Timor-Leste. We therefore have rules about incompatibilities and impediments. They serve to ensure that justice is done, that people believe that justice is done and that their rights and interests are defended, and also to guide private lawyers in the performance of their functions.

### **What activities are incompatible with being a private lawyer?**

When we discuss activities, positions or functions that are incompatible with being a private lawyer, we are generally referring to anything that might create a conflict of interest. In general, a conflict of interest occurs when someone has multiple interests or motivations, one of which might corrupt another. These interests can arise out of many things such as personal relationships, financial investments, or other professional responsibilities. Article 35 of the Private Lawyer's Law focuses on professional incompatibilities. In other words, it focuses on other activities, functions or positions that are barred to private layers that are practicing law.

Article 35

Incompatibilities with practicing law

1. Practicing law is **incompatible with undertaking any other position, activity or function that diminishes the objectivity, independence and dignity of the profession.**
2. Unless otherwise stated, practicing law is **incompatible with the following positions, activities or functions**, namely:
  - a) **Holder or member of a sovereign body and its respective advisors, members and employees or agents** of their respective cabinets, with **exception of the members of the National Parliament**;
  - b) **Ombudsman for Human Rights and Justice**, advisors, members and employees of the department;
  - c) **Judge, public prosecutor, public defender or an employee of any court** or anyone who is in their respective service;
  - d) **Member of an executive body or local government directorate**, or their employees or agents;
  - e) **Notary or public registrar** and employees of those respective services;
  - f) **Leaders, employees or agents of any central or local public services**, even if personalized, with the exception of teachers;
  - g) **Active members of the defense or security forces**;
  - h) **Broker and auctioneer**;
  - i) Any other that a special law considers as incompatible with practicing law.
3. The incompatibilities do not apply to those who are retired, disengaged from the service, on the reserve list, inactive or with an unpaid leave situation.

This article lists many incompatibilities, but first it establishes a general provision where any position, activity or function that diminishes the objectivity, independence and dignity of the profession is incompatible with practicing law. The article does not, and cannot, anticipate every

situation in which a private lawyer might face an incomparability. Those activities that it does anticipate, and explicitly list as being incompatible, are:

- Holders, members, advisors or employees of a sovereign body (except members of the National Parliament). This includes the President, advisors to Parliament or the President, staff members of Parliament or the President. These people can still give legal advice within the scope of their job at such sovereign body, but they cannot have private clients. For example, if the President asks one of his advisors about whether or not a proposed law is constitutional, that advisor could advise the President. However, if that advisor's neighbor wanted to hire him to represent him in court, the advisor could not take on his neighbor as a client as long as he continued to work for the President. While it may seem unfair that these people cannot take on clients of their own after work (after all, it is their free time), the duties and responsibilities as politicians, advisors, and staff members - their main role - are probably too great to allow the compliance with the ethical principles of the profession of a private lawyer. This, among other reasons, would clearly question the objectivity, independence and dignity of the profession of private lawyers, which is why the law expressly considered these activities incompatible with practicing law.
- Members, advisors, or employees of the PDHJ. Again, it may seem unfair that members, advisors and employees of the PDHJ cannot take on clients of their own after work, but this is clearly another case where the objectivity, independence, and dignity of the profession of private lawyers would be jeopardized.
- Magistrates, public prosecutors, public defenders, or employees of any court.

People in these positions have an exclusive responsibility before the State and the judicial system and clear duties of independence and impartiality. Taking on private clients would jeopardize the objectivity, independence, and dignity of the profession of private lawyers while undermining the public's confidence in the judicial system.

- Members of an executive body or local government directorate. This includes a director, a director general, a district administrator, a sub-district administrator, a deputy district administrator, a chief of department, and other positions. These government officials, like others must not be seen to be in conflict with the government, which would potentially happen if they represented private clients. The legislator has considered that people in these positions cannot guarantee the objectivity, independence, and dignity of the profession of private lawyers and, therefore, expressly provided for this incompatibility.
- Notary or public registrar. Notaries and public registrars must not take on private clients because their primary obligation is to the state and public service. Acting simultaneously as private lawyers would therefore jeopardize the objectivity, independence, and dignity of the profession.
- Active member of the defense or security services. Being an active member of the defense or security services is a very important responsibility, which must not be divided. As analyzed above, acting simultaneously as private lawyers would jeopardize the objectivity, independence, and dignity of the profession.
- Brokers and auctioneers. Given their role notably in proceedings involving the liquidation of assets and estates, this incompatibility aims at guaranteeing the

objectivity, independence, and dignity of the profession of private lawyers by barring these people from taking an unfair advantage of their position as private lawyers to get more clients.

It is not allowed for someone to practice law as a private lawyer and to participate in an activity, hold a position, or carry out the functions that are classified under this article as an incompatibility. This means that a private lawyer must no longer practice as such if he takes up one of these activities. But he can always return to his practice once he has left this other job. For example, Francisco has many interests and is having trouble deciding what type of lawyer he would like to be. He decides to begin his career as a private lawyer. He works as a private lawyer for two years and then realizes that he does not enjoy his work. He then takes a job as a public prosecutor. When he does this he must give up his work as a private lawyer. After two years working as a public prosecutor he changes his mind again and returns to his former practice. This is allowed, because he is not longer working as a public prosecutor.

## Questions

1. Maria is a private lawyer. She has been practicing for five years when she becomes very interested in the story about a local policeman assaulting a suspect. She realizes that she feels much more passionately about this than her work as a private lawyer and decides to take a job at the *Provedoria dos Direitos Humanos e Justiça* (PDHJ). Must she give up her private practice? She still has some former clients that approach her for advice. Can she advise them?

2. Juan has been a magistrate for many years. He is getting elderly and has decided to retire. Once he has done so, however, he decides that his new life without work is rather dull. He decides it would be interesting to register as a private lawyer and take on a few clients. May he do so?

### **Answers and Explanations**

1. Maria must give up her practice as a private lawyer. Article 35 specifically lists working at the PDHJ as an incompatibility with being a private lawyer. But must she no longer advise any of her clients? This is a question that goes back to the activities exclusive to private lawyers. Article 22 of the Private Lawyer's Law helps us to answer this question. It lists "legal advice" as practicing law. Therefore, it depends on the nature of advice that her former clients are seeking. If they come to ask her for a recommendation for a new lawyer, it would be entirely appropriate for her to give them a recommendation. If, however, they come to her and ask her to review a rental agreement for their new restaurant, this would not be appropriate and she must not advise them in this way.
2. Juan may become a private lawyer now that he has retired. Article 35 specifically says that "incompatibilities shall not apply to individuals who are retirees".

## What activities are impediments to practicing law as a private lawyer?

Impediments are more limited than incompatibilities. Impediments are a conflict of interest in a particular case or a particular type of case. Most impediments have to do with the lawyer's relationship to the parties or to the case.

### Article 36

#### Impediments to practicing law

1. Impediments **diminish the scope of the practice** of law and constitute **relative incompatibilities** with the judicial power of attorney and legal advice, due to the relationship with the client, the matters in question or the irreconcilable availability for the profession.
  
2. **A private lawyer shall be prevented from practicing law when:**
  - a) The **pubic service in which he or she is a teacher is a part or an intervening party** in the cause;
  - b) He or she **has intervened in the respective proceeding** in the capacity of **judicial magistrate, magistrate of the Public Prosecution, defense lawyer, a clerk, a witness, a declarant, or expert;**
  - c) He or she has **supported, advised, or represented the opposing party on the same matter;**
  - d) The matter is **related to another matter in which he or she assists, advises, or represents** or has assisted, advised, or represented **the opposing party;**
  - e) His or her **spouse or relative**, or family member in straight line or up to the second degree of the collateral line **participates in the judicial proceeding as a magistrate, defender, or law official;**
  - f) He or she **litigates against an employee with whom he or she has a subordinated employment contract.**

Impediments are not like incompatibilities in that they do not require that a private lawyer quit his or her job as a private lawyer or the incompatible activity, function, or position. Again, impediments are much more limited than incompatibilities. Because they usually only apply to a case or a certain type of cases, a lawyer is only prevented from working on that case or that type of cases. This is what this article means by “diminish the scope of the practice of law.”

A good preliminary screen, or first step in identifying impediments, is to consider whether or not the lawyer has a special relationship or has had experience with either of the parties before. If he or she has, then you must carefully consider whether or not that relationship or experience is actually an impediment according to this provision.

This article gives many classes of impediments. In order to better understand them, let us consider them in a different way. A private lawyer should not be involved in a case or representing his or her clients if any of the following are true:

- The opposing party is:
  - A public institution in which he or she is a teacher. This would apply to a private lawyer who also teaches part-time at UNTL if his or her client were trying to sue UNTL. In this case, the private lawyer should not continue to represent his or her client.
  - Someone that the private lawyer has aided and advised on the same or a related matter. For example, Pedro is a private lawyer who lives next door to a married couple, Maria and Francisco. One evening Francisco comes to Pedro and asks for his advice and offers to pay him for his help. Francisco would like to divorce Maria but if this happens, he does not know who will continue to live in the house. Pedro gives Francisco some advice but suggests

that he hire him to help in the full divorce proceedings. Ultimately Francisco hires another lawyer. Maria then comes to Pedro and asks if he will represent her in the remainder of the divorce proceedings. Pedro, however, cannot advise nor represent Maria in these proceedings because he has already advised Francisco (the other party) on this matter (the divorce).

- Someone for whom the private lawyer is working. This would include a private lawyer whose client is now suing the firm where the private lawyer works for discrimination.
- The magistrate, defender, or clerk is related to the private lawyer as:
  - A spouse;
  - A relative in the direct line (meaning someone from whom the private lawyer directly descends, such as a mother or father, or grandmother or grandfather, or someone whom directly descends from the private lawyer, such as a son or daughter, or grandson or granddaughter);
  - A relative up to the second degree of the collateral line (this would include all siblings).
- The private lawyer has served as a magistrate, public prosecutor, public defender, witness, expert, or specialist in this proceeding. This would include Marcos, a private lawyer who witnessed a robbery and who has been asked to give testimony as a witness in the case. After seeing his testimony, the defendant's lawyer becomes very ill and cannot continue the case. If the defendant then asks Marcos to represent him, he could not do so because he has already intervened in another capacity, as a witness.

In all of the situations discussed above, the lawyer would not be able to represent a client. Even if the previous or current relations to the opposing party or to the other parties in the proceedings would actually be a benefit to the client, the private lawyer is impeded because this violates his duties and the principles of objectivity, independence, and dignity of the profession. When the private lawyer has a previous relationship with the opposing party, either having worked for them or having given them legal advice, the private lawyer might actually want the other side to win, or might have access to information that is confidential or at least that he/she would not have otherwise. Where the magistrate or law official is related to a private lawyer in a case that the magistrate or official might decide or influence the case based on his or her relationship with the lawyer, and not based on what is legal or just. Where a private lawyer has been involved in the proceeding in some other capacity, he/she might have access to information that would not be available otherwise or might have a bias or personal interest and that can disrupt the judicial system.

## **Questions**

Marina is a private lawyer. She is considering representing a client who was recently fired from her job as a maid at a local hotel. This client believes that she was fired because she was pregnant and would like the hotel to admit that they were wrong and give her back her job. Could Marina continue to represent her client if any of the following were true? In other words, do any of the following present an impediment to Marina representing this client?

1. Last year Marina represented the hotel in a similar case, where a different maid was fired for being pregnant.

2. Before Marina took on her client she was approached by the hotel, which asked her whether or not it was a form of discrimination to fire someone for being pregnant.
3. Marina has stayed at the hotel on several occasions.

### **Answers and Explanations**

1. Marina could not represent this client in this case because she has previously represented the opposing party (the hotel) in a similar case.
2. If all that happened was a general question of whether or not it was a form of discrimination to fire someone for being pregnant, Marina could possibly still represent this client.
3. Marina could represent this client even if she had stayed in the hotel many times. This is not really a special relationship as many people stay at the hotel. There is in theory no danger that she might have special knowledge or that she might not be exempt or independent towards the hotel because she has stayed there many times.

### 3. DUTIES OF PRIVATE LAWYERS

#### Section Objective

- To explore the duties that a private lawyer has to Timor-Leste, the ideals of justice, clients, magistrates, witnesses, and other lawyers.

#### Section Overview

Private lawyers have serious and binding duties towards:

- Their community and the nation of Timor-Leste more generally;
- Their clients;
- Judges and Public Prosecutors;
- Witnesses;
- Other lawyers.

If the private lawyer is unable to fulfill these duties they face debarment and other penalties.

#### What duties do private lawyers have?

The Private Lawyer's Law outlines many duties of a private lawyer. It explicitly lists duties that a private lawyer has towards clients, magistrates, witnesses, other lawyers, and even the general community. In addition to these duties owed to other entities within the legal system, a private lawyer has a duty to the system itself. Because of the important role that a private

lawyer plays within the legal system, a private lawyer must respect his role within that system as well as the ideals of justice that the system seeks to uphold.

## **Duties to the ideals of the legal system and the profession**

As we have discussed, because of the special role that a private lawyer plays within the legal system, he or she has a duty to uphold the ideals of that system.

### Article 21

#### Primary function

A lawyer's **main duty** is to **contribute to the good administration of justice** and to **uphold the rights and legitimate interests of citizens.**

### Article 39

#### Ethical duties

1. When practicing law and elsewhere, the private lawyer must **behave as an upholder of justice and the law** and, as such, must demonstrate to be worthy of the honour and responsibilities inherent to the profession.
2. In carrying out his/her profession, the private lawyer will **in all circumstances maintain the highest level of independence and impartiality, not using the power of attorney to pursue objectives which are not strictly professional.**
3. The private lawyer will **punctually and scrupulously carry out the duties assigned** by the present law and all others that the law and the professional customs impose in respect to other lawyers, magistrates, public defenders, clients and any

public and private entities.

4. The lawyer must behave with **honesty, integrity, rectitude, loyalty, courtesy and sincerity.**

#### Article 40

##### Obligations to the community

1. The lawyer has the following **obligations to the community**:
  - a) To strive for the **good application of the law**, for a **fast, efficient and fair administration of justice** and for the **improvement of the legal culture and institutions**;

In upholding the ideals of the legal system, it is particularly important that a private lawyer act independently. This includes avoiding conflicts of interest, and respecting the rules and limitations regarding incompatibilities and impediments.

In addition, a private lawyer has a duty to the legal profession. This includes doing his or her job well, upholding his or her duties to others (which we will soon discuss), acting professionally and morally. When we speak about acting professionally, we often mean the way a lawyer acts every day. This includes things that may seem insignificant, such as being punctual, keeping appointments, and dressing appropriately. But it also refers to larger things such as being prepared for hearings and trials. When we say that a private lawyer should act morally, we are again moving away from *legal ethics* and towards *ethics*. A private lawyer must act professionally.

These are very broad concepts, and do not provide much specific guidance. This makes it difficult to rely on any particular provision for guidance in a difficult situation. The Private Lawyer's Law offers some, but not much, additional direction.

Article 40

Obligations to the community

1. The lawyer has the following **obligations to the community**:

...

b) To **protest against violations of human rights and to combat the arbitrariness** that he or she becomes aware of in practicing law;

c) **Not to act against an express law, not to use illegal means or resources, nor to promote procedures that are deliberately meant to delay the process, that are worthless or harmful** to the correct application of the law or the discovery of the truth;

d) **To refuse to give legal assistance in matters that he or she considers unjust;**

e) **Not to accept power of attorney instructions or render professional services that, in any circumstance, are not the result of a direct and free choice of the constituent of the interested party;**

f) Not to advertise nor seek clients, directly or through a third party, except in the cases

g) To **refuse to render his/her services** when he or she **seriously suspects** that the legal action or transaction in question **seeks to obtain illicit results and that the interested party does not intend to abstain** from such a transaction;

h) **To refuse to receive and manage funds that do not correspond strictly to a matter entrusted** to him or her.

This section gives somewhat more concrete obligations of a private lawyer in upholding the legal system, but even those provisions that seem to offer more explicit guidance still involve somewhat ambiguous judgments. For example, the law provides that private lawyers must protest violations of human rights and arbitrary acts and refuse pleading in unjust matters. But how does

a private lawyer recognize a violation of human rights, an arbitrary act, or an unjust pleading? Sometimes it will be obvious, and other times it might be very unclear. Two different lawyers might come to very different conclusions about what constitutes an unjust pleading. These are subjective standards, meaning that your understanding of the situation may not be the same as another lawyer's. That is understandable and expected. What is important is that you understand the duty to react in relation to this subjective standard. If you feel that a pleading is unjust, you must refuse it. It does not mean that every lawyer will or should feel this way.

Most of the obligations listed above in the excerpt from article 40 involve judgments, and, therefore, depend greatly on what the lawyer himself or herself knows or thinks. This article requires that a private lawyer protest against human rights violations, but in order for a lawyer to do so, he or she must *know* or *think* that whatever happened was a human rights' violation. Not simply that something might have been unjust or unfair, but that it was an actual human rights' violation.

The article also requires that a private lawyer obey the law and not deliberately waste the court's time. A lawyer who *intends* to delay the court and perhaps drag a case on for so long that the other party simply gives up would be violating this provision. However, a lawyer who files an extension for a legitimate reason according to the relevant law would not be violating this provision.

A private lawyer is required to refuse to give assistance in matters that he or she *considers* unjust. This provision is particularly subjective and many different lawyers may feel many different ways about a case. For example, in a sexual assault case, one private lawyer may refuse to take on the defense of the case because he or she feels that the man is guilty and he or she would not be able to do a good job in defending him. Another lawyer may feel that he was guilty,

but that there are extenuating circumstances in this client's situation (perhaps he was himself abused, or has a mental disorder and might not have understood the seriousness of his actions), and may accept the case.

A private lawyer must also refrain from aiding a client where he or she believes that the legal action will bring about something illicit. In other words, a private lawyer must not help his or her client to break the law. An example of this might be a company who hires a private lawyer to help them prepare a series of business contracts. As the lawyer prepares these contracts, he begins to suspect that they are not good business contracts, but that they are actually a way for the company to conceal how much money they are making from the state so that they do not have to pay taxes. Because the action (preparing the contracts) would bring about an illicit result (tax fraud), the lawyer must refuse to continue. If, however, he was only hired to prepare some of these contracts and did not have enough information to suspect, and never did suspect, that the contracts were to hide money from the government, he could continue to work for the company.

## **Duties to the client**

It is important to remember that while a private lawyer owes duties to many parties – including the judicial system in general, magistrates, witnesses, and other lawyers – his career would not exist without the client. A private lawyer exists as an advocate and representative of his or her clients. Because of this special relationship it is particularly important that a private lawyer is aware of and understands his or her duties towards clients.

Article 41

Professional confidentiality

1. The private lawyer is **bound to keep professional confidentiality** respecting:
  - a) The **facts regarding professional matters that have been revealed to him/her by the client, or on his behalf, within the exercise of his/her profession;**

Communications between a private lawyer and client are and must be kept confidential. This confidentiality is both a right and a responsibility. It is a right because the police and courts cannot compel a lawyer to reveal what a client has said. It is also a responsibility because a lawyer must maintain this secrecy in order for it to be meaningful.

However, there are some limits to this confidentiality. The right to secrecy only extends to professional matters that were disclosed while the lawyer was *acting* as the client's lawyer or on his/her behalf. In other words, in order for something to be subject to the confidentiality provision the private lawyer must have accessed the information within the exercise of the profession. And although the law does not expressly say so, it seems clear that this applies both to current and potential clients. For example, let's say that Maria is a private lawyer and Juan is her friend. Juan has some land in Dili and his family is now building a house there. Juan is worried because he believes that his family has started to build on a plot that does not belong to him, but they refuse to accept this fact. One day during dinner he comments this with Maria and another friend, criticizing his family behavior. Maria gets access to this information for reasons that have nothing to do with her profession. Therefore, if the case goes to court and she is called as a witness, Maria may not refuse to witness based on the duty of professional confidentiality. Regarding potential clients, the reason why professional confidentiality should apply has to do

with the trust people need to have in private lawyers. Say that Maria has a meeting with Pedro, a potential client in a corruption case, Pedro reveals the details of the case and Maria decides that this case is too complex and not really her area of expertise, so she does not take this client's case. If the information revealed by Pedro was not covered by professional confidentiality and Maria could simply walk to the police and share all that she had learned, it would not be possible to trust private lawyers. This would jeopardize not only the law practice but the legal system in general, as no one would risk going to a private lawyer if the information shared, even as a potential client, was not immediately protected by confidentiality.

#### Article 46

##### Obligations to the client

1. In the relation with the client the **lawyer's obligations** comprise:
  - a) **To refuse to act or provide services** in cases referred in article 36 [*cases of impediments*];
  - b) To give the client his **conscientious opinion** on the merit of the rights or claim invoked by the client, as well as to give, whenever it is asked for, information on the progress of matters entrusted to him;
  - c) **To carefully study** and treat the matter entrusted to him/her with diligence, using all the resources of his/her experience, knowledge and activity to that effect;
  - d) **To keep professional confidentiality**;
  - e) **To advise** all the settlement which he or she considers fair and equitable;
  - f) **To indicate**, whenever possible, the **approximate total amount of the fees** that he or she intends to charge for the requested service, identifying, besides the maximum and minimum value of his/her hourly rate, the rules for determining the fees;
  - g) **To account to the client for all the amounts that he or she has received from the client**, whatever its origin, and to present the invoice of fees and expenses;

**h) Make adequate use of all valuables, documents or objects that have been entrusted to him/her;**

i) Not to make, to his/her own advantage, agreements related to matters entrusted to him/her or, by any means, request or accept a share in the outcome of the case;

**j) Not to abandon the client's assistance or attendance on the matters entrusted to him/her without justified reason.**

...

3. Although a justified reason might exist, the lawyer **must not abandon the client's representation or the assistance on the matters in question so that it is impossible for the client to obtain, in good time, another lawyer's assistance.**

4. In cases of abandonment of the client's representation or assistance on the matters in question and where provisions have been received on account of fees, expenses, first court costs or any other charges, any amount exceeding the value of the respective costs should be returned to the client as soon as possible.

Generally, these duties towards the client can be summarized as follows:

- Maintain professional secrecy;
- Avoid conflicts of interest and respect the rules and limitations regarding incompatibilities and impediments;
- Ensure the client good representation, by doing the best job possible in representing them and ensuring that they are able to find a replacement if the private lawyer drops their case;
- Be honest with fees and billing.

These guidelines are perhaps most easily understood when we consider the private lawyer's role in the legal system. A private lawyer acts on his or her client's behalf, to represent his or her rights and interests in legal issues and in proceedings. As such, a private lawyer has a

duty to both the client and the legal system. These duties are both best served when a lawyer meets the requirements as outlined in the Private Lawyer's Law.

It is important for a private lawyer to maintain confidentiality, not only to guarantee the dignity of the profession but also because this has an impact on the stability and predictability of the legal system. It also helps to ensure that clients will trust and rely on their lawyers, which Timor-Leste, as a rule of law country, believes is important. A private lawyer also best serves his clients and the legal system when he or she helps to ensure that his or her client has good representation. This is true either when a lawyer works diligently to provide representation, or helps to ensure that a client has representation if he or she cannot work on the case any longer. If legal counsel is not dependable or representation is poorly prepared, then it is less likely that justice will be served since it is largely up to the lawyers of the parties to ensure that all of the information and arguments are well presented to a magistrate or arbitrator in a case. Without that, a magistrate may not know enough to rule correctly and justice would be undermined. For example, if a lawyer representing a man in a case of an assault that took place in Dili, neglects to present the fact that his client was in Australia on the date of the assault, the magistrate may find his client guilty, even though it is very clear that the client could not have committed the assault. This situation is an exaggerated one, but the principle is still true in even very subtle cases.

While it may appear that fees and billing have nothing to do with the legal system, it is important for private lawyers to charge appropriate fees in order for the public to trust the legal profession. For example, Marina hires a lawyer to help her prepare some business contracts. The lawyer charges her three times what he should have. Marina is very upset and tells all of her friends and family back home in her village. The next year the policemen that oversee Marina's home village begin to ask for bribes in order to protect local businesses. While the villagers know

that this is corrupt behavior they do not know what they can do about it and are unwilling to speak to a lawyer about their options because of Marina's experience last year. Again, this is an extreme example, but the principle is still true. Appropriate and transparent billing practices are a necessary part of ensuring the public's trust and continued use of the legal profession.

## Duties to magistrates

Private lawyers owe magistrates, as a decisive body in the judicial system, a special duty.

### Article 53

#### Duties vis-à-vis magistrates

1. Without prejudice to their independence, lawyers shall always **treat magistrates with the respect owed to their function** and shall **abstain from interfering in their decisions** either directly, in conversations or in writing, or through an intermediary, which includes the interested party itself.
2. Lawyers are particularly **prevented from sending or causing to send to magistrates any records or from resorting to disloyal methods** for protecting the interests of the parties.

### Article 46

#### Duties towards the client

...

2. Lawyers shall undertake **every effort to prevent their clients from exercising any reprisals against the opposing party, the lawyer of the opposing party, public defender, magistrate, or other intervening party or from being impolite towards them.**

In order for the judicial system to function fairly, a magistrate must be able to deliberate and make decisions without interference. A private lawyer must respect this and refrain from interfering, and prevent his client from interfering as well. This does not, of course, apply to the arguments made before the magistrate in court. What a lawyer must not do is interfere outside of the normal activities of the court. We can think about this difference by describing a lawyer's activities in court as trying to *persuade* the magistrate in his or her client's case. What is prohibited is trying to *interfere* in the magistrate's decision. This could include sending the magistrate letters about the case, trying to speak to the magistrate about the case outside of court, or trying to use the media to persuade the magistrate.

For the same reasons, a lawyer must also seek to prevent his client from *interfering* by retaliating, threatening, or being aggressive to the magistrate or opposing party. A client threatening a magistrate could *interfere* with justice just as much as if a lawyer were to threaten a magistrate. If a client were to threaten or retaliate against an opposing party, it would also *interfere* with justice because the other party might give up the case or deliberately lose just to escape the threats. Therefore, the client might win not because he or she deserved to win, but because the opposing party was too scared to continue. If situations like this were not regulated, the public would lose faith in the judicial system.

Even though a lawyer owes a high duty to his or her clients, and it could be seen as helping the client's interest by interfering, a lawyer owes a higher duty to justice and the judicial system. In order for justice to prevail and for the judicial system to remain worthy of the trust the public places in it, the magistrate and opposing parties must be free from interference.

## Duties to witnesses

Just as a private lawyer has a duty not to interfere with the decisions of a magistrate to ensure that proceedings are fair and just, a lawyer has a duty not to interfere with the witnesses.

### Article 54

#### Relationship with witnesses

The lawyer is **banned from establishing contacts with witnesses or any other parties intervening in the proceedings for the purpose of instructing, influencing or in any way altering his/her deposition.**

A lawyer must not establish inappropriate contact or attempt to influence the testimony of a witness. Again, this does not apply to ordinary trial processes, such as a lawyer questioning a witness before the court. These ordinary trial processes are about presenting the facts, are monitored by the court, and are balanced. In other words, both sides have equal access. This provision prevents corruption, unfair and disloyal defense mechanisms, and the disruption of the system by prohibiting one side influencing witnesses in a way that the other side cannot. This helps to ensure justice and fair trials.

## Duties to other lawyers

Lawyers of all sorts—private lawyers, magistrates, public prosecutors, and public defenders—all play an important role in the judicial system. Indeed, the system needs them all to function properly. It is also important for the system that all of these different lawyers interact civilly and in a predictable fashion.

Article 46

Duties towards the client

...

2. Lawyers shall undertake **every effort to prevent their clients from exercising any reprisals against the opposing party, the lawyer of the opposing party, public defender, magistrate, or other intervening party or from being impolite towards them.**

Article 55

Reciprocal duties among private lawyers

1. The following constitute the private **lawyers' obligations in their reciprocal relationships:**
  - a) To proceed with the **utmost correctness, courtesy and honesty, refraining from any personal attack, impolite criticism or degrading insinuation;**
  - b) **Not to make public statements on a matter known to have been entrusted to another lawyer, save in the presence of the latter or with his or her prior consent;**
  - c) To act with the **greatest loyalty, trying not to obtain illegitimate or improper advantages for their constituents or clients;**
  - d) **Not to contact or to maintain relationships, even in writing, with the opposite party represented by a lawyer, except if previously authorized to do so** by the latter or due to legal or contractual imposition;
  - e) **Not to publicly invoke, especially before the courts, any failed settlement negotiations,** either oral or written, in which a lawyer has intervened;
  - f) **Not to sign opinions, procedural documents or other professional writings which he or she has not prepared or collaborated in preparing.**
2. The obligations established in the previous number **also apply to lawyers and public defenders** in their reciprocal relationships.

These articles outline certain duties of a private lawyer to other lawyers and their clients. First, a private lawyer must not *interfere* with other lawyers (private lawyer, public defender, magistrate, or another intervening party) and opposing parties, and must prevent his or her clients from *interfering*. This includes making threats, making personal attacks, and acting without civility. Private lawyers must not *interfere* with other private lawyers and opposing parties for the same reasons that they must not *interfere* with magistrates: to promote justice and respect for the judicial system, and also to guarantee the independence and dignity of the profession. Second, private lawyers must remain loyal to their own clients and respect the attorney-client relation of other lawyers. A private lawyer should therefore refrain from the following:

- Stealing clients;
- Undermining another lawyer's relationship with his or her client;
- Maintaining correspondence with the client of the opposing party;
- Making statements in public about another lawyer's case or client matters;
- Taking credit for the work of another lawyer;
- Signing documents that he or she did not assist in preparing;
- Interfering in another lawyer's case;
- Attempting to persuade another lawyer to purposefully lose a case;
- Or agreeing himself or herself to purposefully lose a case.

Regulating the interactions between lawyers is important to ensure the public's respect and faith in the legal profession, as well as the integrity of the judicial system. Imagine the distrust that the public would feel towards lawyers if two lawyers began shouting insults at each other in front of the courthouse. People may doubt their commitment to their clients, thinking that they had other personal motives. They might also doubt the lawyer's ability to remain calm

and collected in court. They might fear he or she would simply start yelling at the magistrate, which might put a client's case in serious jeopardy.

## Questions

1. Christiano hires Pedro, a private lawyer in Dili to represent him. Christiano owns a resort just outside of the city. He has recently remodeled and has imported a lot of materials for the renovation. He now fears that the contractor he hired may have smuggled in some of the goods illegally. He hires Pedro to help him understand whether anything illegal has happened and what he should do about the situation. He has several meetings with Pedro and allows him to see all the resort's financial and employment records, the contracts with the contractor, and all of the plans for the renovation. Christiano then goes to New Zealand for two weeks. While he is gone someone is murdered at the resort. The police approach Pedro and ask to see all of the financial and employment records because they cannot reach Christiano and none of his employees can find this information. Can Pedro give this information to the police?
2. Emilia is a private lawyer. She only received her registration about a year ago and has started a small practice. Today she is representing her client before the magistrate. She arrived twenty minutes late, which is not uncommon for her to do. Additionally, she forgot her briefcase with all of the documents that relate to the case. After the morning's proceedings, the opposing party greets her as she passes. She refuses to acknowledge them. As they enter the court for the afternoon her client begins throwing things at the magistrate. Emilia, feeling exasperated, simply walks out of the courtroom and does not return. What has Emilia done wrong?

## Answers and Explanations

1. No. Pedro should not give this information to the police because of the duty he owes Christiano of professional secrecy. Even though the police are requesting these records for a completely unrelated case, the documents were still given to Pedro within the exercise of his profession (Christiano had hired Pedro as his lawyer)..
2. This is, obviously, an exaggerated example. Emilia has done almost everything wrong. To start with, she arrived late. Everyone has bad days and there are always unexpected things, but this is not acceptable on a regular basis. This is particularly bad since she was scheduled to appear before the court. She also does not seem to be doing a very good job of representing her client if she has shown up late and forgotten all of her documents. Emilia, as a private lawyer owes a duty of civility to other parties. It was inappropriate for her to be rude to the opposing party by ignoring them. She also has a duty to see that her client behaves appropriately towards the magistrate and other parties. Here, she did not even attempt to restrain her client, but simply left. In doing so, she did not only disrespect every duty to her client, the other parties and the court, she left him without a representative. She has apparently decided to abandon his case, but has done so in such a way that it is impossible for him to secure another lawyer. Indeed, it's difficult for him to even know if he should, as she has not made her intentions clear.

## 4. RIGHTS OF PRIVATE LAWYERS

### Section Objectives:

- To explore the rights of private lawyers under the Private Lawyer's Law.

### Section Overview

Private lawyers have special rights which include:

- The right to communicate with clients;
- The right to be notified and to be present or to have others present on their behalf during a search of their offices.

### What rights do private lawyers have?

The Private Lawyer's Law outlines many responsibilities and obligations, but it is also important to remember that private lawyers are ensured certain rights under this law. Private lawyers share all of the constitutional and legal rights of all other citizens of Timor-Leste, but they are also ensured certain *additional* protections. These protections help to ensure that a private lawyer is able to practice his or her profession without undue interferences. These protections are not just necessary for the private lawyer, but help to secure the integrity of the judicial system by making sure that private lawyers can do their jobs.

Article 31

Right to communicate with the clients

Lawyers are **entitled**, by law, to **communicate personally and privately, with their clients, especially when the clients are imprisoned or detained** in a civil or military establishment.

Article 32

Searches, seizures, inventories and similar procedures in the private lawyer's office

1. **Searches, seizures, inventories and similar procedures in the lawyer's office or in any other place where he or she keeps his/her files, can only be ordered and directed by a judge.**
2. **Whenever possible the lawyer in question must be present, having been summoned by the judge for this purpose.**
3. **The judge must also communicate the fact to the Management and Discipline Council for the Practice of Law so that it can ensure the presence of a representative.**
4. Relatives or employees of the lawyer concerned are also admitted to the procedure, when they present themselves or when the judge summons them.
5. **Correspondence regarding the practice of his/her profession cannot be seized, unless the mentioned correspondence relates to a criminal activity for which the lawyer has been accused.**
6. The correspondence referred to in the previous number consists of:
  - a) The correspondence exchanged between the lawyer and the person who has or intends to give him/her power of attorney or who has sought legal advice, even if this has

been refused or has not yet been given;

b) The instructions and written information on the power of attorney or legal advice sought.

7. The procedure's minutes will mention expressly the people present, as well as any occurrences that take place during the mentioned procedure.

These provisions of the Private Lawyer's Law protect the communication between a lawyer and his or her client. They do this by ensuring the direct communication (Article 31) and protecting a private lawyer's records of these communications from discovery by other parties, particularly the State (Article 32). Article 32 also helps a lawyer to protect his notes and strategy from the State. These protections are very important. As you can imagine, if the State could simply take a lawyer's files, the lawyer would not be able to represent his client as well. The State would have access to all of the information that the lawyer has, but the lawyer would not have any access to the State's information. This would put private lawyers at a serious disadvantage and would undermine justice. This is why private lawyers have these special protections: to protect the interests of their clients, themselves, and the entire justice system.

## Questions

Madalena is a private lawyer in Dili. She is representing Jose, an official at the ministry of finance who has been accused of embezzling nearly half a million dollars. Explain whether the following situations are allowed or not.

1. Jose is being detained for questioning. Madalena goes to visit him so that she can be present during the questioning and is told that she cannot see him because he has been transferred to

another facility. She later learns that he was never in fact transferred, and the guard who told her he had been transferred was told to convince her to leave before she could see Jose.

2. Madalena has gone to visit relatives outside of Dili for a week. Her husband does not go with her and remains in their apartment in Dili to work. The police and public prosecutor have been investigating her for tax fraud and while she is away a judge orders that her office in Dili be searched to look for her financial records. The judge is careful to notify the Management and Discipline Council for the Practice of Law, which sends a representative to be present during the search. No effort, however, was made to try to contact Madalena, her relatives, or her husband who is still in Dili.

### **Answers and Explanations**

1. The policemen and whoever ordered him to act in that way have acted wrongly. This is a fairly clear case. A private lawyer has the right to communicate with his or her client and here the guard and his superiors were clearly preventing her from doing so. This may be a different case if the guard had merely been mistaken and had thought that Jose had actually been transferred, but that is not the case here. Here, the guard has clearly been told to prevent Madalena from speaking with her client while he was in detention. This is a very serious violation of Jose's constitutional rights, as well as Madalena's rights as a private lawyer.
2. Again, this action is wrong. The court should have attempted to contact Madalena at her office and residence, or her relatives. Wherever possible, the lawyer should be present during the search of his or her offices. Here, the court made no attempt to make this possible.

Because Madalena's husband remained in their apartment in Dili and knew that she would be visiting her relatives, it should not have been too difficult to contact Madalena if the court had made any effort to do so. Because it did not, there was a violation of her rights as a private lawyer. It is good that the prosecutor secured an order to search her office from a judge and had a representative from the Management and Discipline Council for the Practice of Law present, but these do not compensate for the fact that they did not make any effort to contact Madalena herself so that she could be present.

## 5. PUBLICITY AND FEES

### Section Objectives

- To understand the limits on a private lawyer's ability to advertize and publicize his or her service.
- To understand the rules regarding the fees a private lawyer can charge for his or her services.

### Section Overview

- Private lawyers are subject to very strict rules about how they are allowed to advertise that are subject to only a few exceptions;
- There is a default schedule of fees for different types of cases which will be used as the standard rate of billing unless the lawyer has negotiated a different fee schedule with the client in advance. Lawyers are also limited in the number of ways they can collect these fees.

### Advertising

It is important to remember that a private lawyer's obligations are to the legal system, the client, justice, and the legal profession. The laws regulating when and how a private lawyer is allowed to advertise are very strict.

Article 42

Advertising and public discussion

1. Lawyers are **forbidden to advertise** in any way by circular letters, announcements, the media, signs indicating the law practise or any other form of professional advertising, direct or indirect, **especially divulging their client's name.**
2. The lawyers **should not incite, nor authorize, news regarding legal cases or other professional matters** which were confided to them.
3. The lawyer **should not influence or try to influence, through the media, the outcome of lawsuits** or other pending issues.
4. The lawyer **must not discuss pending actions or actions yet to be filed** or contribute to such discussions **in public or with the media.**

Article 43

Exceptions

1. Regarding the provisions of the previous article the **following does not constitute advertising:**
  - a) **Mentioning academic titles or reference to the law firm** with which the lawyer practises;
  - b) The use of **signs** outside the offices, the insertion of a **plain announcements in the newspapers** and the use of **business cards or notepaper, as long as they just mention the lawyer's name, address of the office and working hours.**
2. In **exceptional cases and justified by the public interest** the Management and Discipline Council for the Practise of Law can authorize the issue of statements to the media, safeguarding, namely, professional confidentiality and the

independence from the rest of the legal operators.

Private lawyers must act in a way that is dignifying and ensure the objectivity and independence of the profession at all times. That is why private lawyers are generally not allowed to advertise. This includes media advertisements, flyers, or public announcements advertising his or her services. There are some exceptions, or situations that might appear to be advertising, but the law does not consider to be so. These include listing a lawyer's educational qualifications, business cards, signs at the law offices, and notepaper with the name of the lawyer and law firm. It is also permissible for a lawyer to submit a simple advertisement to a newspaper as long as it only includes the lawyer's name, address and hours of operation.

A lawyer is especially barred from using a current case or client for publicity, using the media to interfere or influence cases, or discuss pending matters with the public or media. First, such an action would seriously violate the principles of dignity, objectivity, and independence of the profession. This could also interfere with the private lawyer's duties to his/her clients, notably the duty of professional confidentiality. The private lawyer could, after all, be leaking confidential information. These situations might also involve conflicts of interest, if a lawyer is leaking information to get more clients in the future. It is therefore important to be particularly careful in discussions with the media.

## **Questions**

1. Pedro is a private lawyer and represents John, an Australian who has been accused of poaching and smuggling. This has become a very closely watched case in Timor-Leste and Australia. The media has been very involved and have followed the case very closely. Many

people have been interviewed about the case, and their interviews have played over and over on the news. Among those interviewed were several men who claimed to have witnessed John's arrest. In their interviews they said that he was violent, trying to attack the police, and used verbally abusive language. The police never made such claims, but have not spoken out. Pedro believes that these false claims are very damaging to his client and may even influence the outcome of his trial. Pedro's sister Marta is a journalist with the *Timor Post*. Can Pedro tell his sister that these men are lying?

### **Answers and Explanations**

1. No. It is very important that Pedro does not enter the public discussion while the case is pending, even though he only has his client's best interests at heart. It would be very different if John decides to speak to the *Timor Post*, or John's family relates to the *Timor Post* that the police never made any allegations that John was violent when he was arrested.

## Fees

Private lawyers are restricted in the fees that they can charge their clients and the ways that they can collect these fees.

### Article 47

#### Settlement of fees

1. When **settling the fees the lawyer must respect the fee schedule and be moderated**, taking into consideration the time spent, the complexity and urgency of the issue, the importance of the work undertaken, the attained result, the degree of intellectual creativity on his/her part, the interested party's economic situation and other professional practices.
2. **It is acceptable to adjust the fees beforehand, which can be paid a fixed remuneration**, without prejudice to the provisions of the following article.
3. **If there is no previous written agreement, the private lawyer presents to the client the respective bill with the description of the services rendered.**

### Article 48

#### Fee schedule

The **fee schedule, which has an indicative nature**, shall be prepared by the **Management and Discipline Council of the Legal Profession** and published in the **Official Gazette**.

### Article 49

#### Prohibitions

Private lawyers shall be **prohibited from**:

- a) **Demanding a part of the amount of debt being claimed** or any other claim **by way of payment**;
- b) **Sharing fees, except among colleagues who have collaborated**;
- c) **Establishing that the right to fees is conditional upon the results** of the proceeding or settlement.

Article 50

Payment of fees

1. Fees shall be **paid in money**.
2. Lawyers **may request advance payments on fees, by way of deposit**, and, where this request is not met, they shall have the right to renounce the power of attorney.

Unless a fixed payment is specified between the private lawyer and client, a private lawyer must observe the fee schedule that is published in the Official Gazette. When preparing a bill, the lawyer must be honest and responsible in accounting for time and expenses. Importantly, a private lawyer must not make his or her fee as a percentage of recovery, or contingent on success. However, a lawyer may request a deposit or some advance payment of fees. If the client cannot or will not pay this deposit, the lawyer can drop the case.

Regulating the fees and collection of fees helps to protect clients and members of the public from being exploited by lawyers and helps to protect the lawyers from being subject to attacks against their dignity and professionalism. It also allows clients to predict before hiring a lawyer what their expenses might be. In turn, this ensures the public's respect for lawyers and their confidence in the judicial system.

## Questions

1. Julio is a private lawyer who is approached by Juan, whose wife has accused him of abandoning her and their five children. It took Juan's wife almost two years to find Juan. Julio worries that Juan might flee before he pays his bill. Before Julio agrees to take on Juan as a client, he requests that he pay 20% of what he believes his total fee will be. Juan does not make the payment, and indeed, doesn't even show up to the meeting. Julio decides to refuse to represent Juan. Has Julio violated the Private Lawyer's Law?

## Answers and Explanations

1. No. It is perfectly acceptable, according to Article 50, for a private lawyer to request a deposit and to refuse the case if the deposit is not made.

## 6. REVIEW

### Section Objectives:

- To review:
  - What it means to be a private lawyer.
  - Who may qualify as a private lawyer.
  - Incompatibilities and impediments.
  - Duties.
  - Rights.
  - And obligations regarding fees and publicity.

We have discussed what it means to be a private lawyer, who can qualify as a private lawyer, incompatibilities and impediments to practicing as a private lawyer, the duties and rights of private lawyers, and the obligations a private lawyer has regarding publicity and fees, as explained by the Private Lawyer's Law.

Practicing law as a private lawyer generally means taking on and representing clients in some sort of legal proceeding. Specific activities mentioned in the statute include: exercising a judicial power of attorney, giving legal advice, and drafting contracts. In order to conduct these activities, or any others that are described as being exclusive to private lawyers, one must be qualified and registered as a private lawyer.

If someone went to law school and trained in Timor-Leste, in order to be qualified to register as a private lawyer, he or she must be an adult, have a law degree, speak and write either

Portuguese or Tetum, pass the training course, and present a criminal record to show that he or she is not barred by having been sentenced to prison for committing a deliberate crime. If someone went to law school and trained outside of Timor-Leste, he or she must have a law degree, speak and write either Portuguese or Tetum, be acquainted with the legal system of Timor-Leste, be qualified to practice law in Timor-Leste or another civil law country.

There are some further restrictions on who may qualify as a private lawyer. These restrictions generally have to do with one's legal status and moral character. For instance, in order to qualify to register as a private lawyer, a person cannot have been dismissed as a magistrate, public defender, or civil servant for moral reasons, or have been sentenced to imprisonment for an intentional crime. Also, to qualify as a private lawyer a person must have legal capacity and fully enjoy his or her civil rights.

In addition, in order to qualify, a private lawyer must not face any incompatibilities. This means that he or she cannot hold activities, positions, or functions that are considered incompatible with the private practice of law. According to the Private Lawyer's Law any position, activity, or function that diminishes the objectivity, independence, and dignity of the profession is incompatible with practicing law. This general rule is complemented by a list of cases that the legislator expressly identified as incompatible with practicing law, since they would undermine public confidence in private lawyers and the legal system in general.

Impediments are more limited than incompatibilities and are usually a conflict of interest with a specific case or type of case. These include cases where the private lawyer has some sort of previous or ongoing relationship with the opposing party (perhaps they once worked for them), the private lawyer has some sort of previous involvement in another capacity with the case (perhaps he or she testified as a witness), or the private lawyer is related to the magistrate,

defender, or other official in the case (perhaps he or she is married to the magistrate). In all of these situations, there is a concern that the private lawyer could jeopardize the trust in the system, the dignity and independence of the profession and the relationship with the client, and, therefore, he/she must not be involved. It is not, however, a problem for him or her to continue practicing as a private lawyer generally. We only require that he or she drop *this* case.

Private lawyers have duties to many other groups in the legal system. First, they owe a broad and rather indefinite duty to the community and ideals of the legal system. These duties include a responsibility to protest against violations of human rights, to not act in an expressly illegal manner, to refuse aid in matters he or she considers unjust, to not deliberately waste the court's time, and to not aid a client when he or she believes it will lead to something illicit. Second, they owe a duty their clients. This includes a duty to keep professional confidentiality, to avoid conflicts of interest, to respect the rules and limitations regarding incompatibilities and impediments, to ensure the client good representation, and to be honest with fees and billing. Third, they owe a duty to magistrates, including a duty not to interfere with, and prevent their clients from interfering with the decisions and functions of the magistrates. Fourth, they owe a duty to witnesses, not to establish contacts with them and not to instruct or interfere with their depositions.

Finally, private lawyers owe a duty to other lawyers. This includes preventing clients from threatening opposing parties and other lawyers. It also involves refraining from stealing clients, undermining another lawyer's relationship with his or her client, maintaining correspondence with the client of the opposing party, making statements in public about another lawyer's case or client matters, taking credit for the work of another lawyer, signing documents that he or she did

not assist in preparing, interfering in another lawyer's case, attempting to persuade another lawyer to purposefully lose a case, or agreeing himself or herself to purposefully lose a case.

In addition to these duties, a private lawyer is entitled to some rights, which offer special protection to his or her correspondence with clients. This includes the right to communicate with clients and to have records of these conversations safe from arbitrary seizures.

Private lawyers also have an obligation under the Private Lawyer's Law not to advertise outside of business cards, office signs, notebook pages, and very simple newspaper statements. It is particularly important not to use the name of clients or cases as publicity. They must also be diligent and honest in submitting fees and bills to clients. Private lawyers must abide by the schedule of fees established by the Management and Discipline Council of the Legal Profession.

This has been an overview of some of the provisions in the Private Lawyer's Law. This text could not hope to provide an analysis of all possible questions of legal ethics that a private lawyer might encounter, nor could we fully review the entire text of the law. Our purpose was to highlight some of the most important provisions, and allow you to begin to apply this law. We would encourage you to read the entire text and create and discuss some hypothetical applications of your own. What scenarios might require you to apply certain applications? In what scenarios might certain provisions come into conflict? How might you resolve this conflict? Are there any parts of this law that help you to resolve the conflict? What provisions help explain one another? What provisions might you need to apply every day?