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The Main Characteristics of the Timorese Legal System – a Practical Guide

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Abstract: The independence of Timor-Leste in 2002 resulted in the creation of a new legal system, which had to navigate a difficult transition from the legal systems inherited from the former Portuguese, Indonesian and United Nations administrations to a new system for the independent nation. So far, little has been published about Timor-Leste's legal system. This paper intends to provide a concise and practical guide to the Timorese legal system for legal and non-legal practitioners and academics interested in Timorese law. It gives a brief overview of the Timorese formal justice system and points out the gaps and omissions that complicate the daily work of legal professionals in Timor-Leste and which leads to a low degree of legal certainty.

A. Introduction

On 20 May 2002, Timor-Leste became an independent country. This independence came after almost 500 years of Portuguese colonial rule, 24 years of Indonesian occupation, and almost 3 years of governance by the United Nations Transitional Administration (UNTAET). The independence of Timor-Leste resulted in the creation of a new legal system, outlined in the Timorese Constitution, and it is the result of a difficult transition from the legal systems inherited from the previous administrations of the territory. In the years since independence, the Timorese legal system has been progressively developed by the work of national and international legal professionals with both civil and common law backgrounds, a feature that is visible in different pieces of legislation and which, in some cases, leads to further complications. So far, little has been published about the Timorese legal system. This paper intends to provide a concise and practical guide to the Timorese legal system for legal and non-legal practitioners and academics interested in understanding the main characteristics of this system. This paper also points out some of the system's gaps and problems that complicate the daily work of legal professionals in Timor-Leste, and result in a low degree of legal certainty.

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B. Origins of the Legal System

Timor-Leste is ruled by a civil law system with features similar to those of other Lusophone countries. The basic rules of the legal system are established in the Constitution that entered into force on 20 May 2002 (Art 170). The Constitution of Timor-Leste was drafted during the administration of UNTAET by the Constitutional Assembly, elected in August 2001 and composed of 88 members. The Constitution is strongly influenced by the Portuguese Constitution, but also has autochthonous aspects.[1] It reflects the historical connections of Timor-Leste to the Lusophone culture[2], a connection that is expressly manifested in Art 8.3 of the Constitution.

C. Reception of Indonesian and UNTAET Legislation in the Timorese Legal System

The drafters of the Timorese Constitution had to deal with the complex matter of succession of legal systems from the previous administrations; in fact, this was not a new situation for the Timorese, considering that two years before, during the administration of UNTAET, the same problem had to be addressed. One of the first difficulties encountered by UNTAET when it took over the administration of the Timorese territory was to determine whether Indonesian law, Portuguese law, or alternatively Timorese customary law should be the domestic law applicable in the country.[3] While according to international law Portugal kept sovereignty over the territory throughout the illegal Indonesian occupation, Indonesian law was de facto applied during this 24-year period; furthermore, Timorese customary law, a product of a predominantly agricultural society, could not adequately deal with matters such as state administration and the prosecution of war crimes.[4]

UNTAET established that the Indonesian laws that were applied in the country before 25 October 1999 would stay in force until they were replaced by new UNTAET regulations (Art 3.1 of UNTAET Regulation No. 1999/1).[5] However, those laws would not be applied if they conflicted with the internationally recognised human rights standards referred to in Art 2 or the mandate of UNTAET. This regulation also listed a number of Indonesian laws that were specifically repealed, and abolished capital punishment (arts 3.2 and 3.3). The

1 *Pedro Bacelar de Vasconcelos et al.*, Constituição Anotada da República Democrática de Timor-Leste, Direitos Humanos - Centro de Investigação Interdisciplinar, Escola de Direito da Universidade do Minho, Braga 2011, p. 3.

2 *Hillary Charlesworth*, The constitution of East Timor, May 20, 2002, International Journal of Constitutional Law 1(2) (2003), p. 329.

3 *Jonathan Morrow & Rachel White*, The United Nations in Transitional East Timor: International Standards and the reality of Governance, Australian Yearbook of International Law 22 (2002), p. 7.

4 *Ibid.*, p. 7.

5 On 25 October 1999 the United Nations Security Council approved Resolution 1272 establishing UNTAET. This resolution, together with Security Council Resolution 1338 of 31 January 2001 and UNTAET Regulation 1999/01 are pointed out as the UNTAET's Constitution. See *Morrow & White*, note 3, p. 42.

symbolism of the decision to retain the Indonesian legislation was controversial.[6] However, this choice was based on practical reasons, considering that the population in general and legal professionals in particular were much more familiar with Indonesian law than with Portuguese legislation, which had not been applied in the country for 24 years.[7]

UNTAET handed over the administration of the country to the first elected Timorese government on 20 May 2002, the same day the Timorese Constitution entered into force (Art 170). Art. 165 establishes the continuing application of the legislation that was at the time in force in Timor-Leste to all matters, except those that are contrary to the Constitution and its principles.[8] The same principle was also established by Law 2/2002 (Art. 1).[9] The objective was to progressively replace the legislation received from previous administrations with national laws (Art 165 of the Constitution).

Some confusion regarding applicable legislation emerged in 2003, when a decision of the Court of Appeal interpreted that Art. 165 of the Constitution and Art. 1 of Law 2/2002 referred to Portuguese legislation in force before 25 October 1999, not to Indonesian legislation.[10] According to the Court of Appeal, the Indonesian occupation was illegal and never recognised by the United Nations, which continued to consider Timor-Leste as a Portuguese territory. Therefore, according to the Court, the Indonesian laws were never in force in Timor-Leste, and the Portuguese legal system in force before 25 October 1999 should be the applicable one. In response, parliament approved Law 10/2003, which established an authentic interpretation of Art 165 of the Constitution and Law 2/2002, clarifying that Indonesian law *de facto* in force in Timor-Leste before 25 October 1999, together with the UNTAET regulations, was applicable.

Law 10/2003 clarified the legislation applicable since independence, but other questions remained unanswered: which legislation should be considered to have been applicable

6 *Hansjörg Strohmeyer*, Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor, The American Journal of International Law 95(1) (2001), p. 58.

7 *Ibid.*, note 6, p. 58; *Morrow & White*, note 3, p. 8; *Fernando Dias Simões*, Law and Language in Timor-Leste: Bridging the Divide, Contemporary Southeast Asia 37(3) (2015), p. 381.

8 This principle is not valid for treaties, agreements and alliances that were applied in the territory before the approval of the Constitution. These have to be confirmed, ratified or adhered to by the Timorese authorities (Art 158).

9 Art 20 of Law 1/2002 and art 2.3(c) of Law 10/2003 attempt to regulate the value of UNTAET legislation. As debated by *Florbela Pires*, Fontes do direito e procedimento legislativo na República Democrática de Timor-Leste – alguns problemas, in: AA. VV (eds.), Estudos em Memória do Professor Doutor António Marques dos Santos, II, Coimbra 2005, p. 35, http://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Pires-Florbela-Fontes-do-direito-e-procedimento-legislativo-na-Republica-Democratica-de-Timor-Leste-alguns-problemas.pdf (last accessed in October 2015), those articles are unclear, and art 20.2 of Law 1/2002 seems to contradict art 165 of the Constitution by saying that UNTAET regulations not approved by the Constitutional Assembly have the same value as government decrees. Taking this into consideration, it seems that UNTAET regulations remain valid as laws, until replaced by new legislation.

10 Decision of the Court of Appeal of 18/07/2003 in Proc. 03/02. See also *Vasconcelos et al.*, note 1, p. 518.

during the period of the Indonesian occupation? For instance, which inheritance law should be applied to someone deceased in Timor-Leste during the Indonesian occupation? There is at least one decision in which the Court of Appeal decided that Indonesian law should be considered applicable in the country since the date of the unilateral declaration of independence (28 November 1975).[11]

But regardless of this doubt, the courts' decisions and the legal practice has stabilised in considering the Indonesian legislation the subsidiary law of Timor-Leste. In other words, when a specific topic is not regulated by Timorese legislation, the UNTAET regulations, and the Indonesian law applied before 25 October 1999 and not repealed by UNTAET regulations, are applicable, if not contrary to the Timorese Constitution.

Despite the decision to uphold the validity of Indonesian legislation, in practice Indonesian laws are infrequently referred to due to insufficient knowledge of the Indonesian legal system among legal professionals working in Timor-Leste, and the mismatch of this system with the Timorese reality and institutions.[12] In fact, the same difficulties were experienced by the UNTAET administration.[13] The common practice of the executive and the courts is to rely on laws approved after independence (with some exceptions, such as criminal law) or to wait for the approval of relevant new laws. Consequently, some legal cases remain unresolved for several years.

D. Sources of Law

1. National Legislation as a Direct Source of Law

The Timorese legal system's direct sources of law are the rules determined in the Constitution and the legislation approved through the legislative mechanisms regulated by the Constitution (Art 2.2; see also art 1 of the Civil Code, approved by Law 10/2011).[14] UNTAET legislation and the Indonesian laws that were in force before 25 October 1999 and that were

11 Decision of the Court of Appeal of 01/06/2012 in No. 05/Cível/Apelação/2012 debated by *Rui Penha*, Guia de Direitos Reais em Timor-Leste – Sumários desenvolvidos das aulas ministradas ao III Curso de Magistrados e Defensores Públicos no CFJ 2008-2009, Tribunal de Recurso, Díli (2012), p. 96.

12 Similar difficulties are also experienced when knowledge of Portuguese colonial legislation is necessary to address legal cases.

13 *Morrow & White*, note 3, p. 9. See, for instance, the decision of the Dili District Court of 11/10/2009 in case 42/Cível/2009/TD.DIL, in which next to his signature the judge writes a note that he is still waiting to receive the copy of the legislation applicable in Timor-Leste, which is still not available. See also *Strohmeyer*, note 6, pp. 57, 59.

14 The legislation and other official acts are published in the Timorese Official Journal (*Jornal da República*), which can be found at http://jornal.gov.tl/.The English versions of UNTAET and some Timorese legislation can be found at http://jornal.gov.tl/lawsTL/index-e.htm.

not yet replaced or repealed by national or UNTAET legislation, are also direct sources of law of the Timorese legal system.

2. International Law as a Direct Source of Law

International law is also an integral part of the Timorese legal system. The Constitution incorporates the customary principles of international law into the Timorese legal system, as well as the international treaties and agreements that Timor-Leste is party to (Arts 9.1 and 9.2). According to Art 9.3 international law prevails over any Timorese legislation that contradicts it. Consequently, international law can be directly invoked in court, without the need for national legislation to support it.[15]

3. Custom as a Direct Source of Law

Custom[16], if not contrary to the Constitution and law, is also recognised as part of the Timorese legal system by Art 2.4 of the Constitution.[17] Art. 2 of the Timorese Civil Code has a similar provision, but does not develop the topic of customary law. Similar to much of the Timorese Civil Code, this article was inspired by the Portuguese Civil Code. In Portuguese legal doctrine, 'custom' is defined as a repeated practice of a behaviour by the society or a community, based on the conviction that such behaviour is mandatory. This practice cannot be a response to the imposed will of a dominant group, but rather must be based on a shared belief by the people who share the custom (Justo, 2006:183; Machado, 1983:153). It is, however, uncertain whether the definition of custom that the Constitutional Assembly had in mind is similar to the above-mentioned Portuguese definition. Nevertheless, no legislation to the role of custom in the Timorese legal system has been approved, and only case-by-case court decisions can declare a specific practice as a legal custom. The clarification of the legal value of custom has major implications for the lives of the Timorese, since for instance the land rights claimed by most Timorese have a customary basis. Customary justice mechanisms are a source of many debates in Timor-Leste: while some point to their prevalence in Timorese society and the advantages of using this embedded normative order, others raise concerns regarding the fairness of customary mechanisms.[18] Despite the de-

15 *Vasconcelos et al.*, note 1, p. 52.

16 The Constitution uses the term 'custom' to refer to what is often understood as 'customary law'.

17 *Vasconcelos et al.*, note 1, p. 23. Art 2.1 of Law 10/2003 ignores custom when it says that '[t]he law is the only direct source of law in Timor-Leste', making this article unconstitutional. See also *Pires*, note 9, p. 47.

18 For more on this topic see *Dionísio Babo Soares*, Nahe Biti: The Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor, The Asia Pacific Journal of Anthropology 5(1) (2004), p. 15; *Laura Grenfell*, Legal Pluralism and the Rule of Law in Timor-Leste, Leiden Journal of International Law 19(2) (2006), p. 305; *Deborah Cummins*, Democracy or democrazy? Local experiences of democratization in Timor-Leste, Democratization 17(5) (2010), p. 899; *Patrícia Jerónimo*, Estado de Direito e Justiça Tradicional – Ensaios para um equilíbrio em Timor-Leste,

bates, no legislation giving legal value to customary justice mechanisms has ever been approved.

4. Court Decisions as an Indirect Source of Law

Court decisions are an important source of interpretation of Timorese Constitution and legislation, but the Constitution does not mention these decisions as a direct source of law. However, there are exceptions to this rule: firstly, the declaration by the Supreme Court of unconstitutionality of legislation in force is compulsorily applicable to all subsequent cases (Art 153 of the Constitution).[19] Secondly, a party in a court case can request an extraordinary review of the final decision of the Supreme Court, in case of contradictory application of the same law by the Supreme Court in a previous decision. This is called an 'extraordinary appeal for standardization of jurisprudence' (Art 494 of the Civil Procedure Code, approved by the Decree-Law 1/2006). The decision of this appeal becomes mandatory for all the following cases (Art 498.1 of the Civil Procedure Code).[20] In practice, previous decisions of the courts are often quoted to justify subsequent court decisions.

E. Legislative Power and Instruments in the Timorese Constitution

1. Legislative Power

In the Timorese legal system, both parliament and government have legislative powers. As detailed in fig. 1, the parliament approves 'laws' (*lei*) proposed by members of parliament ('project of law' – *projecto de lei*) or the government ('proposal of law' – *proposta de lei*).

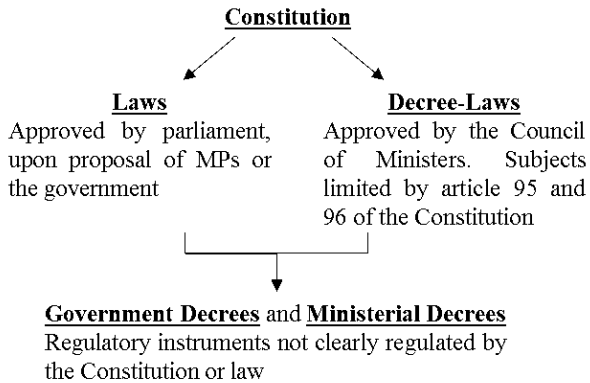
in: Rui Pinto Duarte et al. (eds.), Estudos em Homenagem ao Professor Doutor Carlos Ferreira de Almeida, III Volume, Coimbra 2011, http://repositorium.sdum.uminho.pt/handle/1822/21454 (last accessed in May 2014); *Rod Nixon*, Justice and Governance in East Timor – Indigenous approaches and the 'New Subsistence state', London 2012.

19 The constitutional review is debated below. This compulsory decision of the court is only applicable to verdicts that judge a certain norm unconstitutional; a verdict that determines that a norm is constitutional does not preclude the right of invoking the unconstitutionality of the same norm in a subsequent case. See *Vasconcelos et al.*, note 1, p. 481. The Constitution institutes the Supreme Court of Justice as the highest court of Timor-Leste, but this court has not yet been established. Until its establishment, its functions are exercised by the Court of Appeal (see below).

20 These court decisions have to be published in the Official Journal (Art 498.2 of the Civil Procedure Code and Art 5.2 (k) of Law 1/2002).

The government, gathered in the Council of Ministers, approves 'decree-laws' (*decreto-lei*).[21]

Fig. 1: the legislative power in Timor-Leste



The legislative power of parliament is established in Art 95.1 of the Constitution. In contrast, Arts 115.1 and 115.2 regarding competence of the government do not explicitly refer to its legislative power; however, this power is indirectly mentioned in many other articles of the Constitution and other legislation (Art 95 *a contrario*, 96, 98, and 116, and Art 2.3[b] of Law 10/2003).[22] Furthermore, legal scholars define the political role of the government as a bundle of functions, which includes legislative power.[23] The legislative power of the government is exercised through the decisions of the Council of Ministers (Art. 116 of the Constitution).

The legislative power of the government is limited by the Constitution. According to Art. 95.1 only the parliament can legislate about 'basic issues of the country's national and international policy' which are listed in number 2 of this article (e.g., territorial division, national symbols).[24] Art. 96 lists other subjects that can only be subject of a decree-law of

21 The Council of Ministers is composed of the prime minister, vice prime ministers, and ministers (Art 105.1 of the Constitution).

22 See also *Pires*, note 9, pp. 11, 20.

23 *Vasconcelos et al.*, note 1, p. 374.

24 It is debated whether the list of Art 95.2 of the Constitution exhausts all the topics that only parliament can legislate about, or if other 'basic issues of the country's national and international policy' can also be considered of the exclusive competency of parliament, as per force of Art 95.1. In the author's view, such an interpretation creates constant uncertainty about the constitutionality of legislation approved by government; 'basic issues of the country' is an abstract and volatile concept. Furthermore, such uncertainty is even less justifiable when considering that the parliament can appraise all the legislation approved by the government. For a more nuanced position, see *Pires*, note 9, pp. 15, 27; *Vasconcelos et al.*, note 1, p. 320.

the government after authorization by the parliament (e.g., definition of crimes, expropriation).[25] This authorization is given by the approval of an 'authorization law' (e.g., Law 15/2005). The parliament also has the power to appraise and, if necessary, revoke or amend legislation approved by the government (Art. 98).

The Constitution does not mention any power for approving regulations that complement laws and decree-laws. Nevertheless, regulations have been approved by the Council of Ministers as 'government-decrees' (*decreto do governo*), and approved by ministers as 'ministerial-decrees' (*diploma ministerial*), as described in fig. 1 above. Only Law 1/2002 briefly mentions the approval of government decrees (Arts. 1.2, 5.2[e] and 12) and ministerial decrees (Arts. 5.2[f] and 13), but without clearly defining their scope. In practice these regulations have been approved when a law or a decree-law expressly authorises further regulations about a specific matter. Nonetheless, the lack of a clear limit of scope for these regulations, combined with the practice of not sending these regulations for presidential promulgation (see below), opens the door to abuses of regulatory power. At the regional level, the Oe-Cusse Ambeno Special Administrative Region is the only entity with power to approve regulations (Art. 9 of Law 3/2014).

After their approval, both laws and decree-laws must be promulgated by the president, who has the power to veto them (Art. 85[a], 85[c], and 88 of the Constitution). He can also send them to the Supreme Court to verify their constitutionality (see below). In the case of laws, the veto of the president can be overruled by a vote of a qualified majority of the members of parliament (one half or two thirds, depending on the subject of the law vetoed [Arts. 88.2 and 88.3]). The veto of decree-laws by the president cannot be overruled by the government, which can only re-write and re-approve them. The above-mentioned regulations (government-decrees, ministerial-decrees, and regional regulations) have not been subject to promulgation by the president.

Legislation is only enforceable after its publication in the Official Journal (Arts. 73.1 and 73.2 of the Constitution).[26] Legislation does not enter into force on the day of its publication; if no other date is established, legislation is enforceable ten working days after its publication (Arts. 16.1 and 16.2 of the Law 1/2002).

25 Ironically, the limits imposed to the government's legislative power were breached by the first decree-law ever approved. Decree-Law 1/2002 regarding the transition of the judicial system contravene Art. 96.1 (c) of the Constitution.

26 The Official Journal is regulated by Law 1/2002. At times the publication of the Official Journal experience problems; for instance, the Official Journal is only physically available a few days after the date of its publication. The online version of the Official Journal is made available months after its publication. According to staff members of the National Printing Office, such delays are deliberate, to allow the collection of revenues from the sale of printed versions before the release of the free online versions.

2. Legislative Instruments and their Hierarchy

There is no consensus among legal professionals whether laws and decree-laws have the same legal value. The Constitution does not expressly address this issue; but in the author's view, a logical and comparative interpretation of the Constitution, as well as the current practice, seems to support the conclusion that laws and decree-laws have the same hierarchical rank (see fig. 1 above).[27] Firstly, the Constitution does not make any distinction between the legal ranking of laws and decree-laws.[28] Secondly, the Constitution gives legislative powers both to parliament and government, but through Arts. 95 and 96 the constitution limits the legislative scope of the government, and through Art. 98 it allows parliament to suspend and appraise a decree-law of the government. If there was a hierarchy between laws and decree-laws, these limitations would not be necessary. It is also useful to compare the Timorese Constitution with other Lusophone constitutions that inspired it. The constitutions of Portugal (Art. 112.2), Cape Verde (Art. 268), and São Tomé e Principe (Art. 70.2) explicitly refer to the equal value of laws and decree-laws. Interestingly, during the debates of the Timorese Constitutional Assembly a similar provision was proposed, but not included.[29] Nevertheless, the lack of a clear provision in the Timorese Constitution, and without any legislation regarding this matter, this topic is still debatable.[30]

Considering that these two legislative instruments have the same legal value, a subsequent law or decree-law automatically replaces or changes previous laws or decree-laws on the same subject and in cases where overlaps occur. This replacement can be explicit (*revogação expressa*), when the new law or decree-law mentions the legislation that is replaced or changed,[31] or tacit (*revogação tácita*) when the new law or decree-law regulates differently from the previous legislation without making reference to its replacement (Arts 6.1 and 6.2 of the Civil Code). In this case, the legal principle of *lex posteriori derogat legi priori* is applicable.[32] Art. 6.3 of the Civil Code determines an exception to this principle: a

27 There is one exception: the decree-laws approved under an authorization law (Art. 96 of the Constitution) are restricted by that law.

28 See also *Pires*, note 9, p. 52.

29 See the Minute Number VII/X/2001 of the Thematic Commission II of the Constitutional Assembly. Members of the commission argued that the hierarchy of laws and decree-laws should be regulated by law. It is, however, strange that a law should regulate its own hierarchical value.

30 *Ricardo de Sousa Cunha*, O Ordenamento Jurídico de Timor-Leste em Período de Revisão Constitucional Ordinária, presented at the conference "Investigação, Educação, Cooperação e Desenvolvimento nos Países de Língua Oficial Portuguesa" of the Universidade Nacional de Timor-Leste on 15 July 2014, Díli 2014.

31 For instance Law 11/2008 regarding private lawyers and their training was changed by the Decree-Law 39/2012, and after by Law 01/2013.

32 *Vasconcelos et al.*, note 1, p. 401. An exception to this principle was invoked by the Court of Appeal in its decision 04/2003 from 27/10/2008, when the Court decided that the Law that regulates the Petroleum Fund (Law 9/2005) prevails over annual budget laws. However, this prevalence is explicitly stated by art 4 of the Petroleum Fund Law.

piece of legislation on a specific topic is only replaced by a subsequent general regulation if explicitly determined by the new regulation (*lex specialis derogat legi generali*).[33]

3. Compliance of Laws and Decree-laws with the Constitution

All legislation has to comply with the rules established in the Constitution. There are three ways to verify the compliance of existing laws and decree-laws with the Constitution. Before the promulgation of legislation, the president can request that the Supreme Court verify whether specific provisions of that legislation are unconstitutional ('preventive review of constitutionality', Arts. 126.1[a] and 149 of the Constitution). After the promulgation of legislation, the president, the speaker of the parliament, the prime-minister, one fifth of the members of parliament, or the ombudsman can request the Supreme Court to review the constitutionality of specific legislation ('abstract review of constitutionality', Arts. 126.1[a] and 150). This constitutional review can also be requested by the prosecutor-general, when the application of a specific piece of legislation was refused by the courts in three different legal cases, due to unconstitutionality; while the constitution is not clear, according to some authors, in this case the request by the prosecutor-general is mandatory (Arts. 133.5 and 150[c]).[34] The parties in a court case can also request that the Supreme Court conduct a 'concrete review of constitutionality' of: (1) legislation that was applied by the courts but one of the parties considers unconstitutional; or (2) legislation that the courts considered unconstitutional and therefore refused to apply (Art. 152).

In the case of preventive review of constitutionality, if the Supreme Court declares a norm unconstitutional, the president must veto the legislation and send it back to parliament or government for redrafting and new approval (Art. 149.3 of the Constitution). Through a qualified majority, the parliament can overrule the court ruling, and a norm that was declared unconstitutional thereby becomes part of the legal system (Arts. 149.4 and 88).[35] In the case of decree-laws the government does not have the power to overrule the Supreme Court ruling. The norms declared unconstitutional by a concrete or abstract review of constitutionality are considered removed from the legal system (Art. 153)[36].

33 For example, the specific regulation of leases of state land established in the Decree-Law 19/2004 was not repealed by the generic regulation of leases established in the Civil Code.

34 See *Vasconcelos et al.*, note 1, pp. 420, 479, 481. Note that in this case, the Supreme Court did not rule a norm definitively unconstitutional by force of act 153 of the Constitution, but rather a lower court considered the norm unconstitutional and therefore refused to apply it. See also Art. 120 of the Constitution.

35 *Vasconcelos et al.*, note 1, p. 470. There is at least one case in which the parliament confirmed a law ruled unconstitutional, but soon after publication the president requested a new constitutional revision; the law was again declared unconstitutional by the court (decisions 02/2003 and 03/2003 of the Court of Appeal, published in Official Journal, No. 11, Series I, 18/05/2007. *Vasconcelos et al.*, note 1, pp. 300, 470.).

36 See *Vasconcelos et al.*, note 1, p. 481.

Besides the mechanisms for reviewing the constitutionality of existing legislation, the Timorese Constitution also allows for constitutional review by omission (Art. 151). In this case the Supreme Court analyses whether the legal system is missing specific legislation necessary to make constitutional norms applicable in practice.[37] However, the Constitution does not clarify what happens when the Supreme Court determines unconstitutionality by omission.[38] A constitutional review by omission can be requested by the president, prosecutor-general, or the ombudsman.

The decisions of the Supreme Court about the possible unconstitutionality of norms cannot be appealed and must be published in the Official Journal (Art. 153 of the Constitution).[39] However, few publications of these decisions can be found in the Official Journal, which is an indication that the mechanisms of constitutional review are rarely used.

F. The Timorese Formal Justice System

Upon the withdrawal of the Indonesian administration, in practice the formal justice system ceased to exist: the court buildings and all office equipment were burned; all the Indonesian legal professionals that controlled the formal justice system left the country.[40] The justice system had to be rebuilt from scratch. While the rebuilding and refurbishing of the courts' infrastructure was a complex logistical enterprise, the selection of Timorese judges and prosecutors with adequate professional experience to replace international judicial personnel was an even more difficult task.[41] UNTAET re-established four district courts and the Court of Appeal; it also managed to integrate 60 Timorese trainees with law degrees into the justice system, but the courts remained dependent on international staff.[42]

37 For instance, it is arguable that the lack of legislation that effectively regulates land tenure constitutes an unconstitutionality by omission, for violation of Arts. 54 and 141 of the Constitution.

38 *Vasconcelos et al.*, note 1, p. 476.

39 The obligation of publishing all decisions about possible unconstitutionality seems to be contradicted by art 5.2(k) of Law 1/2002, which only mentions the publication of court decisions that are applicable to other cases, i.e., decisions that declare the unconstitutionality of a norm. The constitutional text is clear about the publication of all decisions of constitutional review, raising doubts about the constitutionality of the mentioned norm of Law 1/2002. In the online version of the Official Journal, some court decisions that do not declare unconstitutional specific norms are published (see, for instance, the decisions of the Court of Appeal of 19/06/2009 and 07/07/2009 in Proc. 01/Const/09/TR and Proc. 02/Const/2009/TR).

40 *Strohmeyer*, note 6, pp. 50, 53; *Simon Chesterman*, Rough Justice: Establishing the Rule of Law in Post-Conflict Territories, Ohio State Journal on Dispute Resolution 20 (2005), p. 84. Besides the courts, prisons and police stations also had to be rebuilt, see *Strohmeyer*, note 6, pp. 51, 57, 58, 62.

41 *Strohmeyer*, note 6, pp. 51, 53; IPAC – Institute for Policy Analysis of Conflict, Justice at the Crossroads in Timor-Leste, IPAC Report 20 (2015), p. 3. The search for Timorese with law degrees who could be trained and integrated into the formal justice system was first made by word-of-mouth, radio announcements, and by dropping leaflets from airplanes.

42 IPAC, note 41, p. 3.

The structure of the formal justice system has not changed much since independence. Currently, the same four district courts serve the 13 municipalities of the country. Since 2008 a program of mobile courts has been serving those municipalities without courts, but with limited success.[43] The Constitution institutes the Supreme Court of Justice as the highest court of Timor-Leste (Art. 124.1), but this court has not yet been established. The Constitution also creates the High Administrative, Tax and Audit Court (Art. 129), which has also not yet been established. Until their establishment, their functions are exercised by the Court of Appeal (Art. 164 of the Constitution; Art. 1 of the Decree-Law 1/2002; and Art. 14 of UNTAET Regulation No. 2000/11).[44] The Constitution also institutes military courts (Art. 130), but neither have these been established. The number of people working in the formal justice system has consistently risen, reaching 292 at the end of 2014; 40 judges, 40 prosecutors, 36 public defenders (lawyers paid by the state to represent people with no economic means), 113 justice officials (bailiffs), 9 translators and 54 administration staff.[45] At the end of 2014 there were 2917 pending cases: 2162 criminal cases and 755 civil cases.[46]

The profession or private lawyer (*advogado*) is regulated by Law 11/2008 (with the changes brought by Decree-Law 39/2012 and Law 01/2013). There is yet no independent bar association; the access to the profession, professional ethics, and disciplinary measures are controlled by the Lawyers Management and Disciplinary Council. In February 2015 there were 84 lawyers registered in Timor-Leste, many of them international lawyers working with private law firms.[47] Access to the profession is a controversial topic; the law imposes that candidates have to follow a training program at the Legal Training Centre, but this program only receives a restricted number of candidates each year.[48] In practice, there is a very limited number of qualified Timorese lawyers, making access to a private lawyer difficult for most Timorese. The Public Defender's Office (*Defensoria Pública*) is responsible for providing legal aid to those who cannot afford a private lawyer (Arts. 1.1 and 5.1 of the Decree-Law 38/2008). At the end of 2014 there were 36 public defenders (JSMP,

43 JSMP – Judicial System Monitoring Programme, Overview of the Justice Sector, JSMP Annual Report (2014), p. 21; IPAC, note 41, p. 8.

44 Law 9/2011 (later changed by Law 3/2013) created the Chamber of Auditors of the High Administrative, Tax and Audit Court, responsible for supervising public finances. This chamber is working under the Court of Appeal, until the creation of the High Administrative, Tax and Audit Court (Art 84.1).

45 JSMP, note 43, p. 25. IPAC reports a lower numbers of prosecutors (35) and judges (34) at the end of 2015, See IPAC, note 41, pp. 8, 9. This lower number is probably due to the termination of contracts of international staff.

46 JSMP, note 43, p. 62. As reported by IPAC, courts have difficulties in making statistical information available, see IPAC, note 41, p. 14.

47 IPAC, note 41, p. 13.

48 IPAC, note 41, p. 12. Some people are exempted from the training program, but all of them have to pass an exam to assess their knowledge of Timorese law (Art. 2.7 Law 11/2008, after changes by Decree-Law 39/2012 and Law 01/2013).

2014:25), spread through the four municipal offices. Such a small number of public defenders raises concerns regarding the quality of service that they can provide.[49]

The criminal procedure in court is regulated by the Criminal Procedure Code (Decree-Law 13/2005), and the civil procedure is regulated by the Civil Procedure Code (Decree-Law 1/2006).[50] Without a Timorese administrative procedure code, the courts have been applying the Civil Procedure Code to administrative cases.[51] However, an administrative procedure code is needed to better adapt the court procedures and decisions to these specific cases.

Since the Timorese justice system started to be rebuilt by UNTAET, much has been achieved. However, the justice system is still far from providing an ideal service to the Timorese. The low coverage, difficult access, delays, and the poor quality of court decisions make the Timorese courts a less-than-preferable tool for conflict resolution between the Timorese. The lack of any link between the formal and the customary justice systems further alienates the large majority of the Timorese from the courts.

G. Conclusions

The Timorese legal system still has gaps and omissions that at times make legal interpretation and application difficult. The unclear role of custom in the legal system, the unclear limits of the scope of regulations, and the as-yet not completely clarified controversy of the hierarchical value of laws and decree-laws can be pointed to as fundamental uncertainties of the Timorese legal system. It is understandable that in the political context in which the Constitution was drafted it was not possible to create a clearer legal document. It is hoped that future revisions of the Constitution and the growing Timorese legal theory and jurisprudence will progressively fill those gaps and omissions. Furthermore, while a practical solution at the time of independence, the subsidiary use of the Indonesian legislation still raises doubts in those cases where there is no relevant national law. Progressive and systematic addressing of those gaps with Timorese legislation would contribute to solve this problem. Despite some progress, the formal justice system is still foreign to most of the Timorese. Improving the capacity of legal professionals, strengthening legal aid mechanisms, and creating a closer relation with customary justice systems are necessary to shorten the distance between the Timorese and the justice system.

49 IPAC, note 41, p. 19.

50 Both of these codes are deeply inspired in Portuguese legislation.

51 *Sara Guerreiro*, Colectânea De Direito Administrativo Timorense Com Comentários De Conteúdo - Parte II: Actividade Administrativa Em Timor-Leste. Provedoria dos Direitos Humanos & UNDP (2012), p. 72. Here we find another example where the subsidiary application of the Indonesian legislation is ignored by the courts. See also *Ibid*., p. 72.