

Legal Note on National Parliament Resolution No. 11/2014 and Government Resolution No. 29/2014 24 October 2014

Prepared by: The Asia Foundation

The following analysis of the recent National Parliament Resolution and Government Resolution was conducted by an Australian lawyer on staff at the Foundation. This information is provided purely in an effort to shed some light on the key facts, legal analysis and possible implications (though this list is not exhaustive). This information sheet is not to be published without the explicit agreement of the Foundation.

Key points

- The resolutions of the National Parliament and the Government, calling for the immediate removal of international judicial officers, violates the principle of separation of powers and independence of the judiciary. These principles are enshrined in the Constitution.
- The immediate removal of international judicial officers will have serious negative impact on the functioning of the justice system. This is not in the national interest.
- Judges, prosecutors and public defenders can only be removed from office by the superior council of each body.
- The immediate removal of trainers from the Centru Formasaun Judisiáriu (CFJ) has serious consequences for Timorese students studying to become magistrates in the future.
- The Government must immediately reconsider the course of action it is taking.

Background

1. On 24 October the National Parliament passed Resolution No. 11/2014, during a 'secret plenary', calling on the Government to:
 - Audit the justice sector
 - Immediately terminate all existing contracts of international staff, including those with judicial functions (judges, prosecutors, public defenders) in the Courts, Public Prosecutor's Office, Public Defender's Office, Anti-Corruption Commission and the Legal Training Centre. Contracts should be terminated on basis of *force majeure* and national interest.
2. In response, the Government passed Resolution No. 29/2014 deciding to:
 - Establish a Commission of Audit on the justice sector, comprising national and international staff

- Provisionally and immediately terminate all existing contracts and contract renewals of international staff, in the Courts, Public Prosecutor's Office, Public Defender's Office, Anti-Corruption Commission and the Legal Training Centre. Contracts should be terminated on basis of *force majeure* and national interest.

Legal Analysis

- The Constitution enshrines the principle of separation of powers - Article 69.
- The National Parliament has legislative oversight (*fiskaliza*) and political decision making powers - Article 92. In the resolution, oversight/*fiskaliza* power is cited as basis of the parliament's supremacy over other bodies. This is not a valid interpretation.
- The Constitution guarantees the independence of the Courts - Article 119. Judges are to have tenure and, unless provided for by law, may not be transferred, suspended, retired or removed from office - Article 121.3.
- *Force majeure* is a clause which frees parties to a contract, in the event of an extraordinary and unforeseeable circumstance outside the control of both parties (such as war, riot, natural disaster, strike).
- A resolution of parliament or government does not qualify as *force majeure*. A 'national interest' clause may exist in contracts with international advisors, but the government has to prove valid national interest.
- International advisors not exercising judicial functions (for example, technical advisors) are contracted directly with the relevant government ministry, under a LoA with an international donor in many cases, or directly with the donor and seconded. Termination of these contracts are regulated by specific legislation on public servants, and under the Labour Code and contract law.
- Appointment of judges, prosecutors and public defenders are regulated by the organic law of each body. They can only be removed from office by the superior council of each body. A government representative and a MP sit on each of these councils.
- Chief Justice of the Dili District Court has publicly stated that the resolution is not legal.

Impact

- There are currently 11 international judges and prosecutors:
 - Dili (2 international judges); Baucau: (1 international judge); Suai: (1 international judge); Court of Appeal: (3 international judges); Public Prosecutors Office (4 international prosecutors).

- Public Defender's Office no longer has any international defenders, only some technical advisors.
- JSMP reports there were no hearings conducted in Dili District Court on Monday or Tuesday following the resolution. Chief Justice of the Dili District Court contacted JSMP on Monday evening, expressing his concern. Judges called a meeting on Tuesday to discuss the impact.
- Courts were functioning as normal on today. International judges are still working.
- JSMP and ALFeLa confirm mobile courts continued hearings this week in Baucau, Los Palos, Manatuto and Ainaro with national judges presiding.
- JSMP reports international prosecutors and judges currently handle most complex legal cases, including taxation, corruption and drug-trafficking cases. It may also impact on the courts' ability to form a full bench (as required in hearing appeals, habeas corpus applications, criminal cases with maximum penalty of more than 5 years in prison and other instances).
- International trainers at CFJ have been suspended with pay until December. The current class of magistrates and private lawyers will not be affected, as they are due to graduate on 10 November. But the new class due to start training this year will be delayed.

Immediate next steps

- JSMP is holding a press conference on Thursday morning, focusing on two key messages: impact on functioning of the judicial system and independence of the judiciary. JSMP is likely to make a strong recommendation to the government to reconsider its actions.
- JSMP is monitoring the situation in the courts.
- JSMP is attempting to get a head count on the voting.
- Reaching out to Amnesty International to increase international attention.

For any questions or comments, please contact:

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