# A Judiciary ‘Suspended’ in Transition?

# A Case-Study of Portuguese Judges in East Timor

Sapna Reheem Shaila*[[1]](#footnote-1)\**

**Abstract***:* This chapter examines the arrangements for foreign judges in domestic courts of East Timor. Building on semi-structured interviews with Timorese judges, lawyers, foreign judges, United Nations Development Programme professionals and field observations, it engages with questions of *why*foreign judges were introduced as part of state-building initiatives and *how*they assisted Timorese judicial actors in strengthening judicial independence. The chapter, at the outset, provides a ‘thick description’ of the challenges that foreign and local judges had to traverse to strengthen the role of the judiciary locally. Relying on data from the field, it problematises the tensions between pursuing ‘ideal’ transnational standards of judicial independence and what may be ‘ideal’ for establishing the authority and legitimacy of courts in a state that is in transition. The chapter also highlights the shifting influence of foreign judges in East Timor.

**Contributions:**  The current piece furthers discussions on legal transfers/ legal transplants in the area of comparative law. The methodological turn that focuses on the practice of legal transfers I propose here can help disentangle the varying influence different groups of international and local actors have in facilitating the movement of certain legal ideas and reception in particular settings. It can also explain why some ideas travel easily, and others don’t.

**Keywords**: foreign judges, Portuguese judges, East Timor/Timor Leste, transitional states, state-building, socio-legal research, qualitative methods

## Introduction

This chapter focuses on foreign Portuguese judges[[2]](#footnote-2) in domestic courts in East Timor. It builds on data collected from semi-structured interviews with Timorese and Portuguese judges, international and Timorese programme managers associated with the United Nations Development Programme (‘UNDP’), candidates and foreign judges at the Legal Training Centre and foreign judicial inspectors, to address the following questions: How are foreign judges used in East Timor, what were the rationales for introducing them, did the foreign judges carry out their intended roles in practice, and have they assisted in improving judicial independence and the social legitimacy of courts in the country? Field observations in 2018, media reports, and other publicly available documents are used to triangulate the data collected from the interviews to study how foreign judges have carried out their roles in practice in East Timor.[[3]](#footnote-3) The data also illustrates the different rationales used to explain why foreign judges were introduced in the Timorese justice sector and their shifting influence on the local judges, politicians, and citizens. The chapter thus aims to provide a ‘deeper’ empirical account of the role of foreign judges in the Timorese judiciary.

Some scholars have already studied international engagements in the justice sector in East Timor. Grenfell[[4]](#footnote-4) and Kent,[[5]](#footnote-5) in their research, examine how international state-building interventions have overlooked customary practices and the traditional justice system in the country. They criticise the naivety of international partners in transferring state-based institutional arrangements and laws to a social setting where a majority of the citizens distrusted the state due to its colonial history.[[6]](#footnote-6) Similarly, Nicholson and Hinderling interviewed local judges and other observers to provide accounts of internationally led initiatives in the justice sector.[[7]](#footnote-7) They analyse their interviews against international donor documents and existing academic literature, and conclude that international interventions have been ‘unidirectional’ without bringing any desired changes on the ground. The authors blame the United Nations (‘UN’) (the primary international donor that supported justice reforms in the country) and its strategy for a ‘handover’ of the justice institutions to the Timorese judicial actors without providing them proper guidance as the reason for the ‘failure’ of international engagement in the justice sector.

In contrast to the scholarship mentioned above that studies international engagements in the Timorese justice sector as a ‘top-down’ effort in which the internationals prescribed reforms that were contrary to local interests, my study approaches ‘local’ and ‘international’ judicial actors *in context*, working alongside each other. Moving beyond the ‘macro’ politics of international development organisations, from the interviews and field observations I illustrate how the ‘foreign’ and ‘local’ judges are not in *opposition* as the scholars highlighted above have argued. Rather, these actors carry out their judicial roles and navigate the complicated realities of a society that is in transition. I emphasise the agency of both the local and foreign judges in domestic courts, and I analyse their roles against the shifting political and social context of East Timor.

This chapter at the outset provides a ‘thick description’ of the role of foreign judges in Timorese courts, and it gives data for comparing how courts with foreign judges operate on the ground. Scholars who have studied such hybrid arrangements in courts identify certain aspects as to *why* foreign judges are recruited and *how* they can influence their local counterparts. For instance, Dickinson observes that hybrid court arrangements are introduced in post-conflict settings for three main reasons: improving the legitimacy of the judicial process, catalysing local efforts for change, and fostering the development of human rights.[[8]](#footnote-8) As for establishing their influence, Dixon and Jackson identify why foreign judges are appointed, the degree of local democratic support, who the foreign judges are, where they are from, their personalities, how they are appointed and paid, and when they exercise their adjudicatory roles as relevant factors. But the existing scholarship is limited in engaging with what actually happens when foreign judges are introduced, or in Dixon and Jackson’s terms what it entails for a foreign judge to take a ‘hybrid position’ as an ‘insider’ and ‘outsider’[[9]](#footnote-9) simultaneously, and *how* foreign judges ought to carry out their roles to ensure that hybrid arrangements lead to intended outcomes.

In this chapter, I attempt to answer these questions. Studying foreign judges in East Timor over the period of time from 1999 to 2018 I illustrate the paradox in pursuing ‘ideal’ arrangements for judicial independence and what may be ‘ideal’ for consolidating the social and normative legitimacy of the courts in the long run. In East Timor, foreign judges were initially recruited to fill human resource gaps within the justice sector. But with time, their roles were redefined as mentors for transferring skills and assisting the Timorese judges to be independent and impartial in order to consolidate the institution of the judiciary locally in the new state. It is worth noting that until 1999, the Timorese citizens have had troubled relations with state-based institutions. Under the Indonesian occupation, many saw state institutions as an arm of the oppressor. Even though, on paper, East Timor adopted all the legal and institutional arrangements that guarantee separation of powers and an independent judiciary in 2002, the judiciary is yet to establish its authority and autonomy in the society fully. Many charismatic resistance leaders are still alive, and they are revered and considered as ‘living heroes’. These leaders continue to hold de facto roles as final decision-makers and remain above the normative limits of the law. It is within this context that Timorese and foreign judges have had to pursue their goals of consolidating the authority of the judiciary and strengthening judicial independence.

I put forth two primary arguments. Firstly, I point out that, especially in countries that are in transition, what may be necessary to strengthen the legitimacy of the judiciary can contradict with standards of judicial independence. In East Timor’s case, support of charismatic resistance leaders was crucial for internationals to gain access and for the Timorese judges to establish their authority and legitimacy in the society. The pursuance of an ‘ideal’ separation of powers, in which the judges acted independently as final decision-makers and above the resistance leaders before the judiciary even fully consolidated its authority, halted judicial development in the country. Secondly, I problematise what makes or breaks a ‘successful’ engagement between foreign and domestic judges in a young transitional state like East Timor. For ease of discussion, this chapter analysese foreign judges in Timorese domestic courts in four different phases divided according to the political developments that influenced the trajectory of foreign judicial assistance within the justice sector. In the initial phase from 1999 to 2002, considered in Part II, foreign judges were hired to try serious criminal offences arising from the conflict and to support new Timorese judges in re-building the judiciary. For the second phase from 2002 to 2005, discussed in Part III, the rationale of foreign judges shifted, as the foreign judges were expected to transfer Portuguese language skills and judicial culture to new Timorese judges, and build East Timor’s position in the global community. A third phase, from 2006 to 2014, saw the waning influence of Portuguese judges, especially among elite political leaders, culminating in the removal of several foreign judges in 2014 (Part IV). Post-2014, the East Timor judiciary continues to feel the effects of the use, and the removal of foreign judges, with no senior Timorese judges and criticisms of the judges’ technical skills and independence (Part V). Finally, the chapter concludes with some observations about how to conceptualise the normative or ‘ideal’ role of foreign judges in transitional settings , and how this might change over time.

## Setting up a New Judicial System: Foreign Judges in Serious Crimes Tribunals, 1999 to 2002

The presence of foreign — especially Portuguese — judges in the Timorese domestic courts must be understood against the country’s colonial history and independence struggle. Until 1975, East Timor was a Portuguese colony, and under Portuguese rule, the Timorese were allowed to rely on traditional law to resolve disputes.[[10]](#footnote-10) After the Timorese declared independence from Portugal, the Indonesian military occupied East Timor and annexed the country as a province of Indonesia. Scholars studying the Indonesian invasion of East Timor note that the major Western powers — the United States, United Kingdom and Australia — were concerned about pro-communist sentiments surfacing among the Timorese. As a result, they supported the Indonesian occupation and, in some cases, even provided weapons to the Indonesian military.[[11]](#footnote-11) Some suggest that the discovery of oil and gas reserves in the Timor Sea further led many Western nations to support Indonesia that enabled the Indonesian occupation.[[12]](#footnote-12)

After the Indonesian military occupied the Timorese territory, the administration extended the jurisdiction of Indonesian laws and established courts. Indonesian judges presided over the courts and there were no Timorese stakeholders who took senior judicial roles. Writing about law and justice under the Indonesian occupation, Babo-Soares recounts that most Timorese distrusted the Indonesian administration in charge as they perceived them to be corrupt and violent. He adds the Timorese citizens’ viewed the state institutions as oppressive and violent, which encouraged them to continue relying on customary law to resolve their issues.[[13]](#footnote-13) In 1999, after a majority of the Timorese voted for independence in the UN-led referendum, the country was thrown into internal turmoil. The retreating Indonesian military, pro-Indonesian Timorese militia, and pro-independence Timorese supporters clashed with each other, burning and destroying infrastructure that was built during the Indonesian occupation. And within the judiciary, those who had taken positions until then as judges, prosecutors and lawyers fled the country. It was in this setting that the United Nations Transitional Administration in East Timor (‘UNTAET’) took control over the country.

In 1999, when UNTAET took control, the administration termed the situation on the ground as a rule-of-law ‘vacuum’[[14]](#footnote-14), and its principal focus was to redress serious crimes committed during and after the referendum. UNTAET established an Investigative Commission, similar to the International Criminal Tribunal in Yugoslavia and the International Criminal Tribunal in Rwanda, to address transitional justice concerns.[[15]](#footnote-15) In line with this proposal, UNTAET recognised the district court in Dili (one of the four district courts established under Regulation No. 2000/11 on the Organization of Courts in East Timor) as having exclusive jurisdiction for serious crimes. Under Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, ‘serious criminal offences’ were defined as genocide, war crimes, crimes against humanity, murder, sexual offences and torture committed between 1 January 1999 and 25 October 1999.[[16]](#footnote-16) The ‘serious criminal offences’ were distinguished from ordinary crimes like felonies and misdemeanours under the Indonesian Penal Code. This distinction was important because during the initial phase even though UNTAET established four national courts geographically spread across the country in Baucau, Suai, Oecussi and Dili to deal with matters other than ‘serious criminal offences’ and to adjudicate ordinary civil and other criminal matters, no ‘ordinary cases’ were heard.[[17]](#footnote-17)

As for the ‘serious criminal offences’, under UNTAET Regulation No. 2000/11, the presence of both East Timorese and two international judges (following Regulation No. 1999/3 on the Establishment of a Transitional Judicial Service Commission)was laid down as essential for prosecuting serious crimes.[[18]](#footnote-18) Similarly, section 15.5 of Regulation No. 2000/11 provides that for appeals to serious crimes cases the appeal panels should be composed of both East Timorese and international judges. Reporting from the field during this period, Strohmeyer noted that the hybrid arrangement of Timorese and foreign judges for serious crimes cases was introduced at the insistence of Sérgio Vieira de Mello, the transitional administrator.[[19]](#footnote-19) According to de Mello, local ownership was fundamental to UNTAET’s mission, and he lobbied for giving opportunities to Timorese citizens, even though they had no prior experience working in the judiciary.[[20]](#footnote-20)

UNTAET used innovative measures to search for and recruit qualified Timorese personnel to take up key judicial roles, reportedly even air-dropping pamphlets to villages by helicopters.[[21]](#footnote-21) The recruitment drive led to about 60 Timorese applying for the judicial and prosecutorial positions. Out of these, eight were appointed as probationary judges and two as prosecutors.[[22]](#footnote-22) It was for the first time the Timorese were given a chance to take up judicial roles. The recruits had no prior judicial experience, except for working as paralegals in human rights organisations in Indonesia.[[23]](#footnote-23) Soon UNTAET recognised the ‘gaps’ in technical and practical knowledge of the recruits, and the situation was described as follows:

In East Timor, unlike other contexts in which the international community has supported judicial training programs, it soon became clear that professional legal training would need to extend beyond technical assistance: legal training was a pivotal element in building and empowering local judicial ranks and in creating a stable legal system. Such training had to focus not only on conveying legal and practical skills but, equally important, on fostering appreciation of the crucial role of the judiciary and the benefits of a culture of law. In a society that had never before experienced respect for the rule of law, and in which laws were widely perceived as yet another instrument for wielding authority and control over the individual, the meaning of independence and impartiality of the judiciary had to be imparted gradually.[[24]](#footnote-24)

Consequently, UNTAET developed a three-tiered approach: (1) providing compulsory ‘quick impact’ training courses for judges, prosecutors and public defenders before their appointment; (2) delivering ongoing training to Timorese judicial recruits; and (3) providing a mentoring scheme in which a pool of international judges ‘shadowed’ and carried on judicial roles alongside their Timorese counterparts.[[25]](#footnote-25)

Foreign judges were recruited to assist their Timorese counterparts in applying international criminal law for ‘serious criminal offences’ cases.[[26]](#footnote-26) At the same time, international professionals were also recruited to guide and mentor their ‘inexperienced’ Timorese counterparts.[[27]](#footnote-27) An interviewee, who was part of the initial batch, recalled:

One of my colleagues was shadowing an international prosecutor at that time… he wrote the indictment charges on a piece of paper and lost it somewhere. When the international prosecutor asked him about the document, only then he realised he had to serve it to the court (!) [signalling surprise].[[28]](#footnote-28)

The informant added:

[during] Indonesian time, I was trained to be a lawyer. I had a bit of experience in the area. [At] the time I learned from international colleagues to prepare an indictment, cross-examine, and carry out investigations… We also had some documents from the old Dili district court… one of the court buildings from the Indonesian time survived the damage in 1999… we could get access tofiles from the Indonesian time. They were not burned, not destroyed… there were these documents that still existed. We consulted those documents as well as the resources shared by our international colleagues. We learnt how judges wrote decisions, how prosecutors prepared indictments, and how a defence lawyer prepared their defence questions.[[29]](#footnote-29)

During the initial phase, judges, prosecutors and public defenders from Portugal, the United States, the United Kingdom, Mozambique, Brazil, Angola, Germany, Burundi, and Cape Verde were recruited to provide technical legal assistance and mentorship to the Timorese judicial actors. Foreign judicial actors were expected to assist with decision-making and help Timorese recruits who were shadowing them in interpreting international criminal principles and procedures, conducting investigations, carrying out proceedings, and writing judgments. UNTAET paid higher salaries to international judges, prosecutors, and defenders to attract ‘experienced’ professionals.[[30]](#footnote-30)

Internationals were perceived to be ‘above’ the sentimental influences of being pro-Indonesian or pro-resistance movement – an opinion that was still expressed in 2018.[[31]](#footnote-31) A Timorese civil society member who has been active in campaigning for the prosecution of serious crimes cases observed that the presence of international judicial actors was essential for prosecuting serious crimes cases. The informant noted that firstly, the law mandated it and secondly because the internationals are perceived to have ‘high values and ethics’ and are ‘trusted to apply the law impartially and independently — thus rendering justice’.[[32]](#footnote-32) The informant noted since the country has only around 1.5 million people, there is always the possibility of Timorese judges presiding over the cases of their relatives or someone they know.[[33]](#footnote-33) These observations were further contextualised: ‘as a small state, the Timorese are a closely knit community, where everyone knows everyone.’[[34]](#footnote-34) According to the informant, this raised questions about Timorese judges’ bias, conscious or unconscious, against pro-Indonesian militia and the military personnel who were prosecuted for committing serious crimes. Thus, during the initial phase, foreign judicial actors were primarily recruited to the domestic courts to assist with serious crimes cases for their perceived knowledge of international criminal law and their independence from local realities.

## A Judiciary for an Independent East Timor: Foreign Judges in Domestic Courts, 2002 to 2006

By 2002, East Timor re-declared its independence, and another United Nations Mission of Support to East Timor (‘UNMISET’) was set up to assist the state in attaining self-sufficiency.[[35]](#footnote-35) When UNMISET took up its mandate, there were 22 Timorese trainee judges, nine trainee prosecutors, nine public defenders, and 35 support staff. In 2002, East Timor also adopted a new Constitution. Following the regulations of the transitional administration, the Constitution set out provisions for District Courts, Court of Appeal and a Supreme Court (although the Court has not been established as of 2021, for reasons explained in Part IV).

During the drafting of the new Constitution, the elite Timorese decision-makers (mainly key resistance leaders from the guerrilla and diplomatic front), who played vital roles during the drafting process, adopted Portuguese along with Tetum as the country’s official languages. The choice of Portuguese as an official language in a country where less than ten per cent of the population spoke it was considered by many Timorese citizens as a ‘political move’.[[36]](#footnote-36) According to interviewees, for the elite resistance leaders, continuing with Bahasa Indonesia meant that the newly independent state of East Timor was condoning Indonesia’s atrocities. Similarly, the elite leaders were reluctant to adopt English as an official language because of Australia’s and other major Western powers’ support of the illegal Indonesian occupation of East Timor in 1975. In contrast, the adoption of Portuguese as an official language was described as a ‘symbolic’ move because the fighters who hid in the mountains and jungles used Portuguese for communication during the resistance. Thus, by adopting Portuguese as the official language of the new independent state, the elite resistance leaders hoped to demonstrate their preference to align with their old colonial administrator.

Unlike other Western powers, during the Indonesian occupation, Portugal continued to support East Timor’s independence claims from Indonesia. Some others argue that aligning with Portugal was a political move because the elite resistance leaders were concerned at the time to elevate East Timor’s presence on the international stage so that the state could have opportunities to connect to the world outside, despite its geographical constraints.[[37]](#footnote-37) Portugal’s image as the colonial power and leader of the Community of Portuguese Language Countries in promoting cooperation and cultural exchange made it a viable and favourable partner for pursuing the ambitions of the newly independent state.[[38]](#footnote-38)

Even though Tetum is recognised as an official language, its use is limited because it is widely perceived by those working in the state administration and the justice sector as an elementary language.[[39]](#footnote-39) On the ground, adopting Portuguese as one of the official languages had implications for the development of the justice sector. One of the civil society members summarised the situation in the following manner:

It was a political project… it was the political decision to make the language of Portuguese the language of the law. This meant that only people who spoke the language could work within the system. But in reality, those who can speak and write in Portuguese do not work in the judicial institutions, instead, it is those who studied in Indonesian law schools who have taken positions as judges.[[40]](#footnote-40)

Thus, in practice, Portuguese became the de facto language within the justice sector[[41]](#footnote-41) and Timorese judges who were recruited by UNTAET during the initial phase and who completed their education in Indonesian universities were met with new challenges.

The Statute of Judicial Magistrates[[42]](#footnote-42) adopted transitional arrangements (which are still operative at the time of writing) ‘mutatis mutandis’ with article 163 of the Constitution.[[43]](#footnote-43) According to the Statute of Judicial Magistrates, all career judges in the courts must be Timorese citizens.[[44]](#footnote-44) However, recognising the limited technical skills of Timorese judges, the Statute allows the Superior Council of the Judiciary (the independent appointing body) to appoint, on a provisional basis, non-East Timorese judges from a civil judicial system with at least 15 years experience).[[45]](#footnote-45) Consequently, the senior officials at the Ministry of Justice could appoint non-East Timorese to ‘professionally integrate’ the judicial organisation in East Timor.[[46]](#footnote-46)

Post-2002, mainly Portuguese judges and prosecutors (and a few from other Lusophone countries) were recruited to domestic courts and the Office of the Prosecutor. Especially in the courts, interviewees explained that Portuguese judges were preferred because the Timorese expatriates who returned from Portugal and other Community of Portuguese Language Countries nations ‘valued’ and ‘looked up’ to the Portuguese and ‘thought highly of Portuguese legal culture’.[[47]](#footnote-47) According to the informants, the Timorese expatriates saw Portugal as a nation that the new state of East Timor could learn from because of its developed jurisprudence. Consequently, the Portuguese judges were identified as the ideal partners for transferring good practices and knowledge[[48]](#footnote-48) to the inexperienced Timorese judges.[[49]](#footnote-49)

The difference in how such skills were valued between Portuguese judges and the newly recruited Timorese judges is evident from the additional salary and perks allocated to a Timorese expatriate judge from Portugal. Judge Claudio Ximenes was appointed as the President of the Court of Appeal by the UNDP in 2003. Judges Ximenes worked as a judge in a local province in Portugal; since he was the only Timorese who had held a judicial position, the UNDP chose him as the President of the Court of Appeal. Judge Ximenes was paid according to global salary rates by the UNDP,[[50]](#footnote-50) and he also received better holiday entitlements than his Timorese counterparts.[[51]](#footnote-51)

The recruitment of Judge Ximenes paved the way for more Portuguese judges to be appointed into the Timorese judiciary. Moreover, the decision in the *Armando dos Santos* case in 2003 by the Court of Appeal consolidated the authority of Portuguese laws and precedents within East Timor. In that decision, Judge Claudio Ximenes and a Portuguese judge, Jose Maria Antunes,[[52]](#footnote-52) concluded that the Indonesian laws applied in East Timor from 1975 to 1999 were ‘invalid’ because the Indonesian occupation was illegal and had never been recognised by the United Nations Security Council. They decided that until the enactment of new Penal and Civil codes, the laws of Portugal, dating back to 1975, would be the applicable law of the land.[[53]](#footnote-53) A Timorese judge gave a dissenting opinion questioning the rationale of the judgment and highlighted the consequences that the decision could have on transactions carried out during the Indonesian occupation.

The decision in the *Armando dos Santos* case shifted the power to those familiar with Portuguese laws and the Portuguese language (i.e., Judge Ximenes and the other Portuguese judges).[[54]](#footnote-54) The decision divided those who were educated in Indonesian law schools, and those who were recruited into the judiciary who were familiar with Portuguese laws.[[55]](#footnote-55) The applicability of different legal regimes was left unresolved (as evidenced in the 2014 tax case discussed below).[[56]](#footnote-56)After the decision, a compulsory qualifying exam and legal training for probationary Timorese judges were requested by Judge Ximenes. In 2005, the probationary Timorese judges sat for a professional qualification exam, and none of them passed. The UNDP was compelled to make flexible arrangements to retain a few of the initial recruits.[[57]](#footnote-57)

During this time, the UNDP also launched its Justice System Program and introduced a Legal and Judicial Training Centre. The UNDP recruited Portuguese judges to teach classes on criminal and civil law, procedural laws, and ethics (to list a few of the courses). The UNDP also appointed foreign Portuguese legal language trainers to support Timorese judges in using Portuguese as the legal language. The Portuguese judges at the Legal Training Centre also sat on the final interview panels to assess the quality and calibre of prospective Timorese judicial aspirants.[[58]](#footnote-58) Besides these measures, foreign judges were also recruited to evaluate the progress and promotion of Timorese judges.

Under the Statute of Judicial Magistrates, Timorese judges are promoted based on a three-tiered category system, like the Portuguese model. According to the tiered system, Timorese judges are initially classified as third-class magistrates. Once they gain more experience, they are promoted to ‘second-class’ judges and then ‘first-class’ judges. The Statute identifies judges as ‘very good’ and ‘good’, depending on their decision-making quality.[[59]](#footnote-59) These classifications are then used for categorising judges into first, second, or third-class. Only judges who have received a ‘very good’ rating can serve as judicial inspectors for assessing junior judges’ progress. Since there are no first-class Timorese judges (even in 2021), Portuguese judges continue to be appointed as judicial inspectors.[[60]](#footnote-60) A Timorese judge explained the role of the Portuguese judicial inspectors in the following manner:

Portuguese judges carry out assessments of us local judges evaluating the quality of our written judgments, number of cases dealt and the years of our experience… We need a Portuguese judicial inspector because according to the Statute of Judicial Magistrates, a judicial inspector has to be a senior judge… in Timor, we do not have any Timorese first-class judges yet. This is also why we do not have the Supreme Court… as only top judges can be part of it… only senior judges can assess our progress.[[61]](#footnote-61)

Such arrangements have had unintended consequences, with some observing that it has shaped how the Timorese judges think, apply, and write the law.[[62]](#footnote-62) On the ground, these arrangements have left a hierarchy between the Portuguese and the Timorese judges, with the former setting the standards of what is considered as a “very good” judge.[[63]](#footnote-63)

To quote one of the interviewees:

The mentality of Timorese judges is structured very similarly to that of the Portuguese judges. For example, all the judgments are written in Portuguese with the same structure of how Portuguese judgments are written… because they [Timorese judges] are trained in that way… The local judges are convinced that they need to follow the format of judgment drafting that they were taught by their Portuguese seniors. They also rely on Portuguese cases to interpret Timorese laws to get a positive evaluation from their superior international counterparts… the Portuguese judiciary has a lot of influence here… They have Portuguese judicial inspectors who are appointed to supervise and evaluate them for promotion… In the legislation, they [judicial inspectors] don’t have any hierarchical power over the Timorese judges… but they [Portuguese judicial inspectors] have the power to evaluate who will be considered for promotion or for disciplinary proceeding.[[64]](#footnote-64)

In contrast to the initial phase, where impartiality and independence of foreign judges were considered essential, post-2002, the rationale shifted. During the second phase, the UNDP relied on foreign judges to assist Timorese judges in improving their Portuguese language skills and transferring Portuguese judicial culture. As for the elite political leaders, they hoped that the presence of Portuguese judges in domestic courts would raise East Timor’s position in the global community. Thus, different rationales motivated the appointment of foreign judges into the judiciary during 2002–2006.

## Consolidating Separation of Powers: Foreign Judges in Domestic Courts, 2006 to 2014

The limited technical expertise and language skills of the Timorese judicial actors led foreign judges to take de facto roles as senior peers in the courts, guiding Timorese judges on complex cases, assisting them in writing judgments in Portuguese and helping them to interpret complex laws.[[65]](#footnote-65) Portuguese judges’ influence on the Timorese judiciary became a controversial discussion issue especially for Xanana Gusmão — the charismatic resistance leader locally known as the ‘father of the nation’ — and his party, who were in power from 2007 to 2015. The waning influence of Portuguese judges, especially among the elite leaders, can be understood against some of the political events that unfurled between 2006 and 2014.

In 2006, what Leach terms ‘history wars’ erupted between the different political elites and eastern/western factions of the security forces.[[66]](#footnote-66) Nygaard-Christensen and Bexley report that soldiers from the eastern provinces, who predominantly fought against the Indonesians, claimed that the younger soldiers from the western provinces were given higher salaries and opportunities for promotion.[[67]](#footnote-67) The authors observe similar concerns were raised in other spheres of public administration as well. Nygaard-Christensen and Bexley trace the roots of 2006 internal conflict to feelings of discontentment and a need for recognition by those who fought for independence. They note that those who fought for independence felt left behind from decision-making roles in the new state that was set up. Most of them did not have educational qualifications which were necessary to gain positions within the state institutions.[[68]](#footnote-68) Similar ‘fault lines’ also appeared between Revolutionary Front for an Independent East Timor party[[69]](#footnote-69) and other parties like the united front of the National Congress for Timorese Reconstruction[[70]](#footnote-70) over the ‘symbolic ownership’ of who contributed more to the resistance and thus, should reap the ‘fruits of the post-independence’.[[71]](#footnote-71)

These tensions surfaced before the judiciary in 2008. Sixteen sitting members of the Parliament from opposition parties brought a case challenging the mid-term budget passed by Xanana’s government. According to the petitioners, the budget plan of US$788 million went beyond the limits prescribed by the national budgetary law. Since Judge Ximenes, the President of the Court of Appeal, was on a medical visit to Portugal, one of the Portuguese judges presided over the matter. The Court of Appeal concluded that the Parliament’s budget exceeded the estimated sustainable income from the petroleum fund ($396.1 million). The three judges sitting on the case ruled that the government had no authority to withdraw above the prescribed limit set by law. The judges also highlighted that allocating 97 per cent of the budget to the government, while only distributing meagre amounts to the Parliament, President and judiciary, violated the constitutional separation of powers.[[72]](#footnote-72) According to the judges, the proposed budget, therefore, was a recipe for furthering corruption with more cash circulating in the public sector.[[73]](#footnote-73) After the decision, the Superior Council of the Judiciary did not renew the contract of the Portuguese judge, Ivo Nelson, who presided over the case. According to an interviewee (who requested anonymity), the non-renewal of Judge Nelson’s contract was ‘motivated by political interests’ and was a signal to show Xanana and his supporters’ displeasure.

The 2008 budget case deteriorated relations between Xanana’s government (which was in power until 2015) and the judiciary. As a country in transition, the elite resistance leaders still hold significant authority and influence over the Timorese population.[[74]](#footnote-74) By challenging Xanana’s decision through the means of law, the judges (especially the Portuguese judges) were perceived as a threat to the authority of the charismatic resistance leader. This tension became more visible during the 2014 judicial crisis that led to the revocation of the visas of Portuguese judges.

The 2014 deadlock between the foreign and Timorese judges and Xanana’s government arose over a tax case filed in Dili District Court between a United States oil and gas producer, ConocoPhillips, and the Timorese government. ConocoPhillips operated out of one of the gas fields (Bayu Undan) in the Timor Sea between East Timor and Australia. According to the joint petroleum development area agreement, 90 per cent of the company’s tax revenues were to be given to East Timor and ten per cent to Australia. Royalties and taxes from its oil fields constitute the principal source of national revenue for East Timor. In 2010, the Ministry of Finance assessed ConocoPhillips as owing US$236 million in tax arrears to the Timorese state.[[75]](#footnote-75) The Ministry’s assessments were based on the Bayu–Undan Contractors Act,[[76]](#footnote-76) the Indonesian laws on Income Tax,[[77]](#footnote-77) and the tax procedures and penalties found in UNTAET Regulation No. 2000/18 (laws that were ruled ‘void’ in the *Armando dos Santos* decision). The company’s representatives challenged the government’s assessments through 28 cases in the Dili District Court, and they argued that the officials had wrongly applied the rescinded laws. The Dili District Court heard the petitioner’s pleadings *ex parte*, as the prosecutor’s office failed to notify the Ministry of Finance.[[78]](#footnote-78) The court decided that the government had applied the rescinded laws, which led to an incorrect tax assessment and the government was ordered to pay the company $20,000 for legal costs.

Xanana immediately challenged the judgment. He gave two televised presentations explaining to the Timorese public how the judges applied ‘incorrect laws’, ‘copy-pasted’ inapplicable precedents and failed to perform their roles adequately. He criticised the apparent lapses in the judgment and questioned the quality of mentorship that the foreign judges provided to the Timorese judges in interpreting laws and using Portuguese as the legal language. As for the prosecutors, Xanana criticised them for biases against him and his government.[[79]](#footnote-79) In addition, Xanana and the ‘veterans’[[80]](#footnote-80) pointed out that the Timorese judges were acting ‘under the control’ of the Portuguese judges and against ‘national interests’[[81]](#footnote-81) whereas the Ministry of Finance was making sure that private companies like ConocoPhillips did not evade taxes. Moreover, he added that the money collected from ConocoPhillips would have been utilised to improve the standard of living of the Timorese public and improve their education and health services.[[82]](#footnote-82)

Following Xanana’s public statements, the National Parliament passed two resolutions: Resolution No.11/ 2014 and Resolution No. 29/2014. Resolution No. 11/2014 terminated the work contracts of five Portuguese judges (two from the Dili District Court and three from the Court of Appeal), two prosecutors (out of four) and one Portuguese anti-corruption commission investigator (out of three – the other two acted as advisers to the Commissioner).[[83]](#footnote-83) They were ordered to leave the country in two days, and the Foreign Office, police and security forces were authorised to implement the resolution. According to the National Parliament resolution, the 2014 tax judgment revealed that the Timorese judges still could not handle ‘complex’ cases and that the foreign judges did not carry out their contractual obligations to improve the skills of the Timorese judges.[[84]](#footnote-84) The members of the National Parliament noted that the 2014 judgment unveiled the substantive and ‘procedural irregularities’ that exposed the national security and sovereignty of the country to “external threats”.[[85]](#footnote-85) Prompted by the parliamentary resolution, the Government passed another Resolution No. 29/2014 to carry out an ‘audit’ of the weaknesses of the Timorese judiciary.[[86]](#footnote-86) The Government resolution noted that the Timorese judges were ‘overly dependent’ on their international counterparts.[[87]](#footnote-87) Both the resolutions underscored the position of the National Parliament and the Council of Ministers and highlighted the necessity for the ‘Timorisation’ of the justice sector: wherein Timorese judges carry out their duties without international support.[[88]](#footnote-88)

In their interviews, local civil society members and Timorese judicial actors identified many reasons as to why Xanana denounced the Portuguese judges. According to some, Xanana was suspicious that the international judges were favouring ConocoPhillips – suspicions that were ignited by local media reports about Portuguese judges exchanging messages with senior officials from ConocoPhillips in Timor-Leste.[[89]](#footnote-89) A few added that the government was also paranoid about the intentions of internationals, especially after the revelation of the Australian spy scandal and Bobby Boye’s fraud case.[[90]](#footnote-90) International observers like Wyvill argued that the revocation of the visas of the Portuguese judges and prosecutors at the anti-corruption commission was motivated by pending corruption charges against senior leaders close to Xanana.[[91]](#footnote-91)

Some interviewees observed that Xanana perceived the internationals and the Timorese working close to them as waging a ‘witch hunt’ against him and his supporters at the time.[[92]](#footnote-92) According to Xanana, Timorese citizens working with the United Nations and in the judiciary had sold their allegiance to the internationals instead of their country.[[93]](#footnote-93) These sentiments were transposed onto Portuguese judges and the Timorese judges who supported them as well. A former international legal adviser to the National Parliament, reflecting on the impasse between the Portuguese judges and Xanana in 2014, put the dilemma in the following manner:

The Portuguese judges and others were pushing to apply ideal standards [in 2014]… they assumed that East Timor *is* Portugal. Leaders like Xanana are necessary to guarantee peace in a transitioning society… If you try to proceed against the resistance leaders, that will create instability, and there is no one to bring the country together at all…the Portuguese judges were going too far in my opinion.[[94]](#footnote-94)

From the outset, the Portuguese judges carried out their expected roles as paragons of independence and impartiality: applying laws, independent of the external social, political, and cultural influences. As ‘outsiders’, foreign judges could exercise their functions more confidently and independently than their Timorese counterparts, who had to live alongside their resistance heroes. However, the bold actions of Portuguese judges, deciding against Xanana’s judgments (or the Ministries acting on his behalf), cost them opportunities to assist their Timorese counterparts in strengthening their skills and consolidating their legitimacy and authority in the country.

## A Dependently Independent Judiciary: Foreign Judges in Domestic Courts, 2014 to 2019[[95]](#footnote-95)

The National Parliament and Government resolutions in 2014 adversely affected the development of the Timorese justice sector. Overall, it can be observed that the 2014 judicial crisis set back the Timorese judiciary from the small achievements it had made until then. According to the Timorese Justice Sector Strategic Plan,[[96]](#footnote-96) by 2015, all positions in the justice sector were supposed to be filled by qualified national staff. However, after the termination of contracts of Portuguese judges, there were no trainers at the Legal Training Centre until 2017. And, until 2018, there were no judicial inspectors to assess or evaluate Timorese judges on their progression.[[97]](#footnote-97) Consequently, at the time of writing, there were no ‘first-class’ Timorese judges, and thus no Supreme Court, 21 years after the independence referendum. Within the judiciary, senior Timorese judges explained the implications of the 2014 resolutions. They noted that, post-2014, the Timorese judicial recruits did not receive the requisite mentorship and training that the earlier cohorts of judges received.[[98]](#footnote-98) Field observations in 2018 revealed that, on the ground, most of the Timorese judges still struggle to use Portuguese as the legal language and to decide complex cases mainly related to tax, oil and petroleum, and audit matters. Furthermore, the public criticisms by Xanana in 2014 had negatively impacted perceptions of the independence of the Timorese judiciary. Even in 2018, when most of the data for this chapter was collected, informants referred to the 2014 tax case to highlight the limitations of Timorese judges and their lack of technical skills and independence.[[99]](#footnote-99)

## Concluding Remarks

This chapter demonstrates the messy realities within which foreign judges and national judges carried out their roles in East Timor. A few particular and generalisable insights can be drawn from the findings presented here. Firstly, even though the Portuguese judges were recruited to assist in raising the authority and legitimacy of judiciary in the country, on the ground they have been unable to further these ends. The Portuguese judges may have provided opportunities to raise the standards and independence of the judicial actors. However, the arrangements also encouraged the Timorese judges to ‘copy’ legal reasoning styles and rely on case law approved by their Portuguese mentors. Their ‘aspirational’ tendencies, mingled with ‘colonial hang-ups’, led Timorese judicial actors to absorb and imitate their Portuguese mentors with limited critical reflection. As a result, there is a limited development of legal jurisprudence in the country and the Timorese judges are still far away from fully assuming their roles as independent actors who have the authority to constrain the powers of charismatic political leaders. Moreover, the Portuguese judges, by overlooking the local realities and assuming that the separation of powers has fully consolidated in the country pushed the Timorese judges to execute their judicial roles in an ‘ideal’ manner, in which they were encouraged to be fully independent even from the opinions of their revered heroes. But in doing so, the foreign judges unsettled the de facto social order, wherein the charismatic leaders remain *above* the illusory limits set by the new arrangements introduced during state-building.

Although the foreign judges were entrusted to strengthen judicial independence and institutionalise the justice sector in the country, pursuing both ends simultaneously contradicted each other. Pushing for ‘ideal’ standards while the Timorese judges were strengthening their technical skills and establishing their authority, negatively impacted the consolidation of judicial independence and establishing the legitimacy of the judiciary in the long run. Timorese judges needed to routinise their normative roles to improve public trust and confidence in the judicial institution. To do so, support from the resistance leaders was necessary for the local judges to gain legitimacy in the eyes of a generation of Timorese citizens who worship the leaders for their sacrifices. Even though the Portuguese judges carried out their roles impartially, they overlooked the nuances that may have been crucial for the Timorese judiciary to routinise practices and processes for carrying out its functions.

The findings in this chapter highlight the dilemmas in pursuing ‘ideal’ notions of separation of powers and judicial independence in a country that is in transition. In a country transitioning into democracy, where state institutions have barely had any influence before, *time* is necessary for the notions of separation of powers and relevance of law as a tool for tackling arbitrary power to fully settle. We must therefore re-evaluate our normative conceptions of the role of foreign judges in transitional settings like East Timor. Should foreign judges pursue their mandates in the idealistic sense — as role models symbolising impartiality and independence — or should they balance their roles with what is ‘ideal’ for a specific setting at a particular time and context? The experiences of foreign judges in East Timor remind us of the tensions in pursuing either of these ends.

The case study also reveals the varying reasons why a nation-state might enter into arrangements for having foreign judges on its domestic courts. Not all actors may have coinciding reasons as to why they may prefer to have foreign judges. In East Timor, civil society members preferred foreign judges because they perceived them to decide matters impartially without the influences of external local factors. Foreign judges were also chosen for their legal expertise and experiences as judges in their home countries. They were expected to transfer the culture of judicial independence and ethics to their Timorese judicial counterparts. But from the perspective of the elite decision-makers, the alliance with judges from Portugal and other Lusophone nations was meant primarily to build international ties for economic and cultural purposes. The Portuguese judges may have found more support than the Americans or the Australians in 2002. But as the years passed and the Timorese resistance leaders took political roles, their attitudes towards the Portuguese judges changed. As the country transitioned to a stable state with defined institutional arrangements through which power is divided, facilitated, and maintained, these misaligned interests between the elite leaders and the judicial actors became apparent. And, since the elite resistance leaders had more power and influence in the society, they could call off the technical exchange arrangements when they went against their interests. The influence of foreign judges may not remain static; instead, it can change with time. Therefore, those studying foreign judges in domestic courts must be open to gathering data on foreign judges’ shifting influences, legitimacy, and authority in particular contexts.

1. [↑](#footnote-ref-1)
2. \* I am thankful for the generous feedback I received from the editors Anna Dziedzic and Simon Young, and from David Nelken, Andy Aydin-Aitchison and Deval Desai on earlier drafts. Their comments helped me to further sharpen my arguments. I am also grateful to all the interview participants who shared their time and experiences with me. My research assistant, Bertanizo Guro da Costa, made data collection more manageable and I would like to thank him for the research support I received during my stay in Dili. Errors, if any, are my own. The descriptors ‘foreign’, ‘Portuguese’ and ‘international’ judges are used interchangeably in this chapter. [↑](#footnote-ref-2)
3. Data gathered through semi-structured interviews on the Serious Criminal Offences Panels was triangulated by a literature review. Triangulation of data gathered from the interviews on developments between 2002 and 2016 was more difficult, as there is limited scholarship on the role of international legal actors within the justice sector outside of Serious Criminal Offences Panels. Local accounts in the form of media and monitoring reports from the local non-government organisation Judicial System Monitoring Programme were used to verify data from interviews wherever available. Field observations and informal conversations with the Timorese within the justice sector as well outside of it — law students, legal trainees, civil society participants workers and internationals who were in the field as technical staff — also helped in providing the background and context of foreign judges in domestic courts. [↑](#footnote-ref-3)
4. Laura Grenfell, *Promoting the Rule of Law in Post-Conflict States* (Cambridge: Cambridge University Press, 2013). [↑](#footnote-ref-4)
5. Lia Kent, *The Dynamics of Transitional Justice: International Models and Local Realities in East Timor* (Abingdon: Routledge, 2012). [↑](#footnote-ref-5)
6. See in particular Grenfell (n 3). [↑](#footnote-ref-6)
7. Pip Nicholson and Samantha Hinderling, ‘Court Development in Timor-Leste: “Handover” and its Long Shadow’, in Christopher May and Adam Winchester (eds.), *Handbook on the Rule of Law* (Cheltenham: Edward Elgar, 2018). [↑](#footnote-ref-7)
8. Laura A. Dickinson, ‘The Promise of Hybrid Courts’ (2003) 97 *American Journal of International Law* 295. [↑](#footnote-ref-8)
9. Rosalind Dixon and Vicki Jackson, ‘Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts’ (2019) 57 *Columbia Journal of Transnational Law* 356. [↑](#footnote-ref-9)
10. Grenfell (n 3) 183–213. [↑](#footnote-ref-10)
11. Laura Southgate, *ASEAN Resistance to Sovereignty Violation: Interests, Balancing and the Role of the Vanguard State* (Bristol: Bristol University Press, 2019). [↑](#footnote-ref-11)
12. Alisa Newman Hood, ‘Australia Adrift: The Timor Sea Oil & Gas Dispute’ (2005) 12 *The Brown Journal of World Affairs* 239. [↑](#footnote-ref-12)
13. Dionisio Babo-Soares, ‘Branching from the Trunk: East Timorese Perceptions of Nationalism in Transition’, PhD Thesis, Australian National University (2003). [↑](#footnote-ref-13)
14. Hansjörg Strohmeyer, ‘Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor’ (2001) 95 *American Journal of International Law* 46, 60. [↑](#footnote-ref-14)
15. Pressure from the international community was the main reason for establishing a transitional justice system: see Suzannah Linton, ‘Prosecuting Atrocities at the District Court of Dili’ (2001) 2 *Melbourne Journal of International Law* 414. [↑](#footnote-ref-15)
16. UNTAET Regulation No. 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, s. 1.3. See also UNTAET Regulation No. 2000/11 On the Organization of Courts in East Timor, ss. 10.1–10.2. [↑](#footnote-ref-16)
17. District Courts were expected to be established in Dili, Baucau, Los Palos, Viqueque, Same, Maliana, Ermera and Oecussi: see Regulation No. 2000/15 (n 15) s. 7.1. [↑](#footnote-ref-17)
18. ibid s. 10.3. [↑](#footnote-ref-18)
19. Strohmeyer (n 13). [↑](#footnote-ref-19)
20. ibid. [↑](#footnote-ref-20)
21. ibid. [↑](#footnote-ref-21)
22. ibid 54. [↑](#footnote-ref-22)
23. Interview with Judge 1; Interview with Timorese recruits 1, 2, 3 from the initial phase (2000 to 2002). [↑](#footnote-ref-23)
24. Strohmeyer (n 13) 55. [↑](#footnote-ref-24)
25. ibid 55–56; Interviews with Timorese recruits from the initial phase. [↑](#footnote-ref-25)
26. Interview with Timorese recruits 1, 3 from the initial phase (2000 to 2002); interview with civil society participant 3 (speaking in relation to their involvement campaigning for the prosecution of serious criminal offences cases before the court). [↑](#footnote-ref-26)
27. Interview with Timorese recruit 3 from the initial phase (2000 to 2002); scoping interview with an ex-UNDP official (international) working on justice sector reforms 2002 to 2005. [↑](#footnote-ref-27)
28. Interview with Timorese recruit 3 from the initial phase (2000 to 2002). [↑](#footnote-ref-28)
29. ibid. [↑](#footnote-ref-29)
30. Interview with Timorese recruits from the initial phase (2000 to 2002); see also ‘East Timor: Justice Past, Present and Future’ (Amnesty International, July 2001). On paper, although the international recruits were assumed to be more competent, some of the Timorese interviewees noted that many of the foreign staff recruited were young graduates from the United States, United Kingdom and Australia. [↑](#footnote-ref-30)
31. There have been multiple reviews of the Serious Crimes Panel and its decisions, see e.g. Linton (n 14) and Dickinson (n 7). The authors are critical of the Panel for not carrying out its mandate as efficiently as possible. In 2018, a few of the civil society members during interviews observed that ‘failures’ of the Serious Crimes Panel could be attributed to lack of interest from key elite leaders who preferred to maintain good relations with Indonesia after they took political positions. Regarding allegations about bias from Timorese probationary judges, Linton compares two similar cases, one involving a resistance fighter from the National Armed Forces for the Liberation of East Timor and another involving a pro-Indonesian militia member. Linton concludes that the Timorese judges showed more leniency to resistance fighters when deciding the gravity of punishment. Linton explains that the murder committed by the resistance fighter was explained by the Timorese judges by taking into account the wider context of the independence movement, something which was not done for the Indonesian military member or the pro-Indonesian militia member: Linton (n 14). [↑](#footnote-ref-31)
32. Interview with Director, Asia Justice and Rights. [↑](#footnote-ref-32)
33. The UNTAET Regulations highlighted that relatives would not sit as judges on the same panel: Regulations No. 2000/11 (n 15) s. 9.3. [↑](#footnote-ref-33)
34. Strohmeyer (n 13); Linton (n 14); see also Dickinson (n 7). [↑](#footnote-ref-34)
35. UNMISET (2002 to 2005) focused on transferring the operational aspects to Timorese, while the United Nations Mission in Timor-Leste (2006 to 2011) focused on strengthening the state institutions and enhancing a culture of democratic governance. [↑](#footnote-ref-35)
36. Field observations 2018; see also Fernando Dias Simões, ‘Law and Language in Timor-Leste: Bridging the Divide’ (2015) 37 *Contemporary Southeast Asia* 381. [↑](#footnote-ref-36)
37. Informal conversations with Helen Hill, an international academic who has worked extensively on East Timor’s resistance movement and education policy; field observations 2018. [↑](#footnote-ref-37)
38. Field observations 2018; interview with internationals working in East Timor in 2002; informal conversations with civil society members and Timorese lawyers. [↑](#footnote-ref-38)
39. All the websites under the Ministry of Justice publish their legal documents and information in Portuguese. Of 171 laws passed by the Parliament, only 13 are available in Tetum: Democratic Republic of Timor Leste (RDTL) see ‘Jornal da República de Timor Leste Online’ mj.gov.tl/jornal; Field observations, 2018. [↑](#footnote-ref-39)
40. Interview with AJAR [↑](#footnote-ref-40)
41. Simões (n 36). [↑](#footnote-ref-41)
42. Statute of Judicial Magistrates, Law No. 8/2002. [↑](#footnote-ref-42)
43. Constitution of the Democratic Republic of Timor-Leste (2002) art. 163.1, provided that the Serious Crimes Panels, composed of national and international judges with competencies to judge serious crimes between 1 January and 25 October 1999, were allowed to remain in operation to conclude cases that were then under investigation. The provision added that the judicial set-up would remain ‘until’ a new judicial system was fully established. [↑](#footnote-ref-43)
44. Statute of Judicial Magistrates (n 43) s. 25. [↑](#footnote-ref-44)
45. ibid s. 111(2). [↑](#footnote-ref-45)
46. Interview with Ministry of Justice participants 1 and 2. Also interviews with senior officials at the Legal Training Centre. The Statute of Judicial Magistrates (n 43) s. 111.1 recognises the arrangement as a ‘transitional’ one and Section 111.2 reads: ‘[t]he Superior Council of the Judiciary may, in exceptional and substantiated cases, select non-East Timorese judges, by comparing different CVs, with at least 15 years’ experience and coming from a civil judicial system, to enter the judiciary of East Timor on a provisional basis.’ [↑](#footnote-ref-46)
47. Field observations 2018; interviews with Timorese judicial actors, lawyers, and staff at development agencies supporting justice sector development. [↑](#footnote-ref-47)
48. Judicial System Monitoring Program, *The Impact of the Language Directive on the Courts in East Timor, 2004*. [↑](#footnote-ref-48)
49. Interview with civil society participant 6. [↑](#footnote-ref-49)
50. See Independent Evaluation Office, ‘Assessment of Development Results: Evaluation of UNDP Contribution in Timor-Leste’ (UNDP, July 2014), p. 28. Concerns about the disproportionately high salaries of international and national consultants recruited through donor arrangements were raised in donor conferences in Dili: for articles on this issue see La’o Hamutuk, Issue Index: Aid to Timor-Leste at www.laohamutuk.org/issues.html#Aid. Since there were no streamlined or harmonised agreements on salaries, foreign judges were remunerated according to their contractual ‘technical transfer’ arrangements. A report in 2016 highlighted that the Ministry of Justice did not have any approved budget for paying for international staff in the judiciary: Lusa, ‘Timorese Court of Appeal without enough judges to respond to cases’, *RTP News*, 2 June 2016, www.laohamutuk.org/Justice/2016/LUSAJudgesNeeded2Jun2016en.pdf. Interviews with Portuguese Judges who were recruited for the Legal Training Cenre and as Judicial Inspectors revealed that they were paid by Ministry of Justice in Portugal, Ministry of Justice in East Timor, and the UNDP conjointly for their services in East Timor. [↑](#footnote-ref-50)
51. ibid; interview with lawyer 2; informal conversations with a justice sector employee. [↑](#footnote-ref-51)
52. *Public Prosecutor v. Armando dos Santos* (Court of Appeal 15 July 2003). [↑](#footnote-ref-52)
53. A new Penal Code was adopted in 2009 and the Civil Code was passed in 2011. [↑](#footnote-ref-53)
54. See dissenting judgment of Judge Correia in *Public Prosecutor v. Armando dos Santos* (n 53)*.*  [↑](#footnote-ref-54)
55. Interview with lawyer 2. [↑](#footnote-ref-55)
56. Judicial System Monitoring Programme, ‘Report on the Court of Appeal Decision in the Case of Armando Dos Santos’ (August 2003). [↑](#footnote-ref-56)
57. Interview with Portuguese Judge 1 at Legal Training Centre; interview with Portuguese Judge 2; focus group with Legal Training Centre trainees. [↑](#footnote-ref-57)
58. Field observations 2018. [↑](#footnote-ref-58)
59. ial Judicial Magistrates (n 43) s. 22. [↑](#footnote-ref-59)
60. Interview with Timorese Judge 1. [↑](#footnote-ref-60)
61. ibid. [↑](#footnote-ref-61)
62. Interview with international technical adviser 3 to the justice sector; field observations 2018. [↑](#footnote-ref-62)
63. Field observations 2018; interview with lawyer 2. [↑](#footnote-ref-63)
64. Interview with international technical adviser 3 to the justice sector. [↑](#footnote-ref-64)
65. Interview with Timorese Judges 1, 2; informal conversations with Timorese lawyers; staff in the justice sector. [↑](#footnote-ref-65)
66. Michael Leach, ‘Difficult Memories: The Independence Struggle as Cultural Heritage in East Timor’, in William Logan and Keir Reeves (eds.), *Places of Pain and Shame: Dealing with ‘Difficult Heritage’* (London: Routledge, 2008). [↑](#footnote-ref-66)
67. Maj Nygaard-Christensen and Angie Bexley, ‘Fieldwork in a New Nation’, in Maj Nygaard-Christensen and Angie Bexley (eds.), *Fieldwork in Timor-Leste: Understanding Social Change Through Practice* (Copenhagen: Nordic Institute of Asian Studies Press, 2018). [↑](#footnote-ref-67)
68. ibid. [↑](#footnote-ref-68)
69. The Revolutionary Front for an Independent East Timor (known as FRETILIN) is currently a political party, but it began as a resistance movement, initially against the Portuguese in 1974 and later Indonesia. [↑](#footnote-ref-69)
70. The National Congress for Timorese Reconstruction was established as a political party by Xanana Gusmão in 2007. However, its origins date back to the resistance movement against the Indonesians with Xanana as its leader. [↑](#footnote-ref-70)
71. Michael Leach, ‘East Timorese History after Independence’ (2006) 61 *History Workshop Journal* 223, 233. [↑](#footnote-ref-71)
72. La’o Hamutuk, ‘Appeals Court Invalidates State Budget’ (4 December 2008), www.laohamutuk.org/econ/MYBU08/BudgetRuledUnconstitutional08.htm; see Decision on the constitutionality and the legality of Law 12/ 2008 ( Court of Appeal, 11 November 2008); https://www.laohamutuk.org/econ/MYBU08/court/CourtRulingORPt.pdf [↑](#footnote-ref-72)
73. Adérito de Jesus Soares, ‘A Social Movement as an Antidote to Corruption’, in Sue Ingram, Lia Kent and Andrew McWilliam (eds), *A New Era? Timor-Leste After the UN* (Canberra: Australian National University Press, 2015). [↑](#footnote-ref-73)
74. Field observations 2018. [↑](#footnote-ref-74)
75. Upstream Staff and Reuters, ‘East Timor Evicts Judges over Tax Ruling’, *Upstream*, 5 November 2014 https://www.upstreamonline.com/online/east-timor-evicts-judges-over-tax-ruling/1-1-1152664. [↑](#footnote-ref-75)
76. Taxation of Bayu-Undan Contractors, Law No. 3/2003. [↑](#footnote-ref-76)
77. ibid. [↑](#footnote-ref-77)
78. Informants observed that the lapse from the prosecutors’ office was a result of the political tensions between the general prosecutor who was in charge at the time and Xanana’s government. The notice was served to the General Prosecutor, but the Ministry of Finance was not informed of the case due to conflicts between the ruling government and the General Prosecutor. Interview with lawyer 3; interview with lawyer from the Ministry of Finance.. [↑](#footnote-ref-78)
79. For Xanana’s televised presentation slides see: Xanana Gusmão, ‘Tax Cases in Dili Court: Errors Made by Courts’, archived at www.laohamutuk.org/Justice/2014/COURT-ERRORS.pdf; Xanana Gusmão, ‘Tax Cases in Dili Court: Errors Made by Public Prosecutor’, archived at www.laohamutuk.org/Justice/2014/PUBLIC-PROSSECUTER-ERRORS.pdf. [↑](#footnote-ref-79)
80. Resistance fighters are referred to as ‘veterans’ in East Timor. A copy of the letter in Tetum is available at www.laohamutuk.org/Justice/2014/VetsDecl29Oct2014te.pdf. [↑](#footnote-ref-80)
81. ibid. [↑](#footnote-ref-81)
82. Xanana’s presentations (n 75). [↑](#footnote-ref-82)
83. Resolution of the East Timorese Parliament No. 11/2014 (24 October 2014). At the time of the resolution there were seven international judges, six Portuguese and one Cape-Verdian, but the resolution mainly targeted the Portuguese judicial officers. [↑](#footnote-ref-83)
84. Resolution of the East Timorese Parliament No. 11/2014 (24 October 2014). [↑](#footnote-ref-84)
85. Resolution of the East Timorese Parliament No. 11/2014 (24 October 2014). [↑](#footnote-ref-85)
86. Resolution of the East Timorese Government No. 29/2014 (24 October 2014). [↑](#footnote-ref-86)
87. Resolution of the East Timorese Government No. 29/2014 (24 October 2014). [↑](#footnote-ref-87)
88. Resolution of the East Timorese Government No. 29/2014 (24 October 2014). [↑](#footnote-ref-88)
89. Interview with Timorese prosecutor 2, civil society participant 8, lawyers 2, 3. [↑](#footnote-ref-89)
90. For details of Australian spy scandal see Mong Palatino, ‘East Timor-Australia Spying Scandal’, *The Diplomat*, 16 December 2013. For details of Bobby Boye’s case see La’o Hamutuk, ‘Bobby Boye: Convict, Advisor and Fraud’ (16 September 2014), www.laohamutuk.org/econ/corruption/Boye/14BoyeCase.htm. [↑](#footnote-ref-90)
91. Alistair Wyvill SC, ‘Report on Relations between the Judiciary and the Government in Timor Leste Following Investigations in Country between Sunday 16 November 2014 and Tuesday 18 November 2014’ (December 2014). [↑](#footnote-ref-91)
92. ‘Xanana Gusmão Defende Ex-Ministra Timorense Condenada e Critica Justiça’, *Observador*, 26 January 2017. [↑](#footnote-ref-92)
93. Maj Nygaard-Christensen, ‘The UN Document Leak: The Production of Political Controversy’, in Nygaard-Christensen and Bexley (eds.) (n 64) p. 199. [↑](#footnote-ref-93)
94. Interview with ex-legal international adviser to the Parliament. [↑](#footnote-ref-94)
95. The data presented here is mainly collected from field research in East Timor in 2018, continued remotely in 2019. The influence of foreign judges in East Timor post-2019 is left for further research. [↑](#footnote-ref-95)
96. Democratic Republic of Timor Leste (RDTL) ‘Justice Sector Strategic Plan for Timor-Leste’ (Ministry of Justice, 12 February 2010), www.mj.gov.tl/files/JSSP\_ENGLISH.pdf. [↑](#footnote-ref-96)
97. Interview with lawyer 2, interview with Timorese Judge 1. [↑](#footnote-ref-97)
98. Interview with Judge 1. [↑](#footnote-ref-98)
99. Interviews with civil society members, focus group with Legal Training Centre candidates, informal conversations with citizens; field observations 2018 on the political impasse between Xanana and President Lu’Olo. [↑](#footnote-ref-99)