



## JUSTICE UPDATE

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### THE COURT OF APPEAL DECISION IN THE FRETILIN CONGRESS VOTING CASE

#### 1. Introduction

In this justice update, JSMP considers the Court of Appeal's decision in the case concerning the 2006 Fretilin Congress, and specifically the re-election by show of hands of Mari Alkatiri to the leadership of the Fretilin Party.

##### 1.1. *Factual background to the case*

On 17, 18 and 19 May 2006 Fretilin held its party congress in Dili.<sup>1</sup> The congress was attended by 577 delegates. One function of the congress was to select the leader for the party. Since Fretilin maintains a majority in the Timor-Leste National Parliament, and since the Prime Minister of Timor-Leste is selected by the political party with a parliamentary majority,<sup>2</sup> the *de facto* role of this vote was the selection of the Timorese Prime Minister.

Article 17 of the Fretilin Party Statute states:

- (1) *Voting is personal, direct and secret in elections for positions in Fretilin's organs at all levels.*
- (2) *The option may be taken of a vote by a show of hands if such is proposed by 10% of the delegates or members of party organs and is approved by a majority.*

On 18 May 2006 the party congress elected to adopt voting by show of hands in accordance with article 17(2) of the party statute. In the consequent vote Mari Alkatiri was returned as Secretary General of the party.

##### 1.2. *The case before the Court of Appeal*

Subsequent to the voting process described above, a group of persons from within the Fretilin party<sup>3</sup> applied to the Court of Appeal, requesting it to:

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<sup>1</sup> Under the Timor-Leste Law on Political Parties the Congress or National Congress of a party is the highest deliberative organ at the national level. It has the exclusive competency to approve party by-laws and political programs, decide about mergers and coalitions with other parties. The party congress must meet on a regular basis at least every four years: see section 19 of Law 3/2004 on Political Parties.

<sup>2</sup> Article 106 Timor-Leste Constitution.

<sup>3</sup> These persons were: Vitor da Costa, Vicente Mau Boci, Adérito de Jesus, Igidio de Jesus, César Moreira, Ricardo Nheu, Armando Midar and Adolfo António Belo.

- 1) consider the legality of the Fretilin leadership election in the light of the Law on Political Parties and consequently the legitimacy of the current party leadership;
- 2) declare as illegal article 17(2) of the Fretilin party statute; and
- 3) immediately order Fretilin to convene an extraordinary congress to elect new leadership according to law.

The Fretilin Party responded to the application and argued against the relief sought.

On 11 August the Court of Appeal issued a decision in favor of the respondent.<sup>4</sup>

JSMP believes there are several contentious issues which arise out of the Court of Appeal's decision.

## **2. Procedural issues arising out of the application**

The first issues considered by the Court of Appeal were whether it had the competency to receive and determine the application, and if so whether the application had been filed within the relevant time limit.

### ***2.1. Identification of the relevant procedural law and the court with jurisdiction to determine the application***

JSMP considers that in order to assess questions of procedure arising in this case it is necessary first to consider the source of the relevant procedural laws. JSMP notes that a new law was passed by the Government on 21 February 2006 which created the Timor-Leste Civil Procedure Code.<sup>5</sup> Additionally, the Law on Political Parties<sup>6</sup> sets out the rules governing the activities of political parties in Timor-Leste.

JSMP considers that cases involving the internal processes of political parties and their compliance with the Law on Political Parties are civil in nature. There is no suggestion that a criminal offence has been committed and that the Criminal Procedure Code should therefore apply. Therefore, the Civil Procedure Code should be the instrument used in the settlement of such cases.<sup>7</sup>

However a question arises as to whether the civil procedure code can be used in cases involving political parties if the Law on Political Parties establishes other procedures? JSMP notes that in the event of a conflict the

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Court of Appeal decision in case No. PP-Div/2006/01.

<sup>5</sup> RDTL Government Decree-Law 1/6006. The Civil Procedure Code is an annex to this law.

<sup>6</sup> Law 3/2004 on Political Parties.

<sup>7</sup> JSMP regrets that it is unable to provide detailed analysis of the Civil Procedure Code and its application to the present case. This is because the Code is yet to be translated into any languages other than Portuguese. JSMP calls on the Government and UNMIT to facilitate the timely translation of Timorese laws into Tetum.

Law on Political Parties takes precedence over the Civil Procedure Code. This is for two reasons:

- 1) Since the Law on Political Parties was created by the Parliament and the Civil Procedure Code by Government Decree, the former is *lex superior* and the latter is *lex inferior*. A higher law must take precedence of a lower one. That parliamentary laws are of a higher status than those created by the Government is made clear by the Timor-Leste Constitution.<sup>8</sup>
- 2) In any event, although passed earlier than the Civil Procedure Code, the Law on Political Parties is *lex specialis* and should therefore take priority over the general rules contained in the Civil Procedure Code where a conflict arises.

However it is not clear whether a conflict between the Civil Procedure Code and the Law on Political Parties arises. The Law on Political Parties refers in a number of places to “the competent Court”.<sup>9</sup> Section 29 defines the competent Court for the purposes of this Law as the Supreme Court of Justice, or until that Court’s establishment, the Court of Appeal sitting as a panel composed exclusively of national Timorese judges.<sup>10</sup>

However the tasks which the Law gives to the “competent Court” (therefore the Court of Appeal) do not relate to litigation. Rather they concern the procedures for the establishment and registration of political parties,<sup>11</sup> and the reporting obligations of political parties once registered.<sup>12</sup> JSMP therefore considers that it is possible, indeed likely, that the Law on Political Parties intended to provide the Court of Appeal with specific competence in respect of political parties’ registration and reporting.

That such competence was not necessarily intended to extend to jurisdiction to hear disputes in cases of non-compliance with the Law may be demonstrated by section 28. That section provides that without prejudice to any civil or criminal liability which may arise, a violation of Chapter IV of the Law on Political Parties (dealing with financial management) renders a party

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<sup>8</sup> See for example section 97(1) which provides that the power to initiate laws lies with a) the Members of Parliament, b) the Parliamentary groups; and c) the Government. See also section 98(1) which gives the National Parliament the power to invalidate or amend laws passed by the Government (other than those passed under the latter’s exclusive legislative powers).

<sup>9</sup> See sections 11, 12, 14, 15 and 17 Law 3/2004 on Political Parties.

<sup>10</sup> Section 29(1) and 29(2) Law 3/2004 on Political Parties.

<sup>11</sup> Section 11(2) requires registration of political parties in a register to be held in the competent Court, and provides that upon such registration a party acquires juridical personality. Section 12(3) gives the competent Court authority to resolve questions regarding the similarity of names or other representations of political parties. Section 14(2) provides for appeal to the competent Court where the Minister of Justice refuses the registration of a political party. Section 15 provides for a process for the granting and advertisement of provisional registration of parties, aspects of which are carried out by the President of the competent Court.

<sup>12</sup> Section 17(1)(b) requires parties to inform the competent Court about any subsequent changes to their by-laws and programme, the identification of their leaders, changes of address of the national headquarters and about any merging or any type of political coalition.

liable to the payment of a fine, the value of which within a specified range is to be established by “the Court”. It is significant that in contrast to the sections establishing registration and reporting requirements, this provision does not refer to “the competent Court”, but only “the Court”. This seems to suggest that at least some cases involving non-compliance with the Law on Political Parties are not necessarily to be heard by “the competent Court” (namely the Court of Appeal).

That the Court of Appeal's specific competency under section 29 was intended to be limited to oversight of party registration and reporting is also supported by reference to the Timor-Leste Constitution. The Constitution provides that one of the competencies of the Supreme Court of Justice will be that of verifying the legality of political parties' establishment and coalitions and of ordering their registration or dissolution.<sup>13</sup> It therefore seems likely that the Law on Political Parties was drafted so as to confer this specific form of competency on the Supreme Court of Justice, and pending the creation of that Court, on the Court of Appeal. There is nothing within the Constitution that would have required the Law on Political Parties to extend the competency of the Supreme Court or Court of Appeal to the hearing of first-instance applications in all disputes arising within political parties or in respect of the Law on Political Parties.

Finally, the Law on Political Parties does not include any provisions regarding the procedure which would be followed in an application to the Court of Appeal regarding a violation of the Law. This also seems to indicate that the Law does not intend to derogate from the general procedures contained in the Civil Procedure Code.

JSMP is concerned that none of these lines of reasoning were even considered by the Court of Appeal in its decision. In establishing its competency, the Court merely referred to section 29 of the Law on Political Parties and noted that it defined the competent Court as the Court of Appeal. It did not go on to consider the powers which were expressly given to the “competent Court” by the legislation or the context in which that term was used. Indeed the Court of Appeal did not appear even to contemplate that the law was capable of conferring various forms of competency on a court, as this would have entailed it considering the extent of the competency conferred upon it by the Law on Political Parties.

JSMP believes that there are strong grounds for believing that:

- (a) the Law on Political Parties was not intended to displace the Civil Procedure Code by providing a special procedure for litigation to be used in cases where the Law has been violated; and therefore that
- (b) the Court of Appeal may not have jurisdiction to hear first instance applications in such cases, or that if it does it is not required to sit in the form required of the “competent Court” under the Law on Political Parties, namely as a panel composed exclusively of national Timorese judges.

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<sup>13</sup> Section 126(1)(e) Timor-Leste Constitution.

If this is the case the decision of the Court of Appeal in this case may itself be unconstitutional.

## **2.2. Time limits relevant to the application**

The Court of Appeal stated in their decision that the applicants had exceeded the prescribed time limit for making their application.

However JSMP is concerned by the Court's reasoning on this issue. In order to properly resolve the question it is necessary to consider where the relevant time limit may be found. In the absence of any specific time limit included in the Law on Political Parties, general time limits proscribed by the Civil Procedure Code should be applied.

The Court of Appeal, in its decision, identified article 119 as the relevant article in the Civil Procedure Code. Article 119 appears under the heading "Acts of parties" and states:

*In the absence of a special provision, the time limit of ten days applies to the parties to request any act or inquiry, allege invalidity, deduce incidents or perform any other procedural power, and ten days is also the deadline for the party to respond to what was deduced by the opposing party.*

Applying this provision, the Court of Appeal stated that the application, which was presented to the Court on 6 July was out of time, since it was made 48 days after the date of the Fretilin Congress election.

JSMP believes that the application of article 119 of the Civil Procedure Code in these circumstances is incorrect. This article is clearly intended to provide a general time limit for the taking of procedural steps during the course of a civil proceeding. Although the provision is not express on the point, JSMP believes that it cannot have been intended to provide a time limit for the *commencement of proceedings*. The use of a statutory limitation period of ten days for the commencement of civil proceedings would be extremely prejudicial to the ability of persons in Timor to enforce their legal rights in the courts. In most jurisdictions the time for the commencement of such proceedings is measured not in days but in years.

## **3. The impartiality of the Court of Appeal**

A conflict of interest may occur when judges have a particular relationship to a case under their supervision. In such cases the impartiality of a judge is called into question. Timorese and international law both state that courts and the judges which compose them must remain impartial in the performance of their functions.<sup>14</sup> This principle encompasses any situation which can give rise to a conflict of interest or may cast doubt on the neutrality of a judge. Such a

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<sup>14</sup> Article 7 Law 8/2002 Statute of Judicial Magistrates; article 14(1) International Convention on Civil and Political Rights (applicable as law in Timor-Leste pursuant to article 9(2) Timor-Leste Constitution.)

situation can arise when a family, financial or organizational relationship exists between a judge and a party to litigation before that judge.

JSMP received information that two members of the panel of judges handling the Fretilin congress case have strong connections to the Fretilin party.<sup>15</sup> More specifically, it is known that Judge Jacinta Correia da Costa and Probationary Judge Maria Natércia Gusmão Pereira, who sat in the Court of Appeal in this case, both have husbands who are members of the Fretilin Central Committee.

JSMP does not wish to imply that these judges were consciously influenced in their decision-making by the position of their spouses. Rather, it points out only that it is important that judges who have a direct personal relationship with a litigant remove themselves from the case in question in order to remove the possibility of any subconscious impact and to ensure public confidence in the impartiality of the Courts. It is for this reason that the Statute of Judicial Magistrates requires that judges should not hear cases involving a person to whom they are related (including by marriage).<sup>16</sup> While the spouses of the judges in the present case were not parties to the litigation in their own right, JSMP believes that their interests, as members of the Fretilin Central Committee, are sufficiently closely connected with the interests of the defendant to mean that those persons are “involved” in the case, and to give rise to a legitimate public concern about judicial impartiality.

#### **4. Validity of the Fretilin Party Statute**

The Court of Appeal held that the Fretilin Congress vote was in accordance with the party Statute which allows a vote by show of hands when this is requested by 10% of the representatives of the bodies present and when agreed to by the majority.<sup>17</sup> JSMP agrees with the application of this article but considers that it is also necessary to examine other articles and superseding pieces of legislation such as the Law on Political Parties, to consider whether article 17(2) the Fretilin Party Statute is in fact valid.

In this context here are two issues requiring analysis:

##### **4.1. Internal consistency of the Fretilin Party Statute**

In considering the validity of article 17(2) of the Fretilin Party Statute the Court of Appeal first considered its consistency with article 17(1) of the same statute. The question considered was whether article 17(2) is in conflict with article 17(1) which requires for a vote to be cast in secret. JSMP agrees with the approach taken by the Court of Appeal on this question. Namely, it is clear that subarticle (2) was intended to provide an exception to the general rule of vote by secret ballot. For this reason there is nothing internal to the Fretilin Party Statute which would invalidate article 17(2).

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<sup>15</sup> JSMP made enquiries of one of the applicants on 14 August 2006.

<sup>16</sup> Article 8, Law 8/2002 Statute of Judicial Magistrates. See also the preceding legislation: UNTAET Regulation 2000/11 on the Organization of the Courts in East Timor, section 20.3.

<sup>17</sup> Article 17(2) Fretilin Party Statute.

#### **4.2. Validity of the Fretilin Statute under the Law on Political Parties**

However, although the Fretilin Statute may be internally consistent, JSMP believes that article 17(2) may be in conflict with the Law on Political Parties. In particular, Article 18(c) states:

*“The internal organisation of political parties must follow such basic specific democratic rules as follows:*

*...*

*(c) the holders of leading organs can only be elected by means of a direct and secret vote of all party members or of an assembly representing them.”*

According to the principle of the hierarchy of laws, if inferior regulation is in conflict with a superior law the former is rendered invalid. According to this principle, in the event of an inconsistency with article 18(c) of the Law on Political Parties, article 17(2) of the Fretilin Statute will be invalidated.

However the Court of Appeal considered that there was no inconsistency between the Fretilin Statute, which permits vote by show of hands, and the Law on Political Parties article 18(c). This is because the Court of Appeal interpreted the requirement of “direct and secret” vote in article 18(c) as applicable only to votes by *all party members*, and not applicable to votes by an assembly representing party members. The reasoning behind this approach appears to be that a system whereby party members choose an assembly to represent it in the election of leaders could never be a “direct” vote, and that therefore the stipulation “direct and secret” could not have been intended to apply to such a process.

JSMP believes that there are flaws in this reasoning. JSMP agrees that the term “direct” could not accurately describe the overall process whereby party members elect an assembly to choose their leader. Such a process is by definition an “indirect” election. However, it is possible to require that the *assembly itself* engage in a direct election for the leader. Such a requirement means that the members of the assembly directly choose the leader, rather than delegating their decision-making power any further. In JSMP’s view this was the intended meaning of article 18(c).

That the phrase “direct and secret” was intended to apply to both modes of election mentioned in article 18(c) (ie vote by all party members or vote by an assembly representing all party members) is clear from the plain meaning of the section. The grammatical structure adopted in the sentence makes clear that the phrase “direct and secret vote” applies to both parts of the following disjunction. If this was not the case, the phrase should have been written:

*“the holders of leading organs can only be elected by means of a direct and secret vote of all party members or **by** an assembly representing them.”*

The fact that this phrasing was not used should create a presumption that either form of election was required to be secret.

Further, as the Court of Appeal itself identified, the context and policy underlying a legislative provision should be taken into account in the process of statutory interpretation. In this case JSMP believes that the policy underlying the requirement is clear. It is directed at ensuring that votes for party leaders are fair and representative. For voters to be able to fully execute their right to vote a number of conditions must be ensured. These include feeling secure in the exercise of a vote. This is a fundamental reason for the use of secret ballots. A vote by show of hands undermines a voter's right to vote freely. This is because voters may be unable to cast their votes sincerely if circumstances cause them to feel insecure or pressured. This can arise for example as a result of real or perceived pressure emitted from a powerful the candidate. This phenomenon appears may be particularly pronounced in respect of the Fretilin Party executive since they currently hold power, and because a large number of those voting work in the government under the very individuals nominating themselves to be re-elected to the party executive. If a vote is not secret, there is a danger that these circumstances may cause voters to give more consideration to external pressures when casting their votes than to their own views.

JSMP considers that these policy considerations are just as important where a representative assembly elects the party's leaders as they are where members themselves directly elect the leaders. This is because the members are not able to be fairly and adequately represented if assembly members feel undue psychological pressure while voting.

Therefore, on both the basis of the plain meaning of the provision and the policy underlying it, JSMP considers that article 18(c) requires all elections of political party leaders to be done secretly. If this is indeed the case, then article 17(2) of the Fretilin Statute is invalid, and the process followed in the Fretilin Congress is contrary to Timorese law.

## **5. The availability of remedies**

Although it had determined that no violation of the Law on Political Parties had occurred, the Court of Appeal went on to consider what the consequence of such a violation would have been had it occurred. The Court concluded that because the Law on Political Parties does not provide a specific sanction for the violation of article 18, in the event of such a violation the Court would have no power to provide remedies such as those sought (including the ordering of an extraordinary congress and new elections within Fretilin).

JSMP is concerned by this approach from the Court of Appeal. It suggests that the Court does not have any powers under general law to grant relief where the law has been violated. JSMP believes that it was incumbent on the Court of Appeal to look beyond the Law on Political Parties for the source of its own power to enforce the laws effectively. The power of a court to order relief should not be expected to be included in each and every statute which creates rights or duties in persons.

## **6. Conclusions and recommendations**

JSMP is concerned that this case sets out a problematic precedent for judges in respect of the future performance of their duties. JSMP recommends that the Court of Appeal take into account the rules relating to the professionalism of judges which are contained in the Statute of Judicial Magistrates, and take steps to avoid any conduct that could be perceived as partial. The Court must also take care when reaching decisions to consider all relevant legal principles so that the quality of their decisions can be assured and justice can be achieved in the cases over which they preside.