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ELECTORAL COMPLAINTS
DURING THE GENERAL ELECTIONS OF 2007
IN TIMOR-LESTE

With the Support of AusAid

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1 Introduction

In 2002 East Timor held elections, under UNTAET authority, for the first President of the Republic and for the Constitutional Assembly, which subsequently became the National Parliament (NP). In 2007, the end of the five-year mandates for these positions brought with it the organization of the first ever, independent national elections in Timor-Leste. The Judicial System Monitoring Programme (JSMP) has been monitoring developments within Timor's legal sector since 2001 and has naturally taken a close interest in the electoral laws and their implementation. No such laws existed prior to December 2006 and few of those involved had any experience of electoral administration. This posed a significant challenge for our fledgling nation.

JSMP does not possess the resources to carry out a comprehensive monitoring project and has therefore turned its attention Electoral Dispute Resolution (EDR) mechanisms. These are increasingly acknowledged to constitute an integral part of legitimate and credible democratic elections, but are rarely examined in detail. In this report we outline the legal development of the electoral process during the period December 2006 to July 2007 and analyse the impact and effectiveness of complaints procedures. We hope that our comments may contribute to improvements in Timor Leste's electoral framework ahead of the next general elections in 2012.

1.1 Background to the project

When the electoral laws were passed in December 2006, it was determined that the basic framework for the implementation and supervision of these elections would rely on two main electoral administration bodies (EABs):

- the *Secretariado Técnico de Administração Eleitoral* (STAE); and
- the *Comissão Nacional de Eleições* (CNE), which would be in charge of the complaints process.

The functioning, and interoperation, of these two institutions would be essential to the successful achievement of democratic elections in accordance with international standards, yet their late introduction into the body of law and the lack of institutional experience in electoral matters flagged early the need to monitor the quality of dispute resolution and potentially to advocate for improvements. This and JSMP's awareness of systemic weaknesses, including partisan influence, in the judicial system (as the final arbiter on electoral complaints), provided the rationale for this project's focus.

The focus on EDR has not prevented JSMP from becoming actively engaged in other debates since this project forms only part of JSMP's broader mandate to monitor, and advocate for change and increased efficiency in the legal system of Timor-Leste. JSMP was, through this ongoing collaboration with government, influential in changing the law so that prisoners and hospital in-patients would be able to vote. This report, however, will concentrate on legal developments relating directly to EDR. It should be noted that quite a small number of complaints were recorded during the electoral period, narrowing the field of our enquiry.

1.2 Methodology and Problems encountered

In order to develop an understanding of the complaints process, JSMP undertook a comprehensive study of the electoral legislation - a task made difficult by numerous amendments throughout the electoral period from March to July. In order to access up-to-date information, good working relationships were needed with government and with other observer groups and NGOs. A relatively low level of co-operation between such groups was reported to have led to frustration among officers from EABs at repeatedly receiving the same requests, and occasionally hampered communication. Generally, however, the relevant bodies were willing to help insofar as they felt it was in their power to do so. On the basis of such information, JSMP produced during the electoral period several justice updates and press releases advocating for changes.¹

The project sought also to monitor the use of the complaints process. Accordingly, JSMP attempted to meet with all the different candidates or groups to hear their thoughts and concerns on the electoral framework and EDR mechanisms. This was useful when it occurred, but the back-to-back elections made all those involved in campaigning very busy most of the time. Many events were rescheduled frequently and at short notice (as witnessed by the CNE's numerous reprimands for illegal changes to campaign programmes), which meant that meetings were often delayed or cancelled. Nevertheless, some of the candidates and groups were able to give us detailed information and documents about specific claims. Cases submitted by candidates/parties/coalitions have the advantage that publicity is often invited, unlike individual complaints which are protected by confidentiality clauses. For this reason, much of JSMP's assessment is based on higher profile public cases.

JSMP joined KOME (Kolimasaun Monitorizasaun ba Eleisaun Geral), the coalition of NGOs formed specifically for the 2007 general elections, early during the year, tapping into a network of more than 1,200 national observers. In collaboration with KOME, we designed a form to be filled out by observers on the specific topic of complaints. This gave mixed results. Recording of complaints by this means was limited during the first round of the presidential elections due to constraints on training opportunities. The second round results were more comprehensive, although the vast majority of complaints recorded related to minor problems that were often settled at polling locations and thus did not afford much insight into the finer workings of the complaints resolution process.

The following report covers the entire electoral period for the Presidential and Parliamentary elections of 2007 in Timor-Leste. Despite slightly different dynamics, we have chosen to consider complaints from these two campaigns together, due to their relatively small overall number. Additionally, rather than duplicating here the work of others on polling and counting procedures, we have chosen instead to concentrate on the legal aspects of the complaints process, drawing on international systems and experiences for comparison where available and appropriate.

¹ JSMP, Justice Update, *The Absence of a Procedure on Electoral Complaints in the First Round of the Presidential Election*, 15 May 2007

JSMP, Justice Update, *The Right to Vote*, 1 May 2007

JSMP Press Release, *Mobile Voting in Prisons and Hospitals for the Parliamentary Election*, 30 June 2007, 9 July 2007.

JSMP Press Release, *The Parliament Election Amendment Law*, 19 May 2007.

2 The importance of Election Dispute Resolution

For elections to meet international standards and, importantly, for them to be *perceived* as doing so, it must be possible to legally challenge each element of the electoral process. This reflects the basic human right that there be recourse at law where an individual suffers a violation of his or her rights², in turn protecting the right to take part in political activities.³ A robust EDR mechanism therefore goes some way to ensuring the transparency, legality and impartiality of democratic elections.

There are different styles of EDR framework, generally separated into three categories: those based on resolution through the existing judicial and administrative institutions; those that channel disputes through a combination of special electoral institutions and the courts; and those that rely on a permanent electoral court.⁴ The second of these is the most common among nations in the process of consolidating democracy, and is indeed the one established in Timor-Leste.

Although there is no single international document outlining the requirements of an effective system for resolving election disputes, best practice standards can be inferred from a number of instruments and by extension of basic principles on democratic elections. The Office for Democratic Institutions and Human Rights (ODIHR), within the Organization for Security and Cooperation in Europe (OSCE), has produced handbook suggesting a number of criteria by which to judge EDR mechanisms.⁵ ODIHR notes initially that the EDR mechanism should be impartial, accessible to all without undue incurrence of costs or unreasonable requirements for submitting claims. Furthermore, it lists the following principles:

Firstly, **jurisdiction**, that is, the forum in which complaints may be raised, must be clearly and unambiguously stipulated in order not to provide complainants with the opportunity to “shop around” for different (more advantageous) fora. Clarity in the legal provisions is also a guarantor of transparency.

Secondly, ODIHR suggests that **timeliness** is an indispensable characteristic of any EDR mechanism, ensuring that election results are not unduly delayed. In the context of Timor-Leste, however, this becomes difficult given the necessary reliance on a judicial system that expeditiously produces judgements.

Adequate **enforcement** powers are required for an EDR system, since without the ability to implement decisions on electoral complaints, the relevant decision-making body loses a lot of authority and credibility.

Finally, guidelines for criminal **prosecution** are integral, since they allow for more severe sanctions, emphasising the seriousness of a breach and upholding the credibility of the institution(s) supervising the elections.

² *International Covenant on Civil and Political Rights*, Art 2.3.a

³ *Ibid*, Art 25

⁴ Petit, Denis, *Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System*, Warsaw, 2000, <http://www.osce.org/odihr/item_11_13590.html> last accessed 4 April 2007, p 5

⁵ *Ibid*, pp 7-8

3 The Presidential Election

As mentioned, the electoral framework was codified in late 2006. The basic framework is contained in three laws of the NP⁶. Law 5/2006 is the Law on Electoral Administration Bodies, detailing the mandate of the CNE and its relationship to STAE; Law 6/2006 is the Law on the Election of National Parliament; and Law 7/2007 is the Law on the Election of the President of the Republic. In this section we will consider Laws 5/2006 and 7/2006, as well as related subsidiary legislation.

3.1 The Election Administration and Supervision Bodies – Law 5/2006

During the *suco* elections of 2004-6 it became apparent there was some confusion as to the role of the CNE.⁷ The legislation on CNE⁸ was so brief as to be open to numerous interpretations, constraining it from fulfilling its supervisory function. STAE, which is a government body, had few such limitations and became, *de facto*, the only valid electoral institution. CNE's advice was repeatedly ignored by STAE and the *Tribunal de Recurso* (the Court of Appeal, hereafter “the TR” – Timor Leste's highest court pending establishment of the Supreme Court of Justice).

CNE lacked its own funds, which prevented it from publicising its role and educating voters on their rights (such as the right to file a complaint). The lack of funds also made the workload of the commissioners unrealistic since they had to carry on with their normal jobs as well as their CNE tasks. Finally, it restricted facilities and support staff to a bare minimum. In response to this untenable position, a new law was passed, resetting the balance between the responsibilities of the electoral organs. In the following sections we shall look at the respective responsibilities of CNE, STAE and the TR in electoral contexts.

3.1.1 CNE

Law 5/2006 recreates CNE as a truly independent organ of supervision, detailing its powers and competencies with more precision and providing a (non-exhaustive) list of the “electoral acts” that the CNE is meant to supervise. It also makes the CNE permanent in character, provides salaries for commissioners and gives it its own budget and secretariat – all as recommended by the outgoing CNE members.

The Law limits STAE's role, as part of the Ministry of State Administration (MAE), to an administrative, organizational and consultative one⁹, Article 10, in particular, obliges it to cooperate with and support CNE upon request.¹⁰

⁶ Lei N.º 5/2006 de 28 de Dezembro Órgãos da Administração Eleitoral, *Jornal da República*, Series I, N.º 24, p 1634

Lei N.º 6/2006 de 28 de Dezembro Lei Eleitoral para o Parlamento Nacional, *ibid*, p 1637

Lei N.º 7/2006 de 28 de Dezembro Lei Eleitoral para o Presidente da República, *ibid*, p 1646

⁷ See Cardoso Gomes, Faustino and Caetano Moniz, Carmelita, *The National Elections Commission during the Suco Elections: A Critique & Recommendations for the Future Electoral Supervisory Body*, IFES/USAID September 2006

⁸ Part V of Lei n.º 2/2004 de 18 de Fevereiro Sobre Eleições dos Chefes de Suco ed dos Conselhos de Suco, *Jornal da República*, Series I, N.º 4, 18 February 2004, p 402

⁹ Preamble, Law 5/2006

¹⁰ Art 10 Law 5/2006:

Although CNE has undergone significant revision of its governance, perhaps the greatest advance seems to have been in greater public understanding of its role. Additionally, international involvement has afforded less opportunity for party political interference in the oversight of electoral proceedings.

Considering that CNE was only established in January (ahead of elections in April) it has, as an institution, shown integrity and the ability to learn fast. Time constraints made recruitment rushed and allowed for little preparation. Offices were small, and only got Internet access and a fully functioning telephone system in early April. Funds, however, remain an issue. The budget allocated to it is not handed over as a lump sum but is administrated by the MAE and paid to the CNE only upon completion of multiple forms that may only be signed only by one person.¹¹ Clearly independent budgeting would better guarantee independence and efficiency.

CNE's confidence in exercising its powers developed over the electoral period. A TR decision during the first round counting period confirmed that CNE may undertake any initiative it sees fit in order to discharge its mandate.¹² JSMP has noted a definite increase in assertiveness among CNE commissioners as to their duties and competencies. This in turn has made the institution more likely to stand its ground in the face of non-cooperation or adverse publicity. We have also noted improvements in CNE's professionalism, especially with regard to public information. Disputes over areas of responsibility did arise between STAE and CNE during the presidential elections, though most observers seem to agree that cooperation between the bodies was vastly improved by the Parliamentary elections, especially at the district level.

3.1.2 STAE

Law 5/2006 only provides that STAE's structure shall be established by law and that its actions pertaining to voter registration and logistical/administrative work relating to elections or referenda shall be under CNE supervision, without prejudice to STAE's dependence on the MAE.¹³ The organic statute for STAE¹⁴ defines its place in relation to the Ministry and to CNE.

STAE draws its budget and its broad political and strategic objectives from the Ministry, which also has the power to appoint (and dismiss) senior STAE personnel. STAE is, however, independent when it comes to executing its mandate in electoral management. In particular it is responsible for the logistics of elections and referenda, for preparing relevant subsidiary legislation, and for the education and training of electoral agents and voters.¹⁵

"1. In the exercise of its competencies, CNE shall receive **all the necessary support** from the bodies and staff of the Public Administration to enable it to carry out its functions.

2. For the purposes of item 1 above, STAE shall provide CNE with the support and collaboration requested by the latter."

¹¹ Interview with Joana Dulce Victor, CNE Commissioner in charge of Finance, 31/05/07

¹² Letter from Claudio Ximenes, President of the TR, to Faustino Gomes, President of the CNE, dated 17 April 2007

¹³ Art 12, Law 5/2006

¹⁴ **Decreto-Lei N.º 1/2007 de 18 de Janeiro**, Estatuto Orgânico do Secretariado Técnico da Administração Eleitoral, *Jornal da República*, Series I, N.º 1, 18 January 2007, p 1675

¹⁵ *Ibid*, Art 6.

Another of STAE's responsibilities is to prepare regulations for approval by CNE on the presentation of candidacies, electoral campaigning, the functioning of polling stations, the counting of votes and the tabulation of results.¹⁶ JSMP has argued elsewhere that this is not an exhaustive list and that in the context of other legal provisions requiring STAE's cooperation in facilitating timely and proper electoral processes, it is certain that legislators' intention was that STAE should prepare all regulations on electoral matters, including those relating to the complaints process.¹⁷ STAE's disinclination to advance the regulation and implementation of EDR measures has been a disappointment marring an otherwise impressive record.

3.1.3 The Tribunal de Recurso / Supremo Tribunal de Justiça

According to the Constitution, the *Supremo Tribunal de Justiça* (Supreme Court of Justice, hereafter "the STJ") is competent to "verify the legal requirements for candidates for the Office of President of the Republic"; to "certify at last instance the regularity and validity of the acts of the electoral process, in accordance with the respective law"; and "to validate and proclaim the results of the electoral process".¹⁸ Currently, the TR carries out the functions of the STJ pending creation of the latter.¹⁹ Despite the current coincidence of function, we shall distinguish between their respective roles for the sake of clarity.

In response to the first draft of the law on presidential elections, it was suggested that the NP should cede as many functions as possible to the EABs, leaving only final recourse and certification with the STJ.²⁰ In view of case backlogs, the subsequent practice of allowing such time-consuming procedures to be carried out by the EABs and ratified by the STJ (retains responsibility for verification) makes good sense.²¹

The STJ is the court of final appeal for candidature issues and for disputes on electoral results. Short deadlines for appeals against provisional national tabulation results, which must be filed with the STJ within 24 hours of being posted (amended to 48 hours for the Parliamentary elections), and the corresponding 24 hour deadline for judicial decisions, pose a problem that we will return to in this report.

Complaints related to voter registration, campaigns and polling procedures, as raised on polling day, may only be raised with CNE, whose decision is final. This does not preclude a challenge against the overall preliminary results if a case could be made that the incident(s) in question had a material effect. Election-related decisions may only be appealed to the TR (functioning in its original jurisdiction) if they come through the normal channels of criminal justice. Infractions can be reported to the police for investigation (though these may not be accorded special status as electoral matters) and potential referral to the Public Prosecutor (PP). Alternately, CNE may decide, on complaints it hears, that a referral is needed for further investigation.

¹⁶ Art 65.1 of Law 6/2006 and Art 67.1 of Law 7/2006, the wording of these two provisions being identical.

¹⁷ See n 1, *supra*. *The Absence of a Procedure on Electoral Complaints in the First Round of the Presidential Election*.

¹⁸ Art 126.2 of the Constitution of the Democratic Republic of Timor-Leste

¹⁹ Art 164.2 of the Constitution

²⁰ *IFES Review of the Draft Law for Presidential Elections: Projeto de lei no. 25*, Nov 2006

²¹ Art 20.2 Law 7/2006

3.2 The Electoral Legal Framework

The legal framework for elections comprises laws, regulations, procedures and codes of conduct. One of the primary aims for the next election should be to ensure better coherence and continuity between all these instruments.

3.2.1 The Presidential Election – Law 7/2007

The Law on the Election of the President of the Republic is simplified and adapted from the Portuguese electoral law.²² It provides for a single constituency, two-round presidential election, whereby (taking account of displacement problems) voters may cast their ballot from stations across the country.

Law 7/2006 suffered from lack of detail on voter registration and complaints, especially regarding where to lodge complaints and the time limit for their consideration. Furthermore, deadlines for submission of appeals on candidacy matters and on preliminary results were very short. It also conflicts with the Constitution in imposing an “active electoral disability” on prisoners and on “individuals clearly and publicly known as mentally ill”.²³

JSMP considered this a serious flaw and argued strongly for effectively re-enfranchising both categories of citizens and establishing mobile voting teams to provide services for prisoners and hospital in-patients.²⁴ We were therefore pleased to see these changes implemented for the Parliamentary Elections²⁵ and were able to observe the smooth running of mobile voting teams on 30 June 2007.²⁶

Law 7/2006 provides broadly for the lodgement of complaints at different stages. It mentions appeals against the inclusion or non-inclusion of a candidate on the list of contenders (Article 21); a broad provision for “complaints or protests relating to electoral operations” (Article 43), on which most of the subsidiary legislation is based; and appeals against preliminary results (Article 47).

The Law does not require a detailed complaints regulation to be produced. Article 43 is the only provision that involves CNE in the complaints process, stating “Any voter or any delegates of the candidacies may raise doubts and file complaints or protests relating to electoral operations” and goes on to outline the procedure for filing such “doubts, complaints or protests” during the voting or after it has been completed. Although it makes clear that resolving those complaints is part of CNE’s mandate, it says nothing about:

²² **Decreto-Lei 319-A/76 - 3 Maio** at <www.cne.pt/dl.cfm?FileID=484> last accessed 9/07/07

²³ Art 5, Law 7/2006; the Constitution states in Art 47 that “every citizen over the age of seventeen has the right to vote (...)”

²⁴ See n 1 supra, *The Right to Vote*.

²⁵ **Lei N° 6/2007 de 31 de Maio**, 1ª Alteração da Lei N° 6/2006, *Jornal da República*, Series I, N°13, p1769

²⁶ See n 1 supra, *Mobile Voting in Prisons and Hospitals for the Parliamentary Election*.

- Where complaints should be submitted earlier in the electoral process, i.e. before polling day (except with regard to candidacies, as per Article 21);
- What the difference is, if any, between doubts, complaints and protests²⁷;
- Any requirement to submit a complaint firstly at polling station level, failing which the right to submit a complaint on that incident may be forfeited; and
- Any possibility of appealing against decisions of the CNE.

Admittedly, the purpose of a NP law is to lay down the broad legal framework, giving room for specialist technical bodies to issue appropriate subsidiary legislation. However, JSMP feels that Law 7/2006 is too detailed on certain issues while leaving too much leeway on other matters.

Various pieces of subsidiary electoral legislation detail avenues for recourse. However, the EAB's failure to produce a comprehensive complaints procedure resulted in a lot of uncertainty during the first round of the Presidential elections. The lack of clarity also made it difficult for voter education programmes to include a section on complaints, which is probably why so many unfounded claims were filed. In the next section we consider how the delay in enacting the Procedure on Complaints²⁸ came about and what, in its absence, the EDR system entailed.

Due to haste in passing the electoral laws and of the lack of institutional experience, unnecessary or inappropriate details were included, prompting an amendment law.²⁹ Such last minute changes added unnecessarily to the confusion.

The most controversial change brought in by the Amendment Law was the modification of the ballot paper design (Article 38), to include a symbol as well as the photograph and name of each candidate.³⁰ This provision was the object of much discussion, ending with a case being put to the STJ. The then President of the Republic, Kayrala Xanana Gusmão, argued that CNE is "independent of any organ of political power"³¹ and since CNE is responsible for approving ballot paper design³², the NP is not empowered to supersede its decisions. Furthermore, allowing candidates to adopt a symbol (understood as a party symbol) could confuse the electorate since the President is supposed to be a non-partisan, national representative.

The TR, acting as the STJ, responded that there was nothing unconstitutional about the amendment to Article 38, amongst other things because CNE is only empowered to implement the law and to make regulations to *clarify* electoral laws, as opposed to changing their substance - the NP retains this power. The Court also stated that symbols would help voters identify candidates and what they stood for.³³

²⁷ The difference between protests and complaints is explained in Art 56 of the Polling and Counting Regulations (**Regulamento sobre o Processo de Votação e Apuramento dos Resultados para a Eleição de Presidente da República N° 131/CNE/II/07**, *Jornal da República*, Series II, N° 7, 4 April 2007, p 537)

²⁸ **Procedimento para Reclamações**, *Jornal da República*, Series II, N° 9, 19 April 2007, p 551

²⁹ **Lei 5/2007 de 27 de Março**, 1ª Alteração da Lei N° 7/2006, *Jornal da República*, Series I, N° 7, p1744

³⁰ *Ibid*, Art 1 amending Art 38 of Law 7/2006.

³¹ Art 4.2. Law 5/2006.

³² Art 38.2. Law 7/2006.

³³ Decision by the Tribunal de Recurso, *Proc.01/PCC/07/TR*, 24 March 2007.

Another challenge arising from the use of symbols came from presidential candidate, Francisco Guterres “Lu Olo”, who argued that the choice, by several candidates, of Timor-Leste’s national flag as their symbol on the ballot paper was contrary to the Law on National Symbols³⁴ and would only serve to confuse voters. Although the STJ admitted that this was likely to create confusion, it found no legal basis for prohibiting candidates from choosing the same symbol. It did not find this to constitute an illegal appropriation of the national flag and thus rejected the appeal.³⁵

3.2.2 Preparing and approving the Procedure on Complaints³⁶

Demonstrating the haste with which many electoral instruments were prepared, the Procedure on Complaints was signed on 13 April and published on 19 April, coming into force the next day.³⁷ The STJ’s official certification of the election results was announced on 21 April.

It seems STAE failed in its duty to cooperate with CNE on producing the regulation, which it is bound to do under Article 10 of Law 5/2006. STAE argued that it had no competence to prepare regulations on complaints since they are not listed under Article 67(1) of Law 7/2006.³⁸ JSMP holds strongly that the list is not comprehensive, especially when read in the light of other provisions on the mandates of STAE and CNE, which all refer to both EABs’ duty to implement and supervise the electoral process in accordance with the law and the Constitution. Since EDR is an intrinsic part of any electoral framework and is needed to secure certain fundamental rights (enshrined in the Constitution through Article 9(2)³⁹), JSMP found STAE’s argument unconvincing.

CNE could have acted to compensate for this non-cooperation by initiating its own legislation. Indeed, Article 11(2) of Law 5/2006, on its Secretariat and Budget, reads: “CNE shall prepare and approve its own rules of procedure”. This clause could have been used for CNE to draft and publish its own rules of procedure for complaints. In JSMP’s opinion this tactic would not have been necessary if STAE and CNE had collaborated to produce a regulation.

³⁴ **Lei 2/2007 de 18 de Janeiro**, Símbolos Nacionais, *Jornal da República*, Series I, N° 1, p 1657

³⁵ Decision by the Tribunal de Recurso, *Proc.01/PREP/2007/TR*, 29 March 2007.

³⁶ For a more in-depth analysis, see *The Absence of a Procedure on Electoral Complaints in the First Round of the Presidential Election*, n. 1, supra.

³⁷ Indeed, according to Art 73(1) and 73(2) of the Constitution, failure to publish a piece of legislation renders it null and void. Additionally, according to Art 16 of **Lei 1/2002 de 7 de Agosto Publicação dos Actos**, *Jornal da República*, Series I, N° 1, 4 June 2003, p 5, laws can only come into force at the earliest one day after their publication. The Procedure on Complaints therefore came into force on 20 April 2007.

³⁸ See p 9 and n. 1, supra. *The Absence of a Procedure on Electoral Complaints in the First Round of the Presidential Election*.

³⁹ “Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette.”

The “Secretariat and Budget” provision may refer to more basic administrative aspects of CNE’s work rather than to the implementation of a fundamental part of the electoral process. Nevertheless, other provisions of the law have been “reinterpreted” to deal with unforeseen events during this election period and it would have been preferable for CNE to act earlier, in order to have a complete legal framework on complaints in time for the first round. It illustrates the lack of confidence that CNE held in its own powers at the beginning of the election.

Whatever the cause of this defect in the electoral legal framework, it resulted in some gaps in the EDR system, primarily for the first round of the Presidential elections. The next sections will explore in detail the elements of the electoral legal framework that touch upon EDR.

3.2.3 The Procedure on Complaints

The Procedure on Complaints not only collate the electoral rules contained in other laws and regulations but includes certain rules that are not stated elsewhere, making the late passage of the Procedure all the more controversial. To its credit though, CNE seems to have refrained from applying the new clauses too strictly during the first round of the Presidential Election. This assertion is, however, based on statements from the complaints resolution office at CNE and the few cases that we have been able to access in sufficient detail.

The most important section in the Procedure is Article 5, on “submitting a complaint to CNE”, which specifies that the person reporting an incident he or she believes may be a violation of the Constitution or any law related to elections must be a *witness* to that incident.⁴⁰ Other, related regulations are silent on this issue.

In JSMP’s view, this is problematic in that some people may feel uncomfortable in coming forward to present a case for fear of reprisals. If individuals were able to report to a party representative for example, and provide a written sworn statement for confidential use by those who handle the case, many more instances of intimidation or electoral fraud might have come to light. The main rationale for the rule is for EDR to be based on quasi-judicial standards. It seems reasonable that cases should be based on clear evidence rather than hearsay, but JSMP argues that it is possible to ensure this without every claim having to come directly from a witness.

Article 5 separates the submission of complaints into those related to voting or counting process at a polling station, and those related to other processes. The former requires complainants to raise their concerns verbally in the presence of electoral officials, i.e. at the polling station during voting or counting. If they fail to do so, they then lose their right to complain about that incident at a later stage. This makes sense for minor procedural violations that can be corrected immediately, but where a more serious offence is taking place, voters may not dare to raise objections. In our opinion there should be an option to lodge complaints after the event, within a certain time limit, or at least in a confidential manner (i.e. not verbally).

⁴⁰ The complainant is not, however, required to be the *victim* of the offence.

Appeals against these first instance verbal decisions are to be in writing and can be given straight to the polling station president, handed to the district CNE contact point or delivered straight to CNE headquarters in Dili.

Complaints not related to voting and counting at polling stations are sent directly to CNE or handed to the district CNE contact point. Such claims must be delivered to the district CNE office or to CNE headquarters by 4pm on the day following the incident. The time allowed by this process for gathering enough evidence seems very short, especially if the incident occurred at a remote location. Voter education must also be comprehensive and pervasive to guard against forfeiture of rights to redress.

In terms of the ODIHR criteria for good EDR legislation, the Procedure on Complaints is relatively successful. It makes clear where jurisdiction lies for most complaints and details how complaints will be treated by the CNE, including the grounds on which complaints may be dismissed (Article 7). On the other hand, the section on lodgement of appeals, which was included in the draft, but removed from the final version, leaves no clear appeals process except as defined by other regulations. In the case of a campaign-related claim, technically no appeal is possible.

The timeliness of the process is less clear. Deadlines for submission are clear (either by close of polling station, after counting for the Presidential election, or by 4pm on the day following the event), but there is no requirement for the CNE to hand down its decision within a certain time limit. JSMP regrets the removal of a section on this topic from the initial draft of the Procedure on Complaints.

In practice, the complaints office has sorted cases into three categories: priority 1 for cases that could affect the results; priority 2 for complaints that allege an offence or a violation where there is adequate supporting evidence or information; and priority 3 for complaints alleging an offence or violation but for which there is not supporting evidence. During the Parliamentary elections, a colour-coding system was used, with the lowest priority given instead to procedural problems at polling or counting centres, indicating an improvement in the admissibility of complaints.

Only priority 1 cases must be resolved before preliminary national tabulation results can be posted. This is supposed to happen within 72 hours⁴¹, but the time constraint was “reinterpreted” when it became clear that it would not be met during the first round of the Presidential election. Electoral calendars for the three elections have consistently allowed 72 hours of national tabulation, which includes the resolution of relevant complaints. However, the line taken by CNE advisers is that there is no mandated timeline at all for completion of the national tabulation process.

As with other documents enumerating CNE’s powers, the Procedure on Complaints requires CNE to inform the PP of any incident that it believes may constitute an electoral infraction or crime. In this, the prosecution aspect of the electoral legal framework is clear, though it would be more effective if the prosecutor’s office did not suffer such a backlog of cases. What is surprising in the Procedure, however, is that Article 11 provides that CNE may impose one of the following sanctions for any breach of an electoral law or regulation:

⁴¹ Art 46, Law 7/2006.

- Impose restitution/compensation/ satisfaction to correct the situation
- Revoke an observer's accreditation
- Revoke the accreditation of a party or coalition agent
- Recommend that STAE should discipline a member of its own staff

JSMP is aware of only one instance of a sanction being imposed, where a coalition agent's accreditation was revoked. There was a request from one of the parties to revoke the accreditation of an international observer for making predictions about the outcome of the Parliamentary elections, though CNE did not consider this a sufficiently serious issue and merely sent a letter suggesting a change of behaviour.

Art 11 also says that CNE may hold a party or coalition responsible for breaches committed by its members, its candidates or agents, and punish it accordingly. Neither this, nor the measures mentioned above seem to be supported by any external authority. Although such powers are necessary for an effective EDR system, their credibility is diminished by having them originate from CNE itself. This could be improved by inserting enforcement powers in the relevant empowering legislation.

A final provision that deserves comment is on the confidentiality of complaints (Article 6). The Procedure establishes that all complaints must contain the name of the claimant, but that *if that person requests that his name should be kept confidential in the complaint* CNE will not reveal the identity of the claimant to anyone outside CNE without consent of the claimant. CNE has interpreted this clause very strictly, not revealing any claimants' names. Although this made it more difficult for JSMP to carry out this project, we understand CNE's cautiousness. It would be deplorable for a claimant to be targeted in retaliation for a complaint. The solution adopted since the end of the final election is to black out names in complaints files in order to allow observers to consult them. JSMP would appreciate the continuation of this measure.

The Procedure on Complaints sets out an EDR mechanism based on the collected laws and regulations on electoral matters, with certain additions. It should not, however, be considered in isolation as the electoral legal framework is very diffuse and there may remain elements that have not yet been examined. It should also be remembered that EDR for the first round of presidential elections was based entirely on different laws and regulations; their contents should be considered independently.

3.2.4 Regulations

a) Voter registration

Aside from stating that registration is a pre-requisite for voting⁴², Law 7/2006 does not provide significant guidance on this issue. The voter registration process and provisions for contesting individual registrations on the electoral roll are set out in a separate regulation.⁴³

⁴² Art 4(2), Law 7/2006. The Law contradicts itself further on when it allows citizens to use their passport as identification to vote. This implies that also unregistered people can take part in the poll.

⁴³ **Regulamento sobre os Procedimentos Técnicos para a Realização da actualização do Recenseamento Eleitoral No. 036/STAE/II/07**, *Jornal da República*, Series II, N°3, 16 February 2007, p 502

Article 21 in the Regulation allows for complaints against a refusal by authorities to register or update an individual's entry on the electoral register. Complaints should be addressed to CNE within five days of the end of the registration period and will be decided on within three days.

There are a number of provisions described that refer to existing penal legislation and provide for informing the PP. There is however no system for abuse of the registration process to be challenged in the public domain, although this has been repeatedly called for, in particular by the Election Certification Team (ECT).⁴⁴

In terms of jurisdiction, it is clear that complaints are to be directed to CNE, which will either respond itself or refer them to the PP Office. The deadlines are clear as well, although once a complaint is with the PP, there is no time limit for issuing a response. It is not clear what action may be taken in response to a breach of the regulation. This is a problem that affects every area of CNE's sphere of responsibility, since it can do no more than reprimand the individual or group in question. Prosecution is not a substantially better solution since the overloaded justice system must prioritise more serious crimes with the result that electoral infractions may not be addressed for months or even years, making any sanction redundant.

Finally, the assumption is that Article 21 allows voters to complain only about a refusal to update or register themselves, but there is no provision for voters to alert authorities to another citizen's fraudulent registration. This underscores the ECT's call a period of "exhibition and challenge". Currently, the electoral roll is said to list a high number of doubly registered and deceased individuals. During the supplementary registration period before the Parliamentary elections, exhibition and challenge measures were implemented, but it is not known how effective this was.

b) Presenting candidacies

Candidacy nominations are governed by regulation 035/STAE/II/07⁴⁵, both for the Presidential and for the Parliamentary elections, although there are certain differences in the procedures for each. Since the responsibility for verifying presidential candidacies rests with the STJ, it is natural that appeals against decisions on the validity of a candidacy should be brought before it. The deadlines for submission of and decision on such appeals are very short. Candidates to the Presidential elections who want to appeal against the acceptance or rejection of a candidacy have only two days to do so.⁴⁶ This raises difficulties given limited public electoral experience and the poor transport and communications infrastructure.

IFES carried out a study for the Indonesian Supreme Court on EDR, providing guidance drawn from comparative data on EDR mechanisms from around the world.⁴⁷

⁴⁴ Benchmark 3.7, See for example *Second Report of the Certification Team*, 19 December 2006, <www.unmit.org> last accessed 5/07/07

⁴⁵ **Regulamento sobre Apresentação de Candidaturas para Eleição do Presidente da República e dos Deputados ao Parlamento Nacional No. 035/STAE/II/07**, *Jornal da República*, Series II, N°3, 16 February 2007, p 504

⁴⁶ *Ibid.* Art 13

⁴⁷ Autheman, Violaine, *The Resolution of Disputes related to "Election Results" – A Snapshot of Court Practice in Selected Countries Around the World*, IFES Rule of Law Conference Paper Series, February 2004,

Although their study focussed on disputes about election *results* some of their findings are pertinent to this project. In particular, the 72-hour deadline for submitting a complaint on results in Cambodia (48 hours for appeals) was considered extremely short. Indonesia allowed 7 days for the same action.⁴⁸

It may be argued that Timor-Leste is not made up of thousands of islands, and that it is much smaller than Cambodia, but it should also be noted that mobile telephony and internet access outside the capital are far from the norm. It takes 9 hours to drive from Suai to Dili, and Oecusse relies on a ferry that runs twice a week for its contact with the capital. On top of these constraints, it may take some time to gather evidence, especially if witnesses are in remote areas or afraid to testify. In our view, the existing legal provision does not allow sufficient time for a serious complaint to be lodged, were one to arise (and none did arise during the Presidential elections). Of course, the time allowed for contesting a decision on candidacy cannot be too long either, since the process must fit into a fairly tight electoral calendar.

Should the STJ take too long, even where it overturned a rejection to find a candidacy valid, the delay may make it impossible in practice for a candidate to carry out a campaign and comply with other requirements for running in an election. The situation of the Aliansa Demokratika coalition during the pre-parliament election procedures⁴⁹ showed that limiting the deliberation time of the STJ safeguards the candidates' opportunity to fully take part in the electoral process.

c) Campaigning

During the Presidential elections there were few complaints on campaign issues (14 during the first round and 2 during the second round). These figures increased substantially for the Parliamentary election, to 24, making up more than 25% of the complaints during the Parliamentary elections. One can interpret this change in two ways. Either it represents an improvement in the awareness and use of the EDR framework by stakeholders; or it signals a less passive stance among the parties and their candidates or spokespeople in the final stage of a long election period. JSMP suggests a combination of these is true. People were more aware of allowable campaigning activities by the third time. The rise in campaign misdemeanours could also reflect the different natures of the Presidential and the Parliamentary contests – the former more likely to generate unifying and placating language and behaviour.

Campaigning rules are governed by the Regulation on Electoral Campaigns⁵⁰ and a Code of Conduct for Candidates⁵¹. The Code of Conduct covers more than just the campaign and is a form of agreement between all those involved in the process to respect the law and cooperate to run a peaceful election. Its legal status is unclear and there are no clear consequences in the case of a breach.

<www.ifes.org/publication/3555a974ddaed52619f7772358e930af/ConfPaper_Indonesia_FINAL.pdf>, last accessed 25/04/07.

⁴⁸ *Ibid*, pp 6-7.

⁴⁹ Cf section 4.1.1.

⁵⁰ **STAE/III/07 Regulamento sobre a Campanha Eleitoral**, *Jornal da República*, Series II, N° 5, 16 March 2007, p 526

⁵¹ **Código de Conduta dos Candidatos a Presidência da República Democrática de Timor-Leste N° 93/STAE/III/07**, *Jornal da República*, Series II, N° 5, 16 March 2007, p 520,

Its status is not clarified by the electoral laws (CNE approves a document suggested by STAE), but, as with other texts with the force of law, it is published in the *Jornal da República*. It would seem that it is a guideline only, contributing peripherally to legal interpretation. Where a breach of another electoral rule has occurred, violation of a Code of Conduct may be considered an aggravating factor.

In terms of electoral infractions, it is surprising that this Regulation does not criminalize the use of public funds or publicly owned commodities, such as government cars, for campaign purposes. Although such activities are “strictly prohibited” (Article 29), they are not listed as “ilícito eleitoral” and no sanctions are prescribed. CNE has no means of enforcing reprimands and there is therefore no effective means of punishing such serious transgressions.

Article 28.2 of Law 7/2006 and Article 29.2 of Law 6/2006 state that

“CNE shall verify the compliance with these principles, to be applied from the date of announcing the election date, and shall adopt measures that ensure compliance with them, and the peaceful unfolding of, the electoral campaign.”

This would suggest that CNE may have the power to enforce the law after all. However, this has never been utilized, perhaps due to the previously mentioned “insecurity” of CNE in relation to the nature and extent of its own powers.

The Regulation protects the rights and freedoms that accompany an election campaign, including freedom of expression and of association. It lays down limitations on campaign activities, including broadcasting rights, campaign timing, use of public spaces, use of public funds and other financing issues, providing many potential sources of complaint (see Annex – Election Dispute Resolution Table).

The Regulation on campaigns contains the only direct reference to a written document outlining a formal EDR system. Article 35 states “the CNE will establish a system for assessing claims, based on a regulation of procedures approved by the CNE”. It is unique amongst regulations on electoral matters in that it does not provide any detail at all on where complaints are to be submitted, within what time frame and how soon they are to be resolved. This is unusual in that other regulations established to make the legal framework on elections more precise all follow a similar pattern.

Both the Regulation on the Presentation of Candidacies (16 February) and the first Regulation on Polling and Counting⁵² (4 April) have similar provisions detailing steps for registering formal complaints and appeals, whereas the Regulation on Electoral Campaigns defers to a non-existent document. Since the Procedure on Complaints (the document that is supposed to describe EDR for all stages of the electoral process) did not come into force until after the first round of the Presidential Elections, campaign-related complaints relied on Article 43 of Law 7/2006 for their legal basis.

⁵² *Op. cit*, n. 27

d) Polling, counting and the announcement of results

The polling and counting Regulation for the first round⁵³ only became law on 5th April, four days before Election Day. There had been very little information available on the exact voting procedures, making voter education fraught. This started very late anyway, making it largely ineffectual, which is probably one of the main reasons for the high number of complaints on procedural issues⁵⁴, many of them unfounded.

The method for submitting complaints during the polling and counting stages is probably most important, since these are the stages that provoked the most complaints. During the first round, 51% of complaints related to polling procedure issues and 19.5% to counting problems. During the second round, those figures stood at 24% and 37% (with 15% alleged “ballot fraud or corruption”).⁵⁵

Common Article 33 of the Regulations on Polling and Counting for the first and second rounds of the Presidential Election⁵⁶ and Article 34 of the Regulation on Procedures for Polling and Tabulation of Results for the Election of Members of the National Parliament⁵⁷ all have the same wording. They provide that:

- Any voter or “*fiscais*” (candidate representative) may present doubts, complaints or protests in relation to electoral operations;
- Those presented during voting or after the close of voting are analysed immediately by polling officials, who may consult with STAE if necessary;
- They shall be the subject of deliberation by electoral officials and decisions shall be approved by at least three of them;
- Decisions shall be communicated to the claimants who may, if they wish, address their complaint to the CNE by submitting it to the same polling centre or polling station, accompanied by all relevant documents.

Article 36(g) of the Counting Regulations for the two rounds of Presidential Elections allows for complaints to be submitted during counting (at the polling station), whereas during the Parliament Elections this is to take place at the District Tabulation Centre due to the change in the law (Article 45(g)). It is not clear if protests may be made during the district tabulation for the Presidential Election. After the national tabulation, appeals against those results may be lodged before the STJ in accordance with laws 7/2006 (within 24 hours) and 6/2006 (within 48 hours).

EDR is probably at its most transparent during voting and polling station counting since it is possible to listen to polling officials’ deliberations. At the same time, this raises the problem of confidentiality, which may be better served by the private consideration of complaints by CNE.

⁵³ *Ibid.*

⁵⁴ CNE complaints office, Complaints Status Report 18/04/07.

⁵⁵ *Ibid.* and Complaints Status Report 16/05/07.

⁵⁶ *Op. cit.*, n. 27 and **Regulamento sobre o Processo de Votação e Apuramento dos Resultados para 2^a Votação e Eleição de Presidente da República N° 160/CNE/IV/07**, *Jornal da República*, Series II, N°10, 24 April 2007, p 558

⁵⁷ **Regulamento sobre o Processo de Votação e Apuramento dos Resultados para a Eleição dos Deputados do Parlamento Nacional N° 369/STAE/VI/07**, *Jornal da República*, Series II, N° 16, 5 June 2007, p 636

The first round of the Presidential elections saw problems identifying genuine candidate representatives (who could lodge genuine claims). The registration process for “*fiscals*” was disorganised and sparked complaints given alleged favouritism towards one of the candidates, with many passes being issued the night before the election for that group. Also, a number of “VIP” and “free access” passes were issued, mainly to government members and other dignitaries. These had no legal basis and allowed certain influential individuals to spend much more time than necessary in polling stations where they may have intimidated voters. These passes were banned as of the second round and registration procedures became considerably stricter.

During the district and national tabulation periods of the first round of the Presidential Election there was a lot of confusion about results. This was commonly the result of mistakes in district tabulation that gave the impression that votes were being subverted or invented. A particularly blatant mistake gave the impression that the district of Baucau had 300,000 votes, when only around 60,000 voters are registered there. It turned out that a polling official had confused the counting centre number with the total number of valid votes. With such an obvious error, it would have been better for CNE to withhold the information until it had investigated more closely. There is no provision for the partial invalidation of results, which makes it all the more important for results to be perceived as correct.

The Lasama Case

The first round also saw the most serious case of the electoral period, submitted by presidential candidate Fernando “Lasama” de Araujo. On 14th April, Mr Lasama submitted a letter to CNE asking it to declare the elections invalid on the basis that they were ridden with irregularities and manipulation. A copy was also sent Mr Ban Ki-Moon, the Secretary General of the United Nations.

The request was based in large part on a number of “*Acta Final Apuramentu Distrital*” (district tabulation minutes), which showed inconsistencies between the total number of valid votes and the totals of votes allocated to candidates, appearing to suggest dummy votes had been added on to district totals. These amounted to disparities of up to 3,000, though most inconsistencies involved a few hundred votes.

Other allegations included the discovery of stocks of falsified ballot papers; multiple voting; the addition of bogus ballot boxes full of votes; pre-marked or unduly invalidated ballot papers; intervention by members of government; intimidation by police and members of government; and shortage of ballot papers. CNE found Mr Lasama’s claim unfounded but did refer the letter to the PP for investigation of any potential electoral infractions. It found that:

- CNE may only determine specific claims containing testimony on an incident
- The documentation provided did not justify invalidating the elections
- The claim was received 4 or 5 days after the 24 hour deadline

- The argument that thousands of voters were unable to vote is unfounded (the error in Baucau that suggesting a higher than actual number of voters had been corrected prior to the complaint being lodged)⁵⁸

The complainants' lawyer claims to never have received notice of these findings, but says that he sent further evidence a few days later, in the form of sworn statements from witnesses to the incidents. However, those seem never to have reached CNE.

JSMP questions CNE's response on several counts. First of all, if there had been large-scale violations of electoral laws, then surely it would be more practical for a party to gather relevant information and submit it together in a coherent package, rather than for many individual complaints to come in from around the country. That EDR should be based on solid evidence is clear, but provision must be made for parties to gather witness statements as necessary. Alternately, CNE could have asked for the missing information before dismissing the claim.

JSMP is not aware of any 24-hour deadline that would have been in force at the time. Neither Article 43 of Law 7/2006 nor any of the other provisions related to complaints in relevant legislation mention such a deadline. Only the Procedure on complaints imposes time limits and since it was not yet in force at the time, it cannot be used as a legal basis for dismissing a claim.

Mr Lasama sent another letter to the CNE, dated 18 April, providing updated information and indicating he still had not received a response. Since the preliminary results were posted that day, there was no time to wait for CNE's response and Mr Lasama lodged an appeal with the STJ jointly with Lucia Lobato, another presidential candidate, and with the backing of Xavier do Amaral.⁵⁹

The allegation of ballot fraud was easily dismissed since the national tabulation results had identified most of the errors and corrected them, leaving very few votes unaccounted for. This information was only distributed to candidates on 19 April.

The STJ rejected every allegation, some because they were unfounded ("false ballots" were in fact simply due to poor quality printing, for example), but most of them because "it was not apparent from the polling station minutes that there had been a complaint against the alleged facts at the time", reflecting the requirement in Article 5 of the Procedure on Complaints. It is JSMP's opinion that the STJ was wrong to impose this condition on the complainants in that context since the Procedure came into force after the events took place. It was effectively applying the law retrospectively, which is in breach of the Constitution (Article 31).

The final allegation, of vote buying, was dismissed on a technicality. The appellants had written about incidents occurring in 2006, meaning 2007. The STJ should have understood this, or asked for clarification and considered investigating this matter further as vote buying is a serious offence (although it was not enshrined in the law until the Amendment Law revising Law 6/2006⁶⁰).

⁵⁸ Letter **141/CNE/IV/07** from CNE to Fernando Lasama de Araujo, dated 16 April 2007.

⁵⁹ Decision of the Tribunal de Recurso, *Proc 02/PREP/2007/TR*, 20 April 2007.

⁶⁰ **Lei N° 6/2007 de 31 de Maio**, 1ª Alteração da Lei N° 6/2006, *Jornal da República*, Series I, N° 13, p 1769

Although a substantial part of the appeal was based on obsolete information, JSMP feels that the little credence given to the allegations shows a lack of engagement with EDR.

In light of CNE's failure to request further details or conduct an investigation of its own, the TR could have ordered a more in-depth analysis and delayed certifying the election. As discussed, the deadlines for submission of complaints are very short and do not allow for proper consideration of complaints if there is no possibility to pause the certifying process in order to check allegations properly.

Similar situations arose in the second round of the Presidential election and in the Parliamentary elections, in that potentially very serious cases were submitted to the PP but there was no time to wait for those cases to make their way through the system. In the former case, the allegations concerned large-scale vote-buying and the evidence included DVD footage of witnesses (although none made any direct accusations). The latter involved several cases, including the involvement of *suco* chiefs in electoral campaigning and allegations of an agreement between a party and several *suco* chiefs to continue giving them contributions if they won the elections.

According to the CNE spokesperson, CNE had not consulted with the Prosecutor General as to whether these cases could be put on a "fast track" since earlier discussions had indicated the PP had other priorities.⁶¹ However, JSMP had recently met with the Deputy Prosecutor General, who had explained that the PP would be willing to prioritise serious allegations of electoral infractions as needed.⁶²

JSMP understands the need for a succinct end to the electoral process. There was a definite sense of election fatigue after the Parliament elections and the results were taken to be certain. However, in the interest of transparency and credibility, it would have been worth taking the time to follow up on the most serious allegations of infractions in order to ensure that the results would not be affected and to help bolster faith in the electoral process.

e) Codes of conduct

A number of Codes of Conduct were published, not just for presidential candidates as previously discussed, but for media professionals, observers, candidate representatives and, later, parliamentary candidates.⁶³ These documents describe the role of each of these groups in the electoral process, and define rules of good behaviour. Their legal status is unclear, though they are often referred to in

⁶¹ CNE Press Conference, 12/07/07, comments by Angelina Sarmento, CNE spokesperson.

⁶² Interview with Ivo Valente, Deputy Prosecutor General, 07/07/07

⁶³ **Código de Conduta dos Candidatos a Presidência da República Democrática de Timor-Leste No. 93/STAE/II/07**

111/STAE/III/07 Código de Conduta de Profissionais dos Órgãos de Comunicação Social

229/STAE/III/07 Código de Conduta para Observadores Eleitorais Nacionais ou Internacionais

332/STAE/III/07 Código de Conduta para Fiscais de Candidaturas, Fiscais de Partidos Políticos e Coligações Partidárias

All in *Jornal da República*, Series II, N° 5, 16 March 2007, pp 518-25

222/STAE/V/07 Código de Conduta dos Partidos Políticos e Coligações Paritárias à Eleição dos Deputados ao Parlamento Nacional da República Democrática de Timor-Leste, *Jornal da República*, Series II, N° 13, 23 May 2007, p 587

reprimands sent out in response to a complaint. Even if they were binding, there is no way of enforcing them. They have been described as “goodwill” documents.⁶⁴

JSMP feels that these Codes of Conduct are beneficial in that they bring together many of the important points from the disparate electoral instruments. It is useful to set out basic rules of behaviour without making every transgression into a basis for complaint, since this could lead to a proliferation of insignificant complaints. However, we would encourage the enforcement of sanctions for certain more serious violations, such as the misuse of public funds.⁶⁵

4 The Parliamentary Elections

Compared to the Presidential elections, the Parliamentary elections ran more smoothly. Again, late changes to the law caused confusion among the public and created more work for the EABs. The overlap between the final activities of the second round of the presidential election and the start of the parliamentary election process exacerbated this disorder, impacting heavily on smaller political parties which did not have sufficient resources to work on both processes simultaneously. Much of the legal framework remained the same, but some changes are worthy of note.

The legal basis for the Parliamentary election is found in Law 6/2006, the regulations on the Presentation of Candidacies, Political Campaigns, a new Polling and Counting regulation,⁶⁶ the Procedure on Complaints, and some elements of the Law on Political Parties.⁶⁷

An amendment to Law 6/2006, introducing fundamental changes to the counting system, was passed on 16 May but not promulgated until 28 May⁶⁸, barely a month before election day. Additionally, the voter registration update period in late May lasted only a week and was fairly poorly advertised. Only around 5,000 supplementary registrations were made. These factors raised fears for the credibility of the system.

4.1 Electing Deputies of National Parliament – Law 6/2006

Laws 6/2006 and 7/2006 have many similarities, aiding the Parliamentary follow-on from the Presidential elections. It allowed much of the expertise gained to be put to good use and ensured a good voter understanding of the method of the elections. This did, however, heighten concerns about the Amendment Law’s changes to procedure.

Members of Parliament are elected through plurinomial lists with mandatory quotas of women. Candidacies are checked by CNE, with the help of STAE. National tabulation for the second round of the Presidential election went from 11 May to 14

⁶⁴ STAE official, 20 July 2007.

⁶⁵ Both the Electoral Certification Team and IFES have argued for the enactment of legal provisions to make sanctions for the misuse of public funds or assets enforceable. Cf *IFES Review*, n 19, supra, and for example *6th Report of the Electoral Certification Team*, at paras 148-150, <[http://www.unmit.org/unmissetwebsite.nsf/f042de6a6630334a4925723c003b1a25/\\$FILE/Electoral_Certification_Team_Report_06.pdf](http://www.unmit.org/unmissetwebsite.nsf/f042de6a6630334a4925723c003b1a25/$FILE/Electoral_Certification_Team_Report_06.pdf)>, last accessed 20 May 2007.

⁶⁶ See supra n 57

⁶⁷ **Lei N° 3/2004 de 14 de Abril**, Sobre os partidos políticos, *Jornal da República*, Série I, N° 5, p 409

⁶⁸ See supra, n 60.

May. 11 May was also the deadline for the presentation of candidacies for the Parliamentary elections. CNE only had two days to notify of any issues with the lists, and though the haste may have led to some errors, the EABs performed admirably.

EDR for Parliamentary polling was intended to function largely the same way as for the Presidential election⁶⁹, given that most of the regulations and the Procedure on Complaints are relevant for both elections. Electoral offences are the same in both election laws' original versions.⁷⁰ The exception is that for the former, complaints on the rejection or acceptance of candidacies were to be submitted at first instance to CNE and could only then be appealed to the STJ.⁷¹

One major case emerged out of the list approval stage of the electoral process. CNE rejected the Aliança Democrática (AD) list for non-compliance with the women's quota requirement, which states that there must be one woman in each group of four consecutive candidates listed on the party or coalition list.⁷²

4.1.1 Initial Rejection of the Aliança Democrática – KOTA/PPT list

The deadline for CNE's acceptance of candidate lists was 21 May, ten days after their submission by the parties and coalitions. In the intervening time, a number of letters were sent and meetings held to clarify and correct inconsistencies. On 20 May, a letter was sent out to notify all those concerned that the deadline for submission of supporting material for candidacies had been extended to the afternoon of 21 May.⁷³

In its decision of 24 May⁷⁴, CNE rejected the Aliansa Demokratika (AD) list because, despite previous CNE correspondence, the list did not contain one woman in each group of four consecutive candidates. CNE argued that AD had been given ample warning, both through written correspondence, telephone calls and press releases, as well as meetings with representatives of the coalition. The leader of KOTA had even been to CNE on 21 May to declare that the list complied with the spirit of the law (in that there were enough women in total in the list) and that he refused to change it. On 23 May, AD lodged a complaint with CNE against its refusal of the list, just within the two-day deadline.⁷⁵ CNE upheld its initial decision and AD appealed to the STJ.

The STJ decision did not respect the legislated time limit as per Article 28 of the Regulation on Presentation of Candidacies, which requires a decision on this kind of appeal within 48 hours. The TR secretariat and CNE legal advisors claimed that this provision was invalid, as subsidiary legislation may not impose deadlines not present in primary legislation. JSMP finds this argument puzzling, since it is our understanding that the point of subsidiary legislation is to provide detail to primary legislation. Also, the draft Parliamentary election laws were criticised for providing

⁶⁹ Art 45, Law 6/2006.

⁷⁰ However, some new electoral infractions were brought in with the Amendment Law (Law 6/2007).

⁷¹ Art 25, Law 6/2006.

⁷² Art 12.3, Law 6/2006.

⁷³ **498/CNE/V/07**, *Prorrogação do prazo de entrega dos documentos*, 20 May 2007.

⁷⁴ 514/CNE/V/2007

⁷⁵ Art 23, Regulation on Presentation of Candidacies, *op Cit*, n 45 supra.

too much detail at that level,⁷⁶ seeming to contradict this perspective. If there is no deadline mandated, STJ delays could make it impossible in practice for a party to pursue its candidacy, regardless of a favourable decision.

The reversal of CNE's decision was based on a dubious technicality. The Court decided that the initial letter(s) in which CNE notified AD of the faults within its list were too general in nature and did not point out the exact problem with the list. Thus, there was no timely notification to the coalition in question and the time limit for correcting the mistake did not commence. CNE was accordingly ordered to revoke its decision to reject AD's candidature.

While JSMP finds it positive that none of those who wanted to run in the elections were excluded, we find it difficult to reconcile this decision with the law and criteria for judicial oversight. This approach lessens the transparency of the process.

4.1.2 The Amendment Law

The dominant faction in the NP proposed an amendment to Law 6/2006, which would move the initial counting process from the polling station level to the district level. The intention was to prevent the targeting of *sucos* in post-electoral violence. The change risked compromising the election process and the newly elected President took two weeks to consider whether to promulgate it⁷⁷, adding to the confusion.

a) Necessary technical changes

Some changes were necessary to correct technical mistakes in Law 6/2006. These were uncontroversial and included the removal of any mention of transparent ballot boxes (Article 43); the specification that only *valid* votes are to count towards the allocation of seats in Parliament (Article 13); and the updating of voter identification practices (Article 40) and voting method (Article 43). The time limit for appeals against preliminary national results was also extended to 48 hours (Article 49).

b) Material changes

i) Articles 4 and 5, re-enfranchisement

The Amendment Law repeals Article 5 of Law 6/2006, an identical provision to Article 5 in Law 7/2006 (which JSMP had criticised).⁷⁸ The re-enfranchisement of prisoners and hospital in-patients through changes to Article 4 re-aligned Law 6/2006 with the Constitution, which states all Timorese citizens over 17 years of age have the right to vote. It also provided for mobile voting arrangements. JSMP considers the changes to be a positive step towards the full expression of the Constitution of Timor-Leste and encourages broader application of this measure in future elections to apply to clinics in all districts and to ensure the participation of disabled persons.

During the Parliamentary election, JSMP monitored mobile voting in Baucau, Dili and Ermera. The process seemed to take place without any problem and JSMP

⁷⁶ IFES Review of the Draft Law for Parliamentary Elections: *Projeto de Lei No. 26 and No. 27*, Nov 2006

⁷⁷ Address to the Nation, TVTL and National Radio, 28 May 2007.

⁷⁸ See supra n. 1 *The Right to Vote*.

congratulates the EABs for this achievement. In one of the hospitals, voters were not provided with screens to preserve the secrecy of their vote, but as far as JSMP is aware, no detailed instructions had been given at all. JSMP recommends that formal guidelines would better ensure a consistent procedure throughout the country.

ii) Article 39, ballot paper design

Ballot paper design became a controversial issue again during the Parliamentary elections. Initially there was going to be a photograph of the first candidate on the party or coalition list next to its name and symbol. However, the Amendment Law removed this. Some felt that the photo would distract voters' attention from the fact that they were voting for a group of people rather than for one candidate as during the Presidential election. JSMP argued that the removal disadvantaged illiterate voters and those that had not been able to follow campaigning closely enough to understand what different parties and coalitions stood for.⁷⁹

iii) Article 46, relocation of ballot counting

The original Article 46 stated that vote counting should start immediately after close of polling, with complaints and protests being considered on the spot. As in the initial version of the Presidential Election Law, it provided that if counting went on for more than one hour, ballot boxes should be re-sealed mid-count and forwarded to the district tabulation centre. This illogical provision was amended to provide that after the close of polling and the consideration of complaints and protests, ballot boxes should be sealed and transported to the district tabulation centre where the counting process would be witnessed by party agents and observers.

It was thought that the Parliamentary elections would be a lot more fraught than the Presidential elections and that there was a high risk of reprisals against villages that voted for change. If a whole district was counted at the same time, however, individual villages would not be singled out. The Amendment Law did not provide for mixing ballots to guarantee the secrecy of individual polling centre results. Fortunately, the relevant Polling and Counting Regulations saw to this.

The change of counting venue was challenging for the EABs. Previous expertise and training would be largely cancelled out by the new procedures. Given strong voter involvement in previous counting stages, there was also a sense that the electorate may not understand why their scrutiny of counting was being taken away.

The Amendment Law created a lot more work for all those involved in preparing elections. Among the many activities to carry out in the short time after its passage were: training for polling staff, party agents and observers in relation to the changes in the law; finding premises for the counting of up to 100,000 ballots; designing and disseminating new education materials; and planning complicated electoral logistics.

JSMP argued at the time that those responsible for drafting and passing the Amendment Law had little regard for the practical difficulties that it would create. While JSMP makes no comment on the choice of counting venue, we were concerned

⁷⁹ See n 1 supra, *The Parliament Election Amendment Law*

about the repercussions of changing the system halfway through the electoral process.⁸⁰ It should also be remembered that consultations at the time the electoral laws were drafted to indicate a general preference for counting at the polling station.⁸¹

JSMP acknowledges that the Parliamentary election process, including the new counting system, ran remarkably smoothly (notwithstanding one incident in Dili). Fewer complaints were submitted than in the two previous rounds, which could be a sign of good management and procedural execution. It could also reflect the increased difficulty in observing each counted ballot, rendering the process less transparent.

In some district tabulation centres (AAD), *fiscais* were positioned further away from the counting tables and several tables were counted at once, though only one representative from each party or coalition was allowed inside at any one time. Cramped conditions in other counting centres meant that announcements coming from different counting tables in very close proximity to one another could cause confusion in observers' counting. Probably the biggest impediment to replicating the high level of transparency achieved during the Presidential election though, was the inevitable straying of attention from watching thousands of votes being counted.

Strict rules of behaviour were issued shortly before Election Day (27 June)⁸², which limited the presence of party representatives to only one from each party or coalition inside the counting centre. This triggered unrest that held up counting in Dili AAD for several hours. In the end CNE relented and allowed more than one *fiscais* from each group to be present. CNE still issued a reprimand against the parties and coalitions for this disturbance.⁸³ JSMP feels that the *fiscais* were right to request a greater presence in order to adequately supervise the counting process.

The Law received mixed reactions from political parties and coalitions. Most parties felt that there were strong political motivations behind the amendment. Generally, smaller parties appreciated the concentration of counting because they lacked the resources to have representatives at every polling station, though this also meant that they were not able to follow the transport of ballot boxes to the AAD. Most parties were concerned about the duration of the counting and the cost involved in keeping party representatives housed and fed during that time.

iv) Additional Electoral Infractions

During the Presidential elections, a number of candidates or their representatives violated provisions of the electoral legal framework. As a result, a number of new electoral infractions were created and introduced through the Amendment Law, reflecting problems such as unauthorised use of another party's symbol or name (a response to the break-off group *Fretilin Mudansa*); campaigning during the "cooling down" period (prohibited for two days preceding Election Day); abusing a position of power; or bearing weapons at polling stations.⁸⁴ JSMP regrets there is still no serious

⁸⁰ *Ibid.*

⁸¹ *IFES Review*, n. 75 supra.

⁸² CNE, *Instrusaun sira ba sentru kontazein nian*, 27 June 2007.

⁸³ **654/CNE/VII/07**, *Repreensão sobre os distúrbios causados por fiscais dos Partidos Políticos e Coligações Partidárias na Assembleia de Apuramento Distrital em Dili*, 1 July 2007.

⁸⁴ Art 13, Law 6/2007, *Acréscimo aos ilícitos eleitorais*.

punishment for misuse of public funds and assets. This has been repeatedly mentioned by the ECT⁸⁵ and needs to be considered seriously before the next elections.

4.1.3 Other changes in the legal framework

A new Code of Conduct⁸⁶ for Parliamentary candidates was published. Participating parties and coalitions also signed a Political Party Accord to complement the Code of Conduct, agreeing to take responsibility for the actions of their supporters and for ensuring that the Accord and the Code of Conduct would be respected. The Accord is not published and therefore remains another “goodwill document” without force of law or means of enforcement. Interestingly, the Code includes an undertaking by political parties and party coalitions to *enforce* the Code on their representatives and supporters, as well as to reprimand them for violations.

New Polling and Counting Regulations⁸⁷ were also written, to effect changes in the electoral law. Disappointingly, the clause on complaints (Article 34) did not reflect the new counting system. When counting used to take place at polling stations, it was clear how complaints and protests should be treated, though, with staff from all around the district in the AAD, it became less obvious who should assess the claims. The only document that clarifies this is the “Closing, Transportation and Counting Procedure Guide for Party/Coalition Agents”, a supplement to the *IRI/UNDP Party/Coalition Agent Manual for the June 30 Parliamentary Elections in Timor-Leste*, which stipulates that agents should raise their concerns immediately with any district tabulation centre official and, if they do not agree with their conclusion, must approach the Presiding officer of the centre before submitting a written complaint.

The absence of detailed procedures in the new Polling and Counting Regulations is probably due to the hurry in establishing them (the Amendment Law was published on 31 May and the Procedures on 5 June) in order to enable training. Nevertheless, these points would have benefited from clarification, especially since the Procedure on Complaints was not updated either.

5 Complaints

As has been mentioned, the majority of complaints during the two rounds of the Presidential election concerned procedural issues. From the KOMEG observer forms of the second round, it is apparent that, although many issues were resolved at the polling station, a number of trivial matters were still referred to CNE, many of which CNE could do nothing about after the event. These included people wearing clothing with party emblems or photographs, and polling stations running out of ballot papers.

During the Parliamentary elections, campaign issues became a large component of the complaints registered (29%), on a par with procedural problems (30%). Intimidation and violence were recorded as higher than in the previous elections (19 and 18%). Some campaign events turned violent and it is not clear in what category

⁸⁵ *Supra* n 65.

⁸⁶ *Ibid.*

⁸⁷ *Supra* n 63.

subsequent complaints were classified. While the second round of the Presidential elections was the most criticised by international observers for being aggressive in its tone⁸⁸, only two complaints were made nationwide with regard to campaigning.

Another development during the Parliamentary elections was the publication of online summaries of the main complaints submitted during the campaign period.⁸⁹ Considered with CNE correspondence sent to the UNDP Observer Coordination Centre (OCC), observers could thus gain a fuller understanding of the complaints and reprimands being circulated. In particular, CNE sent several reprimands to the national broadcaster, TVTL, for not allocating equal amounts of airtime to different parties and coalitions. However, in several instances, CNE sent conflicting messages by reprimanding the individual or group against whom a complaint was aimed yet sending to the complainant a letter explaining why it could not do anything.⁹⁰

Aside from reports on electoral infractions referred to the PP, such as reports on violence and intimidation, no serious allegations were made throughout the electoral process, so far as JSMP understands. Even among the infractions, few have any potential to affect election results. Considering that most of those cases will not be concluded for at least a year, this is fortunate indeed.

5.1 Processing complaints

IFES has been running a project to support the complaints resolution office. Several local lawyers were recruited at the beginning of the electoral process and provided with training and mentoring by election specialists throughout. The lawyers considered the complaints, their legal basis and what response would be appropriate. Recommendations were then made to the CNE commissioners, who decided whether to approve the prepared responses. Three commissioners, all lawyers, were assigned complaints as their primary focus⁹¹ and considered the recommendations at first instance, convening a plenary meeting of commissioners in more difficult cases.

The number of responses to complaints became easier to gauge with the provision of copies of CNE correspondence to the UNDP OCC. In the first round of the Presidential elections, observers were not able to access CNE's answers to any complaints, even those where confidentiality as to identity was not important, such as complaints involving candidate/party differences. Many of the complaints from the first round did not receive individual responses simply because insufficient contact details were provided. A generalised open letter was put out in the press and publicised in all *sucos* where allegations of violations had been made. JSMP agrees that this was probably the best way for CNE to fulfil its duty to respond to cases.

Judging from the available correspondence, responses to complaints were expedited more quickly as capacity developed over time. However, from interviews

⁸⁸ See for example EU EOM Timor-Leste - *Presidential Elections Second Round Preliminary Statement*, 11 May, <<http://www.euomtiorleste.org/pre/xxdefault.asp?id=1&show=59&m=0>>, last accessed 20/05/07.

⁸⁹ <http://www.cne.tl/Boletim_CNE/HTML_Eng/Bol_Eng_v4.htm> last accessed 25/07/07.

⁹⁰ For example, response to Fretilin, **564/CNE/VI/07** *Resposta a Reclamação sobre TVTL*, 8/06/07 and reprimand to TVTL, **567/CNE/VI/07** *Imparcialidade e equidade da informação sobre a campanha eleitoral e dos tempos de antenna*, 8/06/07.

⁹¹ Tome Xavier Jeronimo, Vicente Fernandes e Brito and Sergio de Jesus Fernandes da Costa Hornai

conducted with most Presidential candidates and party/coalition representatives, there remained two common criticisms of complaints management: that it was biased, and that CNE frequently did not respond to complaints. JSMP did not find evidence demonstrating bias in CNE's handling of complaints. The degree of international oversight makes this an even more unsustainable proposition, as does the high level of CNE referral to the PP for serious violations.

At the TR level, there is little material available to assess, since only two election cases reached the TR, only one of which contained allegations of fraud. We have already indicated our opinion that the decision on Mr Lasama's and Ms Lobato's appeal during the first round of the Presidential election was flawed, having been based on retrospectively-applied law. JSMP has no reason to suspect that EDR was politically skewed during the electoral period and hopes that provisions to entrench this further will be implemented for the next electoral process.

According to the complaints office at CNE, the vast majority of the complaints received had to be dismissed on procedural grounds. Either they were submitted by a person who did not witness the incident reported (which is against Article 5 of the Procedure on Complaints) or they did not contain sufficient evidence. Conversely, the candidates and parties complain that CNE was not active enough in informing complainants about the need for additional information or for adequate legal standing. Furthermore, disappointment was expressed that CNE did not inform complainants whose case has been referred to the PP of that fact. These claims are difficult to assess, since they amount to one group's word against another. CNE has, however, improved its transparency, providing copies of its correspondence to the UNDP OCC and making some copies of submitted complaints (with names blacked out) available. In later correspondence with complainants, notifications of referral to the PP and responses to complaints became more common, perhaps due to repeated criticism from aggrieved parties.

The complaints office succeeded in classifying all cases received within a maximum of 11 days. Only those cases classified as having the potential to affect the outcome of the elections needed to be resolved before the announcement of preliminary results although, as we have noted, this does not apply to cases referred to the PP, which are then out of the hands of CNE. The lack of follow-up with the PP is one of the biggest issues in the complaints process. These cases effectively "disappear" from the electoral process, though they are likely to be the most serious. Remaining cases are resolved within a "reasonable time" – depending on number.

5.2 Volume of complaints received, and regional distribution

Districts with the highest number of complaints were Baucau, Dili and Lautem. This is likely due to Dili being the largest district, Baucau being both the second largest and a district where the previously ruling party stood a lot to lose, and Lautem being a stronghold of the ruling party and thus on the defensive.

The volume of complaints was relatively small, especially considering how many did not contain sufficient grounds to be considered fully. If all the claims had been well founded and contained evidence, it is unlikely that the small team of lawyers (seven in total, but no more than five worked at the same time) could have dealt with that amount within the timeframe, especially if many of them had been likely to affect

the final results. This is not in itself a problem, since CNE holds that there is no actual deadline on national tabulation.⁹²

ODIHR suggests that resolving any complaint should take at most two months.⁹³ JSMP feels that this is too long for an electorate that expects results soon after the vote, particularly where violence may erupt. In the current context, where three elections took place in as many months, this would have been unthinkable. A balance must be found that does not allow time constraints to compromise EDR quality.

The decrease in complaint numbers was likely due to improvements in the capacity of electoral staff, thanks to enhanced training, increased voter understanding and an atmosphere of less suspicion as it became clear that electoral proceedings were going well. In the second round of the Presidential elections an important factor in there being no challenge to the results was probably the fact that Mr. Francisco Guterres “Lu-Olo” conceded defeat quite early, avoiding any potential backlash. By the Parliamentary elections, there may also have been some “election fatigue”.

Voter education on complaints was limited. The International Republican Institute (IRI) ran such a programme to train party/coalition representatives, but voter education materials produced by UNDP and IFES – a series of pictograms to be displayed around voting centres – were rejected by STAE. It is understood that STAE decided to remove all voter education materials from polling centres during the Parliamentary elections because it had previously caused confusion. JSMP feels that these materials did more good than ill, and considers the decision regrettable.

5.3 Cases sent to the Public Prosecutor

In the course of the three elections, 67 cases were referred to the PP. These were easier to identify during the Parliamentary elections thanks to the online weekly bulletin that CNE began to produce.⁹⁴ We have already discussed the problems with this system of referral, which does not guarantee that complaints will be considered before the closure of the electoral process. This sits very uneasily with the established benchmarks. Having the possibility to prosecute, and through that, to enforce election legislation, loses its meaning if it only takes place after the results are certified and election matters are far from the public eye. Prosecution and punishment do not then act as deterrents. This is something that must be reconsidered before the next election.

5.4 Improvement in communications

JSMP saw improvements in communication between STAE and CNE over the course of the electoral process. Problems encountered during the elaboration of the Procedure on Complaints, and an incident during training for the second round,⁹⁵ exemplified typical misunderstandings and lack of goodwill. Often this resulted in undue delays and more difficulties in elaborating new regulations. After the second

⁹² See p 13.

⁹³ Petit, Denis, *op Cit*, n 4 supra.

⁹⁴ *Op cit*. n 90 supra.

⁹⁵ Vehement criticism was exchanged between the two institutions after ballot boxes were spotted by candidate representatives being unloaded at Hotel Timor during a weekend. STAE accused CNE of election fraud and CNE was equally scathing in asking STAE to not overstep its competencies and do some research before launching such accusations.

round, cooperation improved. CNE compiled a list of all procedural complaints, to assist STAE training.⁹⁶ This improved relations between the institutions.

During the Parliamentary elections, many observer groups lauded the cooperation between STAE and CNE, especially in the districts. It seems that both bodies have found their place in the electoral process and their responsibilities have been settled.

6 Overall assessment and Recommendations

The primary finding on complaints during the 2007 Presidential and Parliamentary elections is that they were relatively few. Even though the electorate is small (around 500,000 registered voters), and it is the first independent national electoral process, fewer than 400 complaints overall seems low. This reflects that the electoral process exceeded expectations. Indeed, all the international observer groups complimented the election organisers on the quality of electoral administration. National observer groups were more cautious, but seem to agree that the process was transparent and respected international standards. This is not to say that the elections were flawless – one of the blemishes may be the complaints process, which was little known and barely understood until very late in the events.

Voter and stakeholder education

Voter education efforts started as late as two weeks before the first round of the Presidential elections. Despite relatively recent *suco* elections, there was little or no public understanding of the processes involved in general elections, or the differences between the various actors being chosen. For example, there was a great deal of surprise at having to vote a second time to elect one president.

Since the EDR system was established so late, there was no mention of complaints in the first round voter education programmes, and it only really became a topic covered for the Parliamentary election, even then mostly to benefit party agents.

JSMP recommends a sustained civic education program that includes the topic of recourses at law against (legal) administrative decisions. We note that there will be suco elections again in less than two years and that such a programme will have the added benefit of improving people's general awareness of national administration and government as well as their rights and duties as citizens.

CNE structure and powers

The new format of the CNE is a vast improvement. As a permanent institution, staff turnover will hopefully be minimised, allowing some institutional memory to develop. Competency issues have largely been cleared up through practice during the past three months, although the inclusion of complaints in the list of areas that STAE must assist in regulating would avoid any future clashes. The main issues to be addressed are budget management and powers of investigation and enforcement.

The MAE should not have anything to do with the administration of CNE's budget after it has made its yearly allocation. JSMP recommends that a yearly budget

⁹⁶ 368/CNE/IV/07, letter from CNE to the Director of STAE, 18 May 2007.

for CNE be factored into the general State budget (allowing for the recruitment of sufficient administrative staff) and that CNE be required to present its accounts for auditing at the end of the financial year.

JSMP emphasises the importance of providing CNE with additional powers of investigation and enforcement. The recent electoral process has shown that CNE has the capacity to be an efficient and largely impartial independent electoral body, but without the authority to ensure application of its decisions it will remain a screen for Timor-Leste's future electoral processes to be deemed procedurally correct, without actually grappling with potential electoral fraud. The NP must re-examine Law 5/2006 on EABs and give CNE the power to impose fines on and to withdraw privileges from candidates, parties or coalitions and their representatives. These powers must be backed up by other legal provisions to ensure that sanctions are respected, including criminal consequences in cases of non-compliance.

Prosecution for electoral infractions

As one of our benchmarks for best practice, prosecution stands out as the “weakest link” in Timor-Leste’s EDR framework. Indeed, once complaints judged to relate to a potential infraction or crime are passed to the PP, they are completely dismissed from CNE’s sphere of responsibility. Since CNE had no powers of investigation (and even if it had had, no resources to enact them) during these elections, the only prospect for serious enquiry into a case is through the PP. Since hundreds of other cases are already waiting to be analysed, electoral cases may take years to proceed through the system. As a result, in practice, few of the more serious cases of the last elections have yet been properly examined.

Notwithstanding the deep systemic and resource problems from which Timorese justice suffers, and of which JSMP is all too aware, it is imperative that the cases that CNE refers to the PP should be processed within a certain timeframe. There should be a duty by CNE to follow them up. The PP must in turn have an obligation to report to CNE when it encounters cases that may have come to it by other means, but which may affect the electoral process.

JSMP is aware that the Constitution forbids any other courts or tribunals being formed.⁹⁷ However, we feel that this clause does not prohibit the institution of a streamlining system for electoral infractions in the PP Office and we strongly advocate the prompt initiation of talks on designing such a system well in advance of the next electoral period.

Legal Framework on Complaints

The election framework has been a work in progress since last November. Many changes have been made as the elections were taking place to remedy gaps or inconsistencies in the law. This has resulted in disparate pieces of legislation, with varying degrees of detail for different stages of the electoral process. With regard to EDR, the Procedure on Complaints does not reflect all the details contained in the various regulations and hence some uncertainty remains. For instance, there is a

⁹⁷ Art 123.2 of the Constitution “Courts of exception shall be prohibited and there shall be no special courts to judge certain categories of criminal offence.”

severe lack of clarity on the deadlines for submitting complaints to be directed to the PP. Additionally, the primary legislation is missing elements as described above.

JSMP advocates a thorough revision of the entire electoral legal framework, in tandem with a comprehensive campaign of civic education, to start well ahead of the next electoral period, while lessons from the last elections are still fresh and experienced staff are available. This should not preclude later adjustment, as needed.

JSMP would like to see the criminalisation of misuse of public funds or assets, and the introduction of appeal rights against CNE decisions in more areas than candidate registration and national tabulation results. We believe that the right to appeal only against national tabulation results to the STJ, in a petition to annul an election, may allow less serious complaints to fester and take on unnecessary proportions that may disrupt an entire electoral process. A system of immediate appeals could allow smaller issues to be addressed and closed with far less risk.

Transparency of EDR

One of JSMP's main issues in this context has been with accessing information about complaints. While it is understandable in any judicial process that a level of confidentiality must be maintained while a case is being addressed, the delays in making public the contents of complaints have been too long. Especially when it comes to complaints raised by candidates or major parties, which generally seek publicity, details could have been released. We remind CNE that, according to the law, it is only compelled to maintain confidentiality if this is expressly requested.

JSMP suggests that information on complaints should be published more expeditiously and in more detail. It would be preferable for summaries of cases to be issued as they were during the Parliamentary elections from the beginning of the electoral period, with more information about the response from CNE. Indeed, JSMP was able occasionally to access information about complaints themselves, but without knowing what response they were met with, the scope for analysis is narrow. In particular, it has been very difficult to assess whether the complaints office was using too high a standard of evidence, making it impossibly complex to assemble a case that would not be dismissed for lack of evidence. JSMP looks forward to improvements in the publication of information on complaints for the next elections.

International Presence

To conclude, without diminishing the substantial achievement of the Timorese authorities and EABs, JSMP is conscious that the electoral process would not have been so successful without the involvement of international organizations and international observer groups. The *suco* elections of 2004-6 were much less successful in terms of abiding by democratic standards and avoiding intimidation or election fraud. Close international involvement encouraged Timor-Leste's EABs, government authorities and public to maintain a high standard of behaviour and respect for the law. JSMP thanks the international community for its contribution and congratulates the People of Timor-Leste for their achievement. It is our hope that lessons learned will be retained in order that future electoral processes may become increasingly independent and continue to be transparent, credible and efficient.

Annex 1

Abbreviations

AAD – *Assembleia Apuramentu Distritu*, District Tabulation Centre

AD – *Aliansa Demokratika*, coalition between KOTA and PPT parties (Klibur Oan Timor Auswain and Partido Povo Timor)

CNE – *Comissão Nacional de Eleições*, National Commission on Elections

EAB – Electoral Administration Body

EDR – Election Dispute Resolution

KOMEG – *Koligasaun Monitorizasaun ba Eleisaun Geral*, Coalition for Monitoring the General Elections

MAE – *Ministerio de Administração Estatal*, Ministry of State Administration

NP – National Parliament of the Democratic Republic of Timor-Leste

ODIHR – Office for Democratic Institutions and Human Rights

PP – Public Prosecutor

STAE – *Secretariado Técnico de Administração Eleitoral*, Technical Secretariat for Electoral Administration

STJ – *Supremo Tribunal de Justiça*, Supreme Court of Justice

TR – *Tribunal de Recurso*, Court of Appeal

UNDP OCC – United Nations Development Programme Observer Coordination Centre

Annex 3

Election Dispute Resolution Scheme

COMMON PROVISIONS FOR PRESIDENTIAL ELECTIONS AND PARLIAMENTARY ELECTIONS									
Activity	Election Related Violation	Legal Provision	Defendant	Who can complain	Where	Deadline for Complaint	Deadline for Consideration	Appeal	Sanction / Remedy
Voter Registration									
Voter registration	Refusal to register or update citizen details on electoral roll	Regulation on Technical Procedure for the Updating of the Electoral Registration 036/STAE/II/07Art 21	Brigada	Citizens	CNE	Within 5 days of end of registration period	Within 3 days of receipt of complaint		
Voter registration	Prevention of verification, intentional failure to correct electoral roll, illicit access to registration database, falsification of registration certificate, attempt at any of the above	Regulation on Electoral Registration 036/STAE/II/07Art 41-45	Anyone involved in the process	Anyone involved in the process	STAE/ PP				As per corresponding penal legislation
Voter registration	Breach of secrecy, violation of duties of impartiality and neutrality	Regulation on Electoral Registration 036/STAE/II/07Art 47-48	STAE staff (including brigades)	Anyone whose rights have been infringed	PP			Court of Appeal	Breach of secrecy: as per criminal law or disciplinary procedures for civil servants Impartiality/ neutrality: Up to 2 years prison or fine up to USD1000
Candidacy Registration									
Candidacy registration	Obstruction of candidacy	Law 7/2006, Art 53; Law on Parliamentary Election, Law 6/2007, Art 51	Anyone	Anyone, (Candidate)	PP/ CNE			Court of Appeal	Prison one to two years or fine USD500-1000

COMMON PROVISIONS FOR PRESIDENTIAL ELECTIONS AND PARLIAMENTARY ELECTIONS

Activity	Election Related Violation	Legal Provision	Defendant	Who can complain	Where	Deadline for Complaint	Deadline for Consideration	Appeal	Sanction / Remedy
Candidacy registration	Intentional presentation of candidacy by ineligible citizen	Law 7/2006, Art 54; Law 6/2006, Art 52	Anyone	Anyone (STJ)	PP/ CNE			Court of Appeal	Prison up to one year or fine up to USD500
Election Campaign issues									
	Late submission of the campaign calendar / Failure to notify CNE of changes to campaign calendar	STAE/III/07 art. 10; aviso previo	Candidates/Political Parties / Coalitions and their Representatives	Other candidates/ parties / EABs	CNE	4pm on the day following day of violation			Reprimand
Campaigning	Campaigning outside allowed times	Law 7/2006 Art 27; Law 6/2006 Art 28; STAE/III/2007 Art 4, 11	Candidate	Anyone	CNE	As above			Reprimand
Campaigning	Illicit electoral propaganda	Law 7/2006 Art 55.1; Law 6/2006 Art 54.1	Anyone	Anyone	CNE / PP	As above		TR	3 months or USD100
Campaigning	Obstruction of right to campaign freely/ destruction of campaign material	Law 7/2006 Art 55.2, 64; Law 6/2006 Art 54.2 and Art 62; STAE/III/2007 Regimento Sobre a Campanha Eleitoral Art 8, 9, 36, 37	Anyone	Anyone	CNE / PP	As above		TR	For campaign materials and expression of campaign message, up to 6 months imprisonment or USD200 fine For obstruction of campaign-related gatherings, 2 years and USD1000
Campaigning	Media bias, unequal access to broadcast and information	STAE/III/2007 Art 16-23	Press, TV, radio stations, polling groups	Candidates and their representatives/ collaborators	CNE				Restitution, compensation

COMMON PROVISIONS FOR PRESIDENTIAL ELECTIONS AND PARLIAMENTARY ELECTIONS

Activity	Election Related Violation	Legal Provision	Defendant	Who can complain	Where	Deadline for Complaint	Deadline for Consideration	Appeal	Sanction / Remedy
Campaigning	Lack of impartiality of public bodies and employees	Law 7/2007 Art 63; Law 6/2006 Art 61; STAE/III/2007 Art 24-28, 38	Civil servants, state bodies	Candidates and their representatives/ collaborators	CNE/PP			Court of Appeal	Up to 2 years imprisonment or USD1000 fine
Campaigning	Use of public property or funds for campaign purposes	STAE/III/2007 Art 29	Candidates and their representatives / collaborators, public servants	Candidates and their representatives/ collaborators	CNE				Reprimand
Campaigning	Campaign funding	STAE/III/2007 Art 31-33	Candidates, etc	Candidates, representatives, individuals, CNE	CNE	Accounts must be presented to the CNE latest 30 days after election day	30 days after receipt of accounts		Law 3/2004 on Political Parties Art 28, fine between USD1500 and USD25000
Campaigning	Obstruction of freedom of choice, coercion of voters	Law 7/2006 Art 56; Law 6/2006 Art 54; STAE/III/2007 Regimento Sobre a Campanha Eleitoral Art 39	Anyone	Anyone	CNE/ PP			TR	Up to 2 years or USD1000
Election Day issues									
Voting	Obstruction of freedom of choice, coercion of voters, failure to respect voting choice of visually impaired voter	Law 7/2006 Art 56; Law 6/2006 Art 54; Complaints Procedure Art 5	Anyone	Anyone registered to vote or an agent of a candidate, who witnessed the event	PC / CNE / PP	First instance by 1600hrs on Voting Day ⁱ		CNE / TR ⁱⁱ	Up to 2 years or USD 1000
Voting	Violation of another's voting secrecy	Law 7/2006 Art 62; Law 6/2006 Art 60; Complaints Procedure Art 5	Anyone	As above	PC/ CNE / PP	As above		CNE / TR	Up to 6 months or USD200

COMMON PROVISIONS FOR PRESIDENTIAL ELECTIONS AND PARLIAMENTARY ELECTIONS

Activity	Election Related Violation	Legal Provision	Defendant	Who can complain	Where	Deadline for Complaint	Deadline for Consideration	Appeal	Sanction / Remedy
Voting	Failure to fulfil duty as election official	Law 7/2006 Art 61; Law 6/2007 Art 59; Complaints Procedure Art 5	Polling station/ centre worker	As above	PC / CNE / PP	As above		CNE / TR	3 months or up to USD100
Voting	Electoral administration employee breaching duty of neutrality and impartiality	Law 7/2006 Art 63; Law 6/2006 Art 61; Complaints Procedure Art 5	Member of electoral administration or anyone collaborating with it	As above	PC / CNE / PP	As above		CNE / Court of Appeal	Up to 2 years or USD1000
Voting	Disturbance of voting	Law 7/2006 Art 57; Law 6/2006 Art 55; Complaints Procedure Art 5	Anyone	Anyone registered to vote or an agent of a candidate, who witnessed the event	PC / CNE / PP	As above		CNE / TR	Depending on offence, up to 2 years imprisonment or USD1000 fine
Voting	Obstruction of candidate representatives	Law 7/2006 Art 58; Law 6/2006 Art 56; Complaints Procedure Art 5	Anyone	As above	PC / CNE / PP	As above		CNE / TR	Imprisonment up to 1 year or fine up to USD500
Voting	Voting without fulfilling right to vote criteria, voting twice, complicity in allowing such acts to happen	Law 7/2006 Art 59; Law 6/2006 Art 57; Complaints Procedure Art 5	Anyone	As above	PC / CNE / PP	As above		CNE / TR	Up to 2 years, or up to USD1000
Campaigning/ Voting/ Counting	Catch-all clause, any non-compliance, omission, unjustified delay in compliance	Law 7/2006 Art 65; Law 6/2006 Art 63; Complaints Procedure Art 5	Anyone	As above	PC / CNE / PP	Voting: close of polling and counting at PC Other context: By 1600hrs on the day after the day of the incident constituting the complaint		CNE / TR	Up to 1 year or USD500

COMMON PROVISIONS FOR PRESIDENTIAL ELECTIONS AND PARLIAMENTARY ELECTIONS

Activity	Election Related Violation	Legal Provision	Defendant	Who can complain	Where	Deadline for Complaint	Deadline for Consideration	Appeal	Sanction / Remedy
Post voting issues									
Counting	Subversion of vote counting, tabulation and publication, falsification of documents	Law 7/2006 Art 60; Law 6/2006 Art 58; Complaints Procedure Art 5	Anyone	Anyone registered to vote or an agent of a candidate, who witnessed the event	PC / PP/ CNE	As above		CNE / TR/ / STJ	6 months to 3 years or USD200 to 2000
Counting	Disputed tabulation at district level	Law 7/2006 Art 43, Law 6/2006 Art 45; Complaints Procedure Art 5	Brigada / PC President / CNE Focal Point	Candidate / Party Representative	CNE	By 1600 on the day after the day on which the events forming the basis for the complaint took place	End of national tabulation period		Alteration of the record
Counting	Disputed tabulation at national level	Law 7/2006 Art 46-7; Law 6/2006 Art 48-9; Complaints Procedure Art 5	CNE	As above	STJ	Within 24 hours of posting the provisional tabulation of national results (48 hours for Parliamentary elections)	Within 24 hours of receiving the complaint, (48 hours for Parliamentary elections)		Request to CNE for further investigation? Non-certification of elections
Post-campaign clean-up	Leaving electoral materials to litter public space or private property	STAE/III/2007, Art 15	Candidates and their collaborators	CNE, Individuals	CNE	Materials must be removed 1 week after the election day at the latest			Reimbursement of costs incurred by entity contracted to carry out the clean-up work

PRESIDENTIAL ELECTIONS

Activity	Election Related Violation	Legal Provision	Defendant	Who can complain	Where	Deadline for Complaint	Deadline for Consideration	Appeal	Sanction / Remedy
Candidacy Registration									
Candidacy registration	Rejection of candidacy	Law on the Election of the President of the Republic, Art 20 - 22; Regulation 035/STAE/II/07 Art 11-13;	STJ President	Candidates and their representatives	STJ	2 days after publication and posting of successful candidacies	24 hours	STJ sitting in plenary (submitted within 1 day of publication, and decided within 48 hours).	Granting or withdrawal of candidacy status
Candidacy registration	Proposing more than one candidacy	Law on the Election of the President of the Republic, 7/2006, Art 52	Individual voter	Anyone	PP/ CNE			Court of Appeal	Prison up to one year or fine up to USD 500
Counting									
Counting	Disputed counting at polling centre level	Law 7/2006 Art 44, Complaints Procedure Art 5	Polling station worker / brigada	As above	PC	Before the end of polling station counting	Immediately	CNE	Alteration of the record

PARLIAMENTARY ELECTIONS

Activity	Election Related Violation	Legal Provision	Defendant	Who can complain	Where	Deadline for Complaint	Deadline for Consideration	Appeal	Sanction / Remedy
Candidacy Registration									
	Presentation of more than one list / Presence of one person on more than one list	Lei no 6/2006 Art 19; 035/STAE/II/07 Art 16							
	Rejection or contested acceptance of party/coalition candidacy	035/STAE/II/07 Art 23-8	CNE	Parties and their representatives, registered voters	CNE	2 days after the publication of qualifying candidate lists	24 Hours	STJ (must decide within 48 hours)	Revocation of initial decision
Campaigning									
	Campaigning after end of campaign period	Law 6/2006 Art 65 (as introduced by Art 13, Law 6/2007); STAE/III/2007 Art. 11 and 36	Party Leaders and Representatives	Anyone	CNE / PP	As above		TR	6 months to 1 year imprisonment or USD250-500
	Abuse of public functions	Law 6/2006 Art 67 (as introduced by Art 13, Law 6/2007) 222/STAE/V/07 point 19	Public servants, Ministries, parliament members and other relevant government bodies	Anyone	CNE/ PP	As above		TR	2-3 years of imprisonment or fines of USD1000-2000
	Use of other party's attribute in campaigning	Law 6/2006 Art 64 (as introduced by Art 13, Law 6/2007) STAE/III/07 Art.36	Anyone	Anyone	CNE/ PP	As above		TR	1 month imprisonment or USD50-150 fine
	Use of defamatory, provocative and discriminative language	Regulation STAE/III/2007, Art. 13.1	Party / Coalition Leaders and supporters	Anyone	CNE	As above			

PARLIAMENTARY ELECTIONS

Activity	Election Related Violation	Legal Provision	Defendant	Who can complain	Where	Deadline for Complaint	Deadline for Consideration	Appeal	Sanction / Remedy
	Dismissal or threat of dismissal; impeding or threatening to impede employment	Law 6/2006 Art 68 (as introduced by Art 13, Law 6/2007)	Any employer or representative of employer	Anyone who witnesses the infraction	CNE/ PP	As above		TR	1-2 years imprisonment or USD500-1000 fine
	Electoral corruption (bribing, promising favours/ employment)	Law 6/2006 Art 69 (as introduced by Art 13, Law 6/2007); STAE/III/07, Art 13.3	Anyone	Anyone	CNE / PP	As above		TR	6 months to 1 year imprisonment or USD500-1000 for perpetrator; voter accepting bribe 6 months to 1 year or USD250 to 500.
Voting									
	Sale or consumption of alcoholic beverages in or within 100m of a Polling Centre	Art 66, Law 6/2006 (as introduced by Art 13, Law 6/2007)	Anyone	Anyone	CNE/ PP	Close of polling		TR	3-6 months or USD100-250 fine
	Fraudulent introduction of ballots or any other object into ballot box (before or after polling); diversion of ballot box or any ballots	Law 6/2006 Art 70 (as introduced by Art 13, Law 6/2007)	Anyone	Anyone	CNE / PP	Close of polling or counting		TR	1-2 years or USD500-1000 fine
	Refusal to receive a complaint	Law 6/2006, Art 71 (as introduced by Art 13, Law 6/2007)	President of Polling station	Anyone	CNE / PP	Close of polling		TR	1-2 years or USD500-1000 fine
	Bearing arms in a voting station while not in the exercise of legal functions	Law 6/2006, Art 75 (as introduced by Art 13, Law 6/2007)	Anyone	Anyone	CNE / PP	Close of polling		TR	6 months to 1 year imprisonment or USD250-500 fine
Counting									
	Contested national tabulation results posted	Law 6/2006, Art 48, 49 (as amended by Art 10 Law 6/2007)	CNE	Anyone	STJ	48 hours	48 hours		Non-certification of elections

PARLIAMENTARY ELECTIONS

Activity	Election Related Violation	Legal Provision	Defendant	Who can complain	Where	Deadline for Complaint	Deadline for Consideration	Appeal	Sanction / Remedy
General									
	Responsibility for non-appearance of the police when their presence is required	Law 6/2006, Art 72 (as introduced by Art 13, Law 6/2007)	Individual responsible for no-show	Anyone	CNE / PP			TR	1-2 years imprisonment
	Slander	Law 6/2006, Art 73 (as introduced by Art 13, Law 6/2007)	Anyone	Individual affected	CNE / PP			TR	3-6 months imprisonment or USD 150-250 fine
	Lodging a complaint in bad faith	Law 6/2006, Art 74 (as introduced by Art 13, Law 6/2007)	Anyone	Individual/ institution affected / CNE	CNE / PP			TR	6 months to 1 year imprisonment or USD 250-500 fine

Abbreviations:

PC Polling Centre
 CNE National Elections Commission
 STAE Technical Secretariat for Electoral Administration
 STJ Supreme Court of Justice

¹ During the first round of voting it is JSMP’s opinion that there was no formal legal requirement to submit a complaint to polling centre officials that would rightly justify forfeiture of the right to lodge a complaint with the CNE, since the Procedure on Complaints was not yet in force. However, the procedure was in force during the second round and therefore complaints on events that occurred during voting hours were required to be submitted at first instance in the polling centre. Complaints about any other event were to be lodged straight to the CNE.

² Where the initial claim was filed at the polling station and the response was unsatisfactory, an appeal was able to be made to the CNE. Where the claim was filed directly to the CNE, no appeal was available unless the CNE referred the matter to the Public Prosecutor, in which case an appeal could be made after the first instance judgment to the Court of Appeal. Finally, a case was able to be reported to the police directly and would then follow the normal course of criminal investigation, trial and appeal if a basis for prosecution was found.