



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

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The Right to Vote

The first round of the presidential elections saw a high voter turnout, but a number of citizens were denied the right to vote. These included the 255 individuals in detention in one of the three prisons of Timor Leste, a number of in-patients in hospitals too ill to attend polling stations, and an unknown number of individuals who have been unjustly identified as “mentally ill”. The right to vote is a fundamental right enshrined in the Constitution of the Republic of Timor Leste (Art 47) and in international instruments such as the International Covenant on Civil and Political Rights (Art 25). JSMP is of the opinion that the relevant State bodies should have facilitated the exercise by all these individuals of their right to vote and urges them to attend to this issue without delay.

I : The Law

Section 47 of the Constitution of the Republic of Timor Leste (CRDTL) provides that:

1. Every citizen over the age of seventeen has the right to vote and to be elected.
2. The exercise of the right to vote is personal and constitutes a civic duty.

Section 32, paragraph 4 adds that:

Persons who are subjected, **on conviction**, to a sentence or a security measure involving loss of freedom **remain entitled to their fundamental rights**, subject to the limitations that necessarily derive from that conviction and from the requirements for its enforcement. (*emphasis added*)

The terms of the law 7/2006 on the election of the President of the Republic are:

Article 5
Active electoral disability

The following are not granted active electoral capacity:

- a) Individuals judicially disabled due to a sentence imposed by a court of law;
- b) Individuals clearly and publicly known as mentally ill even where they are not judicially disabled.

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II : Persons in detention

1) Preventive detention

Persons in preventive detention are considered innocent until proven guilty and there is thus no legal basis upon which to deprive them of their fundamental rights. They still hold the right to vote. A right that is impossible to exercise is a right denied. It is the duty of the State to ensure that a right enshrined in the Constitution can be exercised, in this instance through making voting facilities available inside prisons. As the organ of the State with the mandate to determine the number and location of polling stations, JSMP urges the Secretariado Técnico de Administração Eleitoral (STAE) to make arrangements for voting (at least by those in preventive detention) to be carried out in prisons in the second round of the Presidential elections and in the Parliamentary elections. This can be done through the addition of new polling stations, or by creating mobile units from existing polling stations.

The argument that STAE may be accused of misconduct by adding to the number of possible voters compared to the first round cannot be countenanced since it is merely a necessary measure of improvement in the polling procedures in the same way that other adjustments are being made in response to lessons learned in the first round.

Voter registration does not either present a relevant counter-argument, since most of the prisoners were given the opportunity to register on the electoral roll, or hold old voting cards.

2) Sentenced Prisoners

a) International practice

A survey of different jurisdictions and case law from around the world reveals a range of approaches to the question of restricting the voting rights of sentenced prisoners. The main conditions for a law governing this to be considered fair are:

- such restriction should be known in advance, including by the individual affected;
- they should not curtail the right to vote to such an extent as to “impair its very essence and deprive it of effectiveness”;
- criteria for disqualification should be clearly laid down in the law and not be subject to arbitrary or discretionary decision;
- they should be imposed in pursuit of a legitimate aim;
- and the means employed for disqualification must not be disproportionate.

In general, international practice seems to be evolving towards fewer permissible restrictions on the right to vote.¹

While JSMP would concede that Law 7/2006 fulfils these criteria in broad terms, it is also of the opinion that an evolving jurisdiction such as that of East Timor should strive toward a progressive interpretation of international human rights standards. Consequently, JSMP feels that sentenced criminals should maintain the right to vote except where a sentence **specifically** provides for the loss of civic rights.

b) *The Domestic Framework*

Article 5 of the Law on the Election of the President of the Republic (Law 7/2006) takes an unduly strict approach to the restriction of the right to vote, implying that any convicted criminal should forfeit voting rights.

By contrast, the RDTL Constitution enshrines the right to vote in its broadest form, subject to the necessary limitations. Arguably, the restriction of the right to vote laid down in the Law on Election of President is not strictly **necessary**. The enforcement of the right to vote does not require any alteration to a conviction, or any action to impede the enforcement of a sentence. In other words, Art 5 of Law 7/2006 is disproportionately restrictive when read in the light of the Constitution.

Furthermore, on comparison with the Portuguese electoral law for presidential elections (see annex), on which the Timorese law is based, the ambiguous formulation of Art 5(a) of Law 7/2006 becomes clearer. In the Portuguese law, if paragraph (a) (which is identical to Art 5 (a) Law 7/2006) were intended to impose a blanket restriction of voting rights on every individual upon whom a judicial sentence has been imposed, there would be no need for paragraph (c) (non-existent in Law 7/2006) which prescribes that persons who are deprived of their political rights by a formal judicial decision lose their electoral capacity. It emerges that the meaning of the common paragraph (a), "Individuals judicially disabled due to a sentence imposed by a court of law" in fact refers to those individuals (not necessarily prisoners), who have been declared legally disabled by a judicial decision. Not every sentenced detainee has been declared legally disabled.

Since no other provision of Timorese law gives any more detail on conditions for the restriction of electoral capacity, as would be required both by international standards on legal clarity and by Article 24 of the RDTL Constitution (see Annex), it follows that no person in detention in Timor Leste should be

¹ (See Legislation online <<http://www.legislationline.org/>> for international jurisprudence and IDEA's "International Election Standards, Guidelines for Reviewing the Legal Framework of Elections" <<http://www.idea.int/publications/ies/>>)

deprived of his or her right to vote on the grounds that they have received a sentence decided by a court of law.

Consequently, in JSMP's view the State has failed in its duty to protect and implement the fundamental right to vote of its citizens in omitting to provide voting facilities in prisons during the first round of the presidential elections. JSMP hopes that this issue will be resolved in time for the second round of voting.

III : Persons “clearly and publicly known as mentally ill”

Restricting the civic rights of individuals deemed “unsound of mind” is a common feature of most legal systems. As in the case of minors, society judges that an individual of “unsound mind” is unable to make sufficiently informed decisions and choices to administer his or her own affairs, or to take part in civic life. It is imperative, however, that the determination of a person's mental ability is subject to close scrutiny, and based on as objective criteria as possible. Against this standard, the sweeping provision in Art 5(b) of Law No. 7/2006 is completely unacceptable. A provision that leaves the determination of an individual's state of mental health up to “clear and public knowledge” allows for numerous abuses and does not have a place in a modern judicial system.

Another comparison between the Timorese and Portuguese versions of the law reveals that the Timorese clause has been truncated, rendering it devoid of legal credibility. The Portuguese law provides that individuals may lose their electoral capacity if they are “clearly and publicly known as mentally ill, even where they are not judicially disabled” *if, and only if, they are either interned in a psychiatric establishment, or if they are declared as such by a board of two doctors.* Clearly, this leaves only three options for depriving a person of their right to vote due to mental disability:

- A formal judgment specifically rendering them judicially incapable;
- Internment in a psychiatric institution, or
- A concordant medical opinion by at least two doctors.

It does not allow for an estranged relative or a disgruntled neighbour to successfully petition for the recognition that someone is mentally disabled.

It could be argued that the state of medical services in East Timor makes it complicated to apply these criteria in a uniform manner throughout the country, but JSMP feels strongly that in such circumstances, it is preferable to err on the side of caution and restrict the right to vote as little as possible. The risk of harm incurred by the law as it stands is far greater than the harm that may arise from allowing a few people with mental disabilities to vote. The numbers involved cannot be sufficient to affect the outcome of a poll, so there is no justification for keeping such an open determination of mental disability as is currently in force.

Therefore, JSMP would like to see a revision of the law restricting the right to vote of the mentally disabled to make it precise and objectively verifiable. JSMP would like to add that this is an area of law that has not been addressed yet in legislation and is in need of more thorough scrutiny.

IV : Hospital in-patients

People who suffer from illness or injury that renders them bed-ridden, but who remain sound of mind, still possess the right to vote. As was pointed out above, a right that is impossible or disproportionately difficult to exercise is equivalent to a right denied. In the first round of the presidential elections, no facilities were provided for hospital in-patients, or other voters physically unable to travel to a polling station to vote, thus denying their right to do so.

Many countries' electoral law makes provisions for mobile voting. This is a commendable measure, but may be a stretch on already limited resources for electoral logistics in Timor, if it had to be applied to every hospital or clinic in the country. However, it is quite possible for STAE to implement a mobile voting system for any hospital or clinic where more than 10 people are concerned for instance. JSMP would welcome the implementation of such a system as soon as possible.

V : Timorese citizens abroad

Article 22 of the CRDTL states that "East Timorese citizens who are or live overseas shall enjoy protection by the State for the exercise of their rights and shall be subject to duties not incompatible with their absence from the country". There is therefore no reason why there should not be facilities for expatriated citizens to vote, including a similar method to people who are physically unable to reach a polling station, discussed above. JSMP accepts that adequate information and registration systems on citizens residing abroad may not yet be in place, and understands that the Republic of East Timor cannot have diplomatic representations in every country. However, JSMP considers that the absence of such facilities is something that must be attended to before the next elections, in 2012.

VI: Conclusion

JSMP commends the electoral administration bodies and the Timorese people for the smooth running of the first round of the presidential election, but maintains that there is room for improvement in certain areas. One of these is the uniform and truly equal application of the right to vote for all citizens. JSMP looks forward to monitoring the developments in this field of law.

ANNEX

Portuguese Law on the election of the President

Decree-Law 319-A/76 - 3 May

Article 3

Electoral incapacities

1 – ...

2 – The following are also not granted active electoral capacity:

- a) Individuals judicially disabled due to a sentence imposed by a court of law;
- b) Individuals clearly and publicly known as mentally ill even where they are not judicially disabled, if they are committed in a psychiatric institution or if they are declared as such by a board of two doctors;
- c) Individuals who have been deprived of their political rights by a formal judicial decision.

Constitution of the Democratic Republic of Timor Leste

Section 21

(Disabled citizens)

1. A disabled citizen shall enjoy the same rights and shall be subject to the same duties as all other citizens, except for the rights and duties which he or she is unable to exercise or fulfil due to his or her disability.
2. The State shall promote the protection of disabled citizens as may be practicable and in accordance with the law.

Section 22

(East Timorese citizens overseas)

East Timorese citizens who are or live overseas shall enjoy protection by the State for the exercise of their rights and shall be subject to duties not incompatible with their absence from the country.

Section 23

(Interpretation of fundamental rights)

Fundamental rights enshrined in the Constitution shall not exclude any other rights provided for by the law and shall be interpreted in accordance with the Universal Declaration of Human Rights.

Section 24

(Restrictive laws)

1. Restriction of rights, freedoms and guarantees can only be imposed by law in order to safeguard other constitutionally protected rights or interests and in cases clearly provided for by the Constitution.
2. Laws restricting rights, freedoms and guarantees have necessarily a general and abstract nature and may not reduce the extent and scope of the essential contents of constitutional provisions and shall not have a retroactive effect.

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