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**M. Parvizi Amineh**

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## Reality and Challenges

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## **5 Counting Votes That Count: A Systemic Analysis of the 2007 Timorese Elections and the Performance of Electoral Institutions**

*Rui Graça Feijó*

In the course of three months, Timor Leste has held three successive elections, all reputed as ‘free and fair’ by several international observation teams – who have nevertheless raised critical issues in the way the whole process was carried out from the beginning.<sup>1</sup> If all goes well, a period of up to five years will now elapse before new elections will be called, as the stabilisation of the country will be enforced by those who have fought the last elections and accepted their results, both as government and as opposition. This is the moment to review critically the kinds of political choices made regarding the electoral system adopted for those elections, and to lay the groundwork for an evaluation of what should be corrected in due course.<sup>2</sup>

This paper aims not to discuss the political outcome of the three elections, but rather to cast a critical look at the ways the established electoral framework performed; and what systemic features are perceived as less efficient than the expected level of compliance with internationally accepted standards, or that have eventually been responsible for distorting the will of the people as expressed directly in their vote.

### **The creation of the legal framework and the electoral mechanism**

As of 2 August 2007, Timor Leste possessed the legislation and the necessary institutions to organise a new election if and when the need arises. Just one year ago, this very statement would be completely false. There was no legal framework in place, and the independent body required to supervise the organisation and proceedings of any election as required by the Constitution was missing.

The decision made by President Xanana, both to rely on elections as a means of laying the foundations for a political solution to the crisis that erupted in early 2006, and his willingness to wait for the proper legal framework and institutional capacity on the part of the Timorese elections, should be considered among the major factors contributing to the present situation. Indeed, Xanana’s concern with the lack of con-

ditions for proper elections had been expressed earlier in 2005, both at the ceremony in which the new members of the first constitutional government were sworn in (July), and in his presidential address to the Parliament at the beginning of the fourth legislative session (September). Moreover, in February 2006, during the state visit of Portuguese President Jorge Sampaio, the Timorese presidency had launched an initiative to discuss the foundations of the electoral system, and to foster the largest possible convergence of political parties and respected public figures. Xanana's insistence on the basic idea that the organisation and the staging of elections should be viewed as an act of sovereignty in accordance with the Constitution, and not as lip-service paid to the international observers and donors available in the supermarket of worldwide organisations ready to settle in the country and organise elections for a fee, was therefore critical in securing the broad framework of a Timorese-oriented electoral scenario.

In the government camp, Ana Pessoa – Minister for the Public Administration, which comprised the unit for electoral affairs (STAE – *Secretariado Técnico para os Assuntos Eleitorais*) – wrote a letter to the Secretary General of the United Nations asking for international help of a technical nature in preparing for elections. This would comprise three aspects: legal, institutional and logistical.

The UN responded by sending a NAM (Needs Assessment Mission) led by Judge Kriegler of South Africa, who had already been involved on previous occasions with Timor regarding electoral matters. The NAM's report, issued in December 2005, identified a number of critical points to be addressed, and strongly recommended immediate action in order to adhere to the constitutionally expressed deadlines. However, the UN team's document was not followed by substantial multilateral involvement as the minister turned to Portugal instead as a major partner in the process.

FRETILIN and its leaders abstained from participating in the workshops set up by the President. On the other hand, Portuguese advisors were brought in to work directly with the minister and STAE. Rumour had it that they were advised not to pursue any sort of relationships with anyone outside STAE, including MPs of opposition parties. In early May 2006, the government was in a position to submit a legal proposal to the National Parliament – but the fall of Alkatiri and his replacement by a new government, headed by Ramos-Horta, washed the opportunity away. FRETILIN would later resurrect the project and submit it under its own initiative. Parliamentary debate on these proposals would only resume in the fifth and last session, starting in September.

Parliament confronted two basic proposals; one from FRETILIN, the other from an ad hoc coalition of opposition parties. The main topics of disagreement were the following:

- the nature of the constitutionally required body of electoral supervision. FRETILIN envisaged it along the lines of the one erected for the local government elections in 2004 and 2005, i.e. a non-permanent body, whereas the opposition clamoured for a permanent institution;
- the replacement of the Hare quota method of allocating seats used in the 2001 election by the d'Hondt method, on the grounds of favouring political stability;
- a legal threshold of five per cent for parties to win seats in Parliament;
- the opposition claimed a gender quota which FRETILIN opposed.

The opposition claimed that votes should be counted at the local polling stations, and FRETILIN favoured counting them at district level, without any mention of sub-district results. The last formula had been adopted in earlier polling, namely in the 1999 referendum, as a precautionary measure against intimidation and retaliation – two phenomena one would have expected to be more or less eradicated.

Agreement existed on the creation of a single constituency and the adoption of the maximum number of deputies (65) allowed by the Constitution. Parliamentary debate was assigned to the specialised Commission A, which submitted the proposals to a short, three-day public forum.

It was announced that there had been a global agreement to use the opposition's document as the one to receive general approval, followed by a number of substantial amendments. Under this agreement, the *Comissão Nacional de Eleições* (CNE – National Committee for Elections) would receive permanent status but would remain distinct from STAE; the threshold would be lowered to 3 per cent; and the gender quota accepted at a lower level of exigency. In general, the similarity of the solution to Portuguese practices (d'Hondt method, double-headed electoral administration) is striking. The most significant divergence is that Portugal has refused to alter electoral legislation without an enlarged convergence and at a prudent date far from elections, whereas in Timor Leste, FRETILIN failed on the agreement, passed its own proposal as the one to be generally validated, and thus saw the opposition walk out and take no part in the voting procedures. Electoral legislation was therefore vulnerable to a presidential veto, since it could only earn the majority party vote, which is less than two-thirds of the House. These were not the most auspicious conditions for the electoral laws to be adopted in mid-December. The President of the Republic decided, given the very short time before the constitutional deadlines were reached, and judging the convergence to have been partially inscribed in the bills, to approve them on 28 December 2006.



However, this would not be the end of the process – it required fine-tuning which far exceeded the time designated for the political campaign. For one, the letter of the law asked for transparent ballot boxes – but STAE had none and it could not afford to have them shipped in time. (This example clearly shows the Portuguese influence in the tendency to be ultra-specific on details, and the scant awareness of the advisors as to the actual conditions of the country). Also, some contentious issues during the run-up to the presidential elections – like the legitimacy of using party symbols on the ballot – were settled by law, the last of which was approved on 27 March for an election to be held on 9 April. When the party of international observers was briefed on the legal framework, less than a week before polling day, some legal dispositions could not be found in writing. One might imagine the extent to which these regulations were actually passed on to the teams working the polling stations, and the panicked training sessions they must have generated.

Another issue of great magnitude was subject to controversy: voter registration. The Constitution requires voter registration to be conducted under the supervision of what was to be CNE; that is, an independent body. Yet CNE could only be installed on 15 January 2007. In the absence of such an institution, STAE undertook the task with a generous grant from UNDP, under the assumption that updating an existing register was not covered under the above mentioned constitutional rule, and without very clear rules of procedure. Efforts have been made to gain access to the full file of regulations and procedures for registration of voters – but so far to no avail. Those few applications which could be submitted to CNE by early March were approved, only five weeks before the actual voting day.

The general image emerging from close contact with the reality on the ground in Timor is that of a fairly loose legal framework, subject to ad hoc changes in periods that would be inconceivable elsewhere, and controlled to a large extent by the government rather than CNE – who struggled bravely to lay claims to its fundamental role in assuring fair treatment of electoral matters.

Having reviewed here the main steps of the process of creation and institutionalisation of the electoral mechanisms in Timor Leste, and their major faults, a comment is perhaps allowable; it need not have been so contentious. Both the ruling party in Timor Leste and the international community, through its various branches, bear responsibility for these avoidable traps. May all of them be alert and willing to discuss ways to right things that were written wrong.

## An appraisal of the electoral legislation

The Timorese constitution requires electoral matters to be supervised by ‘an independent body’, and stipulates that its ‘competence, composition, organisation and working procedures are determined by law’ (Article 65.6).<sup>3</sup> This independent body had been created previously, in the bill that set the procedures for local government elections, as a temporary body to be formed each time an election was called and disbanded upon formal acceptance of its results. The government legislative initiative in 2006 adhered to this model which, in order to perform its duties, would have to rely heavily on the government’s own unit for electoral affairs – the STAE.

From the very early stages of public debate – namely during the visit of the UN’s NAM in the fall of 2005 – it became clear that a serious dividing line would appear, as the opposition parties voiced very critical views of the model. The balance of power between CNE and STAE seemed too much tilted in favour of STAE which, in turn, seemed to take to heart the differences of status between the two bodies, and considered itself exempt from the obligation to be neutral – or so it was perceived by large sectors of actors in the process. As a consequence, and realizing the mighty power entrusted to STAE, opposition parties claimed the need for this body to be moved from under the command of the government to become the technical and operational arm of the new independent body. In the end, as we have already seen, a compromise was achieved, to reproduce in Timor Leste the model which has been operating in Portugal for three decades: the co-existence of both an independent body (CNE in both cases) and a governmental unit, under the supervision of a senior minister (STAPE in Portugal, STAE in Timor Leste).

To guarantee real independence for the newly-created CNE, the designation of its members was entrusted by the law on electoral administration (*Lei n° 5/2006 de 28 de Dezembro – Lei dos Órgãos da Administração Eleitoral*) to a large number of institutions – some organs of the state administration, like the President of the Republic (3 members), the National Parliament (3), the Government (3), magistrates (3) and others of the so called ‘civil society’, such as the Catholic Church (1) and other religious denominations (1), women’s groups (1), with provisions for those who were supposed to appoint three members to include at least one woman amongst them (Article 5). Also, the term was fixed at six years, with a possible second term (Article 7.1). Additionally, it was granted the right to dispose of its own budget (Article 11.1). The underlying principle of independence was that the wide variation of institutions brought into the process of appointing the members of CNE

would create the conditions for no one group to be unduly benefited by its actions.

The actual nomination of the fifteen CNE members took place in the very beginning of 2007, and the inauguration on 15 January – to supervise the whole process of elections to be held within 90 days, starting nearly from scratch. Although some members of CNE had previous experience in the job, such was not the case for the majority.

The story told by the first six months in office is that of an epic battle for survival – understaffed, inadequately budgeted, entrusted with heavy duties and a shortage of time allowed for most of its duties, CNE appeared in the eyes of the electorate and the observers as one pole in a battle with STAE, each institution mud-slinging the other at every single step in any procedure of the electoral process. Regardless of the actual reason behind each of the contentions, the image of an ‘electoral civil war’ was the relevant, eye-catching feature of the relationship between those critical players in the Timorese electoral cycle. Much thought must already have been devoted to ways of ameliorating the situation and creating a more adequate frame for electoral administration.

Three questions remain unresolved:

1. *How to ensure the independence of CNE.* The model chosen last year places great emphasis on the selection procedures for the designated members, and avoids altogether any form of monitoring their activity and performance. As it stands now, CNE is virtually free from monitoring its own activities, and – for better or worse – only the President of the Republic may intervene in case of failure, under his power to oversee the regular functioning of the democratic institutions. Alternatively, a model based on extended powers placed in parliament and requiring a substantially qualified majority (two-thirds or even four-fifths of all deputies) could offer better guarantees of independence cum political responsibility.
2. *Budget.* One major issue pertaining to the independence of a body entrusted with a mandate, such as the one ascribed to CNE, is the budget. As a matter of fact, both the amount of the annual (or better: the multi-annual) budget for CNE and the way it is managed need to correspond with the purpose of this institution. The ways CNE has existed so far, and was called upon to perform its duties in the electoral cycle of 2007, are a far cry from assuring any real independence. CNE cannot claim decent levels of real independence if its budget remains under the control of the government, and worse, under the control of the same minister who manages STAE, as it did throughout the first electoral cycle.
3. *Relations with STAE.* It remains to be proven that the political convergence on the bi-polar model of electoral administration is more efficient and credible than the one proposed by the opposition par-

ties in 2006. Eventual duplication of tasks, frequent feuding over the respective roles and functions, and the actual cost of maintaining two units on a rather parallel level could perhaps be reduced if electoral administration would be consolidated under a single organic unit addressing the constitutional requirements of independence.

The current situation needs to be confronted with an alternative model, which would simplify the electoral administration by merging both CNE and STAE under a politically independent leadership, elected and accountable before a qualified majority in parliament, capable of negotiating its own budget and managing it without external interference, thus reducing costs and avoiding unnecessary confrontation and feuding. At a moment when the empowerment of the Timorese authorities in electoral affairs is clearly on the table, to clearly illustrate the 2007 experiences and to improve on their own capacities to perform elections with reduced international cooperation, it would seem wise to bring the actual experience of the past half year or so under close scrutiny. The electoral results have produced a major change in the positions all parties involved in the political arena occupy; it therefore seems likely that a new frame for electoral administration would emerge.

### **The electoral cycle of 2007 viewed with critical eyes**

The presidential election presented no problem in the way the legislation adopted the constitutional predicaments. There would be a first ballot open to all the registered candidates; if none could secure a 50 per cent plus one majority of votes, a run-off election should be held thirty days later, open only to the two highest vote-getters. The polling of 9 April returned a verdict calling for a second round between two candidates whose score on the first was sufficiently different from each other, and from the third, so as to diffuse any possible contention over legitimate tallying of the votes. Elections on 9 May returned a new President, who scored a landslide victory so that no conflict over the outcome was possible. CNE credited Ramos-Horta with 69.18 per cent of the national vote. Parliamentary elections would prove to be somewhat different.

Having examined earlier the way the polling proceeded, let us turn now to an analysis of the impact of the main contentious issues on the actual results of the parliamentary election. Three items will be considered: the adoption of the d'Hondt method; the creation of a threshold of votes to gain access to parliament; and the degree of representation achieved by the parties that succeeded in electing deputies.

**Table 5.1** *Results of the Parliamentary Elections, 2007*

	<i>Voters and votes</i>	<i>Percentage</i>	<i>Seats</i>	<i>Seats as % of total MPs</i>
Electors	529,198	100.00		
Total votes	426,210	80.50		
Blank votes	2,636	0.62		
Void votes	7,970	1.87		
UNDERTIM	13,247	3.19	2	3.1
CNRT	100,175	24.10	18	27.7
PR	4,408	1.06	0	0
PDRT	7,718	1.96	0	0
PDC	4,300	1.03	0	0
UDT	3,753	0.90	0	0
PMD	2,878	0.69	0	0
PD	46,946	11.30	8	12.3
PST	3,982	0.96	0	0
ASDT/PSD	85,358	15.73	11	16.9
FRETILIN	120,592	29.02	21	32.3
KOTA/PPT	13,294	3.20	2	3.1
PNT	10,057	2.42	0	0
PUN	18,896	4.66	3	4.6

*Source:* CNE

These figures allow for two immediate considerations.

First, the votes which failed to elect any member of the National Parliament total 47,702 (or to 37,096 if considering only the correctly expressed votes). That represents 11.19 per cent of all votes (or 8.9 per cent of the valid votes), and therefore a sharp increase in this index when compared with the results from 2001. In those elections, only 2.8 per cent of the electors voted for parties which did not win any seat (Feijó, 2006: 77).

Secondly, the three per cent threshold adopted is responsible for the elimination from parliament of two parties that would otherwise have won a seat (PDRT and PNT), thus excluding 17,775 electors from direct representation. The other parties failed to secure representation on grounds of their own poor performance.

Considering now the effects of the replacement of the conversion formula and the adoption of the d'Hondt method, the results allow for the following comments.

- The cost of each seat, expressed in the number of votes needed to acquire one seat, varies from the lowest figure of 5,565 votes for each seat won by CNRT, to a maximum of 6,624 for UNDERTIM. The largest party, FRETILIN, required 5,743. Curiously, the second party got 'cheaper' mandates. In a parliament with as few as 65 deputies, the disparity in this index is remarkably small, and does not produce noticeable distortions.

- The percentage of deputies gained through the application of this method is quite similar to the percentage of the vote, with gains for the largest two parties under four percentage points for each. Distortion in favour of the largest parties was, thus, relatively mild.
- Had the conversion method been the same that was used in the 2001 constitutional election, two parties (PDRT and PNT) would have won one seat each from FRETILIN and CNRT, the remaining distribution being unaltered.

As a general conclusion, the system performed according to the proportionality required by the Constitution, and the main factor responsible for distortion in this case was the inclusion of the threshold barrier, rather than the adoption of the d'Hondt method in lieu of the Hare quota previously used. In general, the effects of the electoral system management upon the distribution of seats were limited. The choice of a single national constituency and the largest number of deputies accepted in the Constitution did offset any tendency that the choice of the d'Hondt method might produce away from proportionality. However, the degree to which the new parliament represents the electorate as a whole has been reduced, as some parties were not able to secure enough votes. The total number of regular votes which produced no deputy is closer to the votes received by the fourth largest party, PD, with eight seats.

### **The gender issue**

A contentious issue in the debate leading up to the drafting of the electoral bills was the gender quota, favoured by the opposition parties under the leadership of a number of determined women. Previous electoral laws under the UN administration did not provide for such a quota, but affirmative action has been pursued in different fields of activity in Timor Leste, and electoral legislation would be no exception. In the first Parliament, directly issued from the Constituent Assembly elected in 2001, the proportion of women amounted to roughly one-quarter. There were 22 women voting on the Constitution out of a total 88 deputies. In 2006, convergence among parties led to a quota of one-quarter of women. In every party or coalition slate presented to the electors, one of every four candidates for election needs to be a woman, and the internal organisation of the list must respect this principle in the way it distributes the candidates. Also, in the case of replacement, gender quota must be maintained.

The parliament elected on June 30 has 65 deputies, 18 of whom are women (27.7 per cent), thus in keeping with previous elections. Two or-

ganisations that elected only two deputies (KOTA/PPT and UNDER-TIM) have no woman as their representative; FRETILIN has 5 of 21 (23.8 per cent); PD 2 of 8 (25 per cent); CNRT has 6 of 18 (33.3 per cent) and PUN 1 of 3 (33.3 per cent); the latter being the only party to present a candidate as its head of list. ASDT/PSD is tops in the group with 4 of 11 (36.4 per cent).

The inclusion of the gender quota did not yield substantial change in what was the previous practice. Nevertheless, it may have been a useful tool in the ongoing struggle to ascertain a role for women in public life in line with the experience from the first political cycle of the new country.

### **Vote counting: rules and practical issues**

For many observers of the 2007 national elections in Timor Leste, election days could be divided into two very separate parts – from early morning before the polls opened at 7: 00 a.m. to 4: 00 p.m., when they closed, all in accordance with the prescribed procedures and attracting a very high voter turnout; and from 4: 00 p.m. onwards, as the task of making good use of the votes cast was placed in the hands of the electoral administration, and the book of rules was set aside and replaced by good will and improvisation at the cost of reliability. This is the main reason explaining why all votes were counted in the few hours after the closing of the polling stations, but why it took almost a week in all cases for the results to be known with certainty. This reason, in turn, has its own reason.

Some observers have suggested that long delays and the fluctuation of explanations given by CNE in Dili in the days after polls had closed were mainly due to poor training of the staff assigned to the 705 stations. Training for more than 3,500 people was a detrimental factor in the performance of the electoral administration. However, the group exists and has already benefited from three consecutive elections for on-the-job training, learning from their own mistakes, and should be maintained and brought into the process of reviewing standard provisions.

My own experience suggests, however, that behind the poor training was the very nature of the process of drafting the rules to be obeyed – a highly political process disguised in ‘technical’ jargon. Two aspects are more salient. In the first place, some rules were adopted in Parliament few days before the actual voting, some of them after the official start of the electoral campaign. Delays in the formulation of the procedural rules made it impossible to organise nationwide information on those matters, let alone to train all the teams involved (for the record, may I recall here that several stations were reachable by helicopter alone, and

that several others could only be reached by the 70-odd horses and mules hired by the electoral administration, four-wheel-drive cars being prevented from reaching them).

Rules and procedures themselves should come under scrutiny. They seem to have as much bureaucratic zeal as lack of adherence to local reality. Let me recount here part of my own experience as an observer.

At 4: 00 p.m. local time on 9 April 2007, I was present as a registered observer in one polling station located in a sizeable neighbourhood outside of Dili, where a little over a thousand people had cast their votes. Rules required the room to be vacated by all but the electoral officers, the delegates from candidates, and accredited observers. This was not the case, however, since the presence of anxious voters prevented the officers from closing the door, and it remained open throughout the vote-counting period. The first task consisted of taking all ballot papers from the box, opening them, and placing them in a pile. This operation was designed to check that the number of votes found in the box matched the number of voters registered by the officers. In the end, one vote was missing – but no action was taken to correct this, given that this operation had taken two hours.

Next came the separation of ‘valid’, ‘null’ and ‘blank’ votes. At this stage, contested votes were also set aside. My initial understanding was that those votes would be scrutinised after the end of that procedural step, but they were never to be seen again. This procedure took another two hours. It was 8: 00 p.m. and pitch dark when the final separation and counting of the valid votes actually began under the light produced by four tiny gas lamps. This process, vividly commented upon by all present in the room, took another two hours. Midway through the counting, light started fading, and in the last half-hour or so some lamps were turned out in order to save them for the time ahead – only to be too little too late, for when electoral officers had to verify the distribution of votes (actually, figures would not match) and fill out the forms, they needed to use light produced either by cigarette lighters or mobile phones. Contested votes were not checked and discussed at the end of each stage, and some colleagues reported that in some cases the people present in the room took sort of an ad hoc vote as to in which pile they should go – and forfeited the right of appeal inscribed in the regulations. Little wonder that CNE would state publicly that a great proportion of forms gathered from polling stations contained ‘errors and inconsistencies’.

Ballot boxes and completed forms were then taken to district headquarters – but only to be forwarded to Dili without any sort of processing. This stage of the proceedings was totally wasted. So CNE was granted with 705 ballot boxes and as many forms filled out in who knows what circumstances. CNE’s efforts in making votes count were



at all levels remarkable. The whole process does appear though to have been conceived without the most superficial level of consideration for actual local conditions. Responsibility for this may be attributed to the Timorese authorities to the extent that they were active in choosing external help from the wide range of options available. It falls also on the shoulders of international institutions – namely those from the UN galaxy and the Portuguese bilateral advisers – whose familiarity with Timorese conditions ought to have been more efficiently used in the recruitment procedures and the definitions of adequate profiles for the jobs. As the rules and procedures stand, training may well be available for the next five years in massive doses, and nonetheless still prove to be the scapegoat for next round's problems.

### **A note on personal experience**

The short description of my own experience on 9 April 2007 and subsequent days should not be understood as an attempt to summarise the shortcomings of the electoral process, but rather as an illustrative narrative. To be sure, international organisations have deployed observation teams on the ground, some for an extensive period of time, and reports have been or are being produced. The UN, for its part, decided early in the process (actually, in the last quarter of 2006) to set up an Electoral Certification Team (ECT) which has been monitoring very closely the whole electoral cycle, from the drafting of regulations to the actual results of the voters' choices, including all institutional and organisational aspects. So far, seven detailed reports have been issued, using internationally accepted benchmarks, still pending one report of their appraisal of the legislative elections.

Reports of that kind are valuable tools in the hands of the Timorese leaders to perfect their electoral system. They should be discussed and, as much as required and judged adequate, used in changing the current situation. This is a task that belongs first and foremost to the Parlamento Nacional, as the electoral legal framework belongs, by virtue of the Constitution (Article 95.2.h), to the realm of its own prerogatives.

These reports focus very strongly on what has happened and the valuation of how the process was implemented. Perhaps they do not reflect enough on issues missing from regulation or not obviously present. The question of party and candidate financing – namely in the case of presidential candidates deemed to be running on their own merits rather than representing party lines – figures prominently on the list. An effort is also required to address these questions, and international comparisons are a sound way to proceed, if conducted under the per-

spective of adaptation rather than adoption of extant models. The opportunity is at hand.

## Notes

- 1 For a systematic discussion of the electoral process, step by step, see the reports of the United Nations Electoral Certification Team on the UNMIT website; for a critical appraisal of the same process, see the IFES website.
- 2 News from Timor as this paper was being finalized (November 2007) indicated that the new authorities have decided to establish a commission to elaborate a revision of the electoral laws, in line with the position of the then-Opposition, at the time of the approval of the legal framework under which these elections were fought.
- 3 This issue is further discussed in Feijó (2006: 61-84).