

# *The Law on Political Parties (No.3/2004) and the decision of the Timor Leste Court of Appeal in the case of Vitor da Costa and Others v FRETILIN (12 August 2006)*

*The election of Mari Alkatiri and Lu-Olo at the FRETILIN National Congress in May 2006.*

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## 1 Introduction

In *Vitor da Costa and Others v FRETILIN (12 August 2006)*<sup>2</sup>, the Court of Appeal of Timor Leste upheld the legality of the election by show of hands of Fransisco “Lu-Olo” Guterres and Mari Alkatiri to the FRETILIN leadership at the party Congress held on 17-19 May 2006 (**Congress**). In its decision the Court focused on the legislative intention behind the drafting of section 18(c) of the Law on Political Parties (No.3/2004) and unanimously held that the section permitted two forms of election by which political parties could elect their leadership. The first form of election is a vote by all members of a political party which has to be direct and secret. The second form of election is a vote by a representative assembly of members which by its nature is not direct so does not have to be necessarily secret.

In reaching its decision the Court of Appeal recognised the importance of having a secret ballot in elections for the holders of the leading organs of a political party in circumstances where it is done by all members of the party in a universal way. Where there is a direct vote by all members of a political party it is essential to have a secret ballot because it is the exercise in a direct form of the will of each member. A secret vote also minimises the risk of intimidation of party members and the manipulation of the electoral process.

In the case of an indirect vote of a representative assembly, the Court of Appeal held that it is not necessary to have a secret ballot. This is because the risks of not having a secret ballot are counterbalanced by the transparency and openness of a non-secret vote which makes the representative assembly accountable to its constituency. The transparency and accountability of a non-secret vote by a representative assembly is important because political party members have transferred their personal right to vote to delegates over whom they have no control.

The Court of Appeal’s finding that a vote by a representative assembly did not have to be secret had some important consequences for the election of the FRETILIN leadership at the Congress. Firstly, it meant that Congress did not violate section 18(c) of the Law on Political Parties when it passed by-laws which allowed the party

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<sup>2</sup> Court of Appeal case no. PP-Div/2006/01

leadership to be elected by show of hands. Secondly, the Congress did not violate section 18(c) in electing by show of hands Lu-Olo and Alkatiri to the FRETILIN leadership. Thirdly, the leadership of Lu-Olo and Alkatiri was not affected in its legitimacy because they were elected by a show of hands. Fourthly, there was no basis for the Court of Appeal to order FRETILIN to hold an extraordinary congress to elect a new leadership as demanded by the applicants and President Xanana Gusmao.

The Court of Appeal's unanimous decision represents a rebuff to critics of the vote who claimed that Alkatiri had acted undemocratically by changing the FRETILIN Statutes to allow voting by show of hands. It also represents a rebuff to President Xanana Gusmao who had attempted to exercise judicial power when he declared the vote illegal. In the writer's view, most of the criticism, particularly from the media, has failed to place enough emphasis on two important factors underpinning the election. The first is that Guterres and de Jesus, the purported challengers, failed to meet the minimum threshold requirements to contest the leadership. This raises the question as to whether there was a need to have an election at all given that there was only one candidate, Alkatiri and Lu-Olo, for each of the positions of the FRETILIN leadership. The second important factor is that the decision to elect the leadership by show of hands was made by the delegates to the Congress and not Alkatiri. The decision was made in accordance with the FRETILIN Statutes based on a proposal of more than 280 delegates of the Congress adopted by the latter. Above all it is a fact that there was no other candidate contesting the leadership. The failure to acknowledge that it was the delegates to the Congress and not Alkatiri who opted for the vote by show of hands is disrespectful to the delegates who acted within the legal parameters established by the FRETILIN Statutes and the Law on Political Parties.

This article seeks to explain in detail the factual circumstances surrounding the vote at the Congress, the Law on Political Parties and the decision of the Court of Appeal in *Vitor da Costa and Others v FRETILIN (12 August 2006)* which upheld the legality of the vote. An analysis of these topics is important because almost all of the criticism of the vote by show of hands has been based on a lack of understanding of the conduct of the Congress and the operation of the law in this area. The following key topics are covered by this article:

- 1 The conduct of the Congress and the election of Alkatiri and Lu-Olo to positions of Secretary General and President of FRETILIN;
- 2 The Law on Political Parties and the FRETILIN Statutes;
- 3 The recent Court of Appeal decision in *Vitor Da Costa v FRETILIN* which upheld the legality of the vote by show of hands;
- 4 The President's declaration of the illegality of the vote by show of hands; and
- 5 Whether there was a need to have an election at the Congress given that there was only one candidate.

## 2 The FRETILIN National Congress

The Congress took place on 17-19 May 2006 at the FRETILIN headquarters in Dili and is the highest deliberative organ of FRETILIN at the national level<sup>3</sup>. The Congress took place in a volatile environment, with several groups of armed rebels in the mountains around Dili, including Major Alfredo Reinado's armed group. By this stage, Reinado and another leader of the rebels, Lieutenant Gastao Salsinha, were demanding the resignation of Alkatiri as Prime Minister and the dismissal of Government by the President. Also, the Australian Government had on 16 May 2006 ordered Australian navy ships to the Timor Sea in case there was an escalation of violence following the Congress.

### Attendance of FRETILIN delegates

The Congress was well attended by the FRETILIN delegates with 577 of the 586 delegates (**Delegates**) attending. The breakdown of Delegates was as follows:

1. 464 delegates representing the thirteen districts of Timor Leste. The district delegates were voted in 2006 at the nationwide sub-district and district elections and accounted for approximately 80% of the total Delegates of FRETILIN. Their presence at the Congress ensured the participation and representativeness of the grassroots of FRETILIN at the Congress in accordance with section 19(2) of the Law on Political Parties<sup>4</sup>.
2. 116 delegates comprising each member of the FRETILIN Central Committee and representatives from affiliate organisations such as the women's group, OPMT, and various youth groups such as OJETIL, Lorico Aswain, Lemorai, OPJELATIL and Fitun.

It was the Delegates that had the power to elect the office bearers of the leading organs of FRETILIN. The leading organs of FRETILIN are the President, the Secretary General and the Central Committee<sup>5</sup>.

### Vote by show of hands

As stated above, one of the main functions of the Congress was to elect the holders of the leading organs of FRETILIN. Article 17 of the FRETILIN statutes sets out the voting options for party elections. Set out below is article 17:

#### Article 17

#### (Electoral system)

- 1 In all elections at all levels for positions for FRETILIN bodies, voting is personal, direct and secret;
- 2 It is permitted to opt for a vote by show of hands provided it is so proposed by 10% of delegates or members of party bodies present and if it is so approved by the majority;
- 3 The party bodies are elected by a majority of votes system;

<sup>3</sup> Section 19(2) of the Law on Political Parties (No. 3/2004)

<sup>4</sup> Section 19(2) of the Law on Political Parties (No. 3/2004)

<sup>5</sup> Under article 60(4) of the FRETILIN Statutes, the Congress is to elect the President, the Secretary General and the members of the Central Committee

- 4 By the majority of votes system, a candidate is elected if he/she obtains an absolute majority of votes from effective members of the body for which the vote is held;
- 5 If no candidate obtains an absolute majority of votes in the first round of voting, a second round of voting will be held for the candidates obtaining the highest first and second number of votes and whoever obtains more votes on the second round of voting will be elected.

Under article 17(1), all elections for positions for FRETILIN bodies are to be personal, direct and secret. However under article 17(2), it is possible to have a vote by show of hands if it is proposed by 10% of the delegates present and if it is approved by the majority of delegates present. The FRETILIN Statutes containing the option of voting by a show of hands under article 17(2) were approved by a majority of the Delegates on the second day of the Congress.

At the beginning of the Congress, 198 of the Delegates put forward a proposal to the chairperson of the Congress that a vote by show of hands be used to elect the President and Secretary General. During the course of the Congress, this number grew to 281 of the Delegates or almost 50% of the Delegates present at the Congress. A majority of Delegates then voted in favour of using a vote by show hands to elect the party leadership. Accordingly, the decision to opt for a vote by show of hands was in accordance with article 17(2) of the FRETILIN Statutes as it was proposed by more than 10% of the Delegates and approved by the majority.

It is important to note that at no stage during the Congress were Guterres and de Jesus nominated by the Delegates to challenge for the positions of Secretary General and President.

#### **Members vote for Secretary General and President as a leadership team**

Article 55(1) of the FRETILIN Statutes requires that the President and the Secretary General of the party be elected together on a single list at the National Congress, with the candidates in effect put forward as a leadership team for FRETILIN.

Candidates seeking nominations for the positions of President and the Secretary General must have their nomination subscribed by 20% of the Delegates of the Congress<sup>6</sup>. Under article 83(1) of the FRETILIN Statutes, the Secretary General is the FRETILIN candidate for the Prime Minister of Timor Leste and the President is the FRETILIN candidate for President of the National Parliament of Timor Leste.

The vote at the Congress was to elect Alkatiri and Lu-Olo together as a leadership team, and not individually. If anybody within FRETILIN wanted to contest Alkatiri for the position of Secretary General they would also have to nominate a person to contest Lu-Olo for the position of President of FRETILIN.

#### **The purported challenge of Juis Luis Guterres and Egidio de Jesus**

On 15 May 2006, the then Ambassador of Timor Leste to the US and the UN, Jose Luis Guterres, and the then State Secretary for Region III, Egidio de Jesus, held a media conference to declare their intention to contest the positions of Secretary General and President of FRETILIN. At the media conference, Guterres put himself forward as a

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<sup>6</sup> Article 55(2) of the FRETILIN Statutes

candidate for the position of Secretary General and de Jesus as a candidate for the position of President.

Under article 55(2) of the FRETILIN statutes, Guterres and de Jesus were required to obtain at least 20% of Delegates to propose their nominations for positions of Secretary General and President. With all due respect to Guterres and de Jesus, the pre-requisite to contesting the leadership is not overly onerous and in effect required the two to obtain the support of 117 Delegates at the Congress.

The intention of Guterres and de Jesus to contest the FRETILIN leadership never crystallised because they did not obtain the support of 117 Delegates required to be nominated for the leadership. In fact, this was made mathematically impossible because 515 of the 577 Delegates (89% of the Delegates) proposed that Alkatiri and Lu-Olo continue in their respective positions.

The fact that Guterres and de Jesus were never nominated by the Delegates was completely overlooked by the media. Instead the media condemned the vote by show of hands as being undemocratic<sup>7</sup> and Guterres withdrew his candidacy claiming that "to vote by show of hands is typical of how power was managed in the former Soviet Union"<sup>8</sup>. Also, the President in his national speech of 22 June 2006 stated that the election for the FRETILIN leadership contravened the Law on Political Parties and the Constitution. This was because the leadership was elected by a show of hands as opposed to a secret ballot. As a result, the President argued, the leadership of FRETILIN was illegitimate and effectively ordered FRETILIN to hold an extraordinary congress to elect a new leadership.

#### **Should the identity of the Delegates supporting a nomination be kept secret?**

It is critical that the identity of the Delegates supporting a nomination be identifiable and not be kept secret. This is necessary to ensure that no Delegate can put forward a fraudulent nomination. Also, the identity of the Delegates supporting a nomination should be known by the party members at large instead of having to rely on the opinion of one person, for example the Chairperson, to declare that a nomination is authentic<sup>9</sup>.

A possible compromise which could be taken by political parties is to keep the nominations confidential until the period for nomination ends. Once the nomination period ends, the details of the Delegates supporting the nominations can be made available to party members at large<sup>10</sup>.

### **3 Analysis of voting method and Law on Political Parties**

#### **The legal status of political parties Timor Leste**

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<sup>7</sup> See for example: Anne Barker, ABC Online, "PM- East Timor leadership ballot to be held tomorrow", 18 May 2006 at <http://www.abc.net.au/pm/content/2006/s1642112.htm>

<sup>8</sup> See Paul Toohey, The Bulletin, "Dili vote", 30 May 2006 at <http://bulletin.ninemsn.com.au/article.aspx?id=141130>

<sup>9</sup> N E Renton, Guide for Meetings and Organisations (2000), 7<sup>th</sup> edition, LBC Information Services, Sydney, p 153

<sup>10</sup> N E Renton, Guide for Meetings and Organisations (2000), 7<sup>th</sup> edition, LBC Information Services, Sydney, p 151

Political parties in Timor Leste are permanent in nature and have juridical as well as judicial capacity <sup>11</sup>. Accordingly, a political party has all the rights of a legal person, including the right to sue and be sued in its own name.

### **Background on Law on Political Parties**

The right to political participation is enshrined in the Constitution of the Democratic Republic of Timor Leste. Section 46(2) states that every citizen has the right to establish and to participate in political parties and section 46(3) states that the establishment and organisation of political parties shall be regulated by law.

The Law on Political Parties was enacted by the National Parliament which is empowered under section 95(2)(i) of the Constitution to make laws in relation to political parties and association. The preamble to the Law on Political Parties is clear in identifying the importance of political parties to democracy in Timor Leste. The preamble states that:

“Political parties galvanise and organise the participation of citizens in the political life of the country and the multiparty system presently is undoubtedly one of the major pillars of contemporary democracy. Within this context, it becomes necessary to define the rules that govern the activities of political parties so as to ensure their proper functioning”.

The Law on Political sets out the basic legal framework under which political parties are required to operate. The by-laws and the political programme of a political party must not contravene the Law on Political Parties or the Constitution.

### **By-laws and political programmes**

The Law on Political Parties empowers political parties to approve by-laws and political programmes to manage their internal affairs. Section 18 a) states that (emphasis added) “the political party objectives, the **internal structuring and the mode of functioning** must be contained in the respective by-laws and political programme”. The section clearly contemplates that the internal affairs of a party are to be regulated by by-laws and the political programme and not by Acts of Parliament. This interpretation of section 18(a) is supported by the following sections in the Law on Political Parties which contemplate the existence of by-laws to regulate the internal affairs of a political party:

- 1 Section 1 (Concept);
- 2 section 7(1) (Principle of Transparency);
- 3 section 17.1(b) (Specific Duties);
- 4 sections 18 (b), (d), (e) (Democratic Rules); and
- 5 section 20 (Internal Monitoring).

The by-laws and the political programme, as approved by a political party, are necessary to ensure the functioning of the political party in accordance with a set of laws. It is not appropriate for all laws regulating political parties to be contained in Acts of Parliament which need to be reviewed and passed through parliament. If this were

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<sup>11</sup> Sections 1(1) and 1(2) of the Law on Political Parties (Law No.3/2004)

the case, political parties would lose flexibility in managing their affairs or be unable to prepare laws suitable to their particular needs and circumstances.

### **FRETILIN has the power to pass by-laws and the political programme**

The Law on Political Parties permits a political party to pass by-laws and political programmes through two avenues. The first is at the National Conference (or Congress) which under section 19(3) has the exclusive competency to approve by-laws and the political programmes. The second is under section 18(b) which states that by-laws and the political programme can be approved by the totality of the party members or by the representatives organs of the political party.

The current FRETILIN Statutes and political programme were passed at the Congress held in May 2006 before the election of Alkatiri and Lu-Olo. The documents are subordinate legislation and have the force of law because the party has the power to pass these documents under an Act of Parliament. They are effectively internal party statutes.

### **Political party elections**

Section 18(c) of the Law on Political Parties set outs the basic law in relation to voting. The section states that:

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

The section clearly contemplates that the holders of leading organs can be elected either through a direct vote of all party members or by a vote of an assembly representing all the party members.

A direct vote allows voters to exercise their voting rights without the need to act through representatives (for example, delegates, agents or proxies) over whom they have no control. Proponents of direct voting will argue that it is the most effective form of voting as it does not involve the transfer of any voting rights to a representative. In a direct vote, the vote is one that has an immediate result from the manifestation of the will of the voter without the intervention of a representative or any alien will. The immediacy of the vote gives the voter the first and last word because the choice of the voter constitutes the ultimate scope of the entire electoral process.<sup>12</sup>

A vote by an assembly of representatives is different to a direct vote because in this case party members appoint or elect representatives to vote on their behalf. Accordingly, a vote by a representative assembly is, by its very nature, an indirect vote. In this situation the voters have effectively limited themselves to electing an “electoral college or grand electors” who will in turn choose candidates to the various organs of political power<sup>13</sup>. The distinction between a direct and an indirect vote is contemplated in section 46 of the Constitution which states that (emphasis added) “every citizen has the right to participate in the political life and in the public affairs of the country, either **directly or through democratically elected representatives**”.

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<sup>12</sup> J.J. Gomes Canotilho “Direito Constitucional e Teoria da Constituicao, Almedina edicao, p 300 cited in Court of Appeal decision in Vitor da Costa e Outros dated 12 August 2006

<sup>13</sup> J.J. Gomes Canotilho “Direito Constitucional e Teoria da Constituicao, Almedina edicao, p 300 cited in Court of Appeal decision in Vitor da Costa e Outros dated 12 August 2006

**Does section 18(c) require that a vote by a representative assembly be by secret ballot?**

On one interpretation of section 18(c), it is arguable that there is an unequivocal requirement that the leadership of a party be elected by a direct and secret vote, whether it is by a vote of all party members or by a vote of an assembly representing the party members. The need for secrecy supports contemporary democratic principles because it prevents the intimidation of voters and the manipulation of the electoral process.

Another interpretation of section 18(c) is that the requirement to have a direct and secret vote is only necessary where the leadership of a party is being elected by a vote of all party members. This is because use of the words "direct and secret" together imply that secrecy is only a requirement when there is a direct vote by all party members and not when there is an indirect vote by a representative assembly.

## 4 Court of Appeal decision of Vitor Da Costa and others v FRETILIN (12 August 2006)

**The orders sought by the applicants**

On 6 July 2006, Vitor Da Costa and others presented a petition to the Court of Appeal requesting the Court to consider the legality of the vote by show of hands at the Congress. The petition requested the Court to undertake the following:

- 1 Inquire into the legality of the election of the FRETILIN leadership at the Congress which was taken by a vote by show of hands in violation of the Law on Political Parties as well as the legitimacy of the present day leadership of Alkatiri and Lu-Olo;
- 2 Declare illegal article 17(2) of the FRETILIN Statutes which permits the election of the leadership of the party by a show of hands;
- 3 Order FRETILIN to hold an extraordinary congress to elect a new leadership in accordance with the principles laid down in the Law on Political Parties; and
- 4 For the court to immediately order FRETILIN to hold an extraordinary congress to elect a new leadership, given the present political crisis.

The applicants' challenge to the legality of the election by show of hands turned on two main legal points. The first was that article 17(2) of the FRETILIN statutes was a violation of article 17(1) of the same statute. This is because article 17(1) states that party elections for all FRETILIN bodies must be personal, direct and secret. As a result, the applicants' argued, it was not open for Congress to opt for the vote by show of hands under article 17(2). The second was that the vote by show of hands contravened section 18(c) of the Law on Political Parties which states that holders of leading organs of a political party can only be elected by means of a direct and secret vote of all party members or of an assembly representing them. According to the applicants, secrecy was a necessary pre-condition for all elections.

The applicants argued that it has been the practice of FRETILIN since 1974 to elect its leadership by direct and secret voting. They argued that the election by show of hands



did not give the Delegates the freedom to express their political belief as psychological, political and physical pressure could be brought to bear on the Delegates from those holding power. This pressure, the applicants argued, undermined the spirit of democracy enshrined in the Constitution and the law in Timor Leste. To support their argument, the applicants pointed to the fact that the Delegates of the Congress had all been elected by a direct and secret vote of FRETILIN's members. They also pointed to the President's speech of 22 June 2006 in which the President declared that the FRETILIN leadership was illegal because of the election by show of hands.

### **The response from FRETILIN**

In response to the applicants, FRETILIN argued that if parliament had intended to limit the method of electing a party's leadership to direct and secret elections, it would not have permitted elections through a representative assembly. This is because a vote by a representative assembly is by its nature an indirect vote. A distinction must be made between the methods to be used to elect the leadership of a party when there is, on the one hand, a vote by all members and where there is, on other hand, a vote by a representative assembly. Where the vote is to be taken by all members, the vote has to be direct and secret. However, if the vote is to be taken by a representative assembly, then the representative assembly should have the discretion to choose between secret and non-secret elections. According to FRETILIN, it is not necessary to impose secrecy in an indirect vote of a representative assembly because the risks associated with having a non-secret vote are outweighed by the openness and transparency of the non-secret vote. The openness and transparency of a non-secret vote makes the representative assembly accountable to the party members on whose behalf they are voting.

FRETILIN rejected the applicants' argument that it had been the practice of the party since 1974 to elect its leadership by a direct and secret vote. FRETILIN pointed out that at the national conference held in Sydney in 1998 the delegates opted for a vote by show of hands. FRETILIN also rejected the President's declaration that its leadership was illegal, arguing that any such declaration was a judicial function to be exercised by the Court of Appeal under the Law on Political Parties.

In relation to article 17 of the FRETILIN statutes, FRETILIN explained to the Court of Appeal that the reference to "personal, direct and secret vote" in article 17(1) was intended to apply to a vote where all members of the party were called upon to vote directly and personally. This occurred, for example, when the Delegates to the Congress were elected by a secret vote at the nationwide sub-district and district elections in 2006. The purpose of article 17(2), FRETILIN argued, was to give its Delegates the option of choosing what is arguably a more open, transparent and hence more democratic method of voting at the Congress.

### **The Court of Appeal's interpretation of section 18(c)**

The Court of Appeal was guided by three principles of interpretation of the law when it made its decision on whether the vote by show of hands by a representative assembly was permitted under section 18(c) of the Law on Political Parties. The first rule of interpretation was that interpretation should not be burnt on the letter of the law, but, along with the legislative thinking, be reconstituted from the text, having above all, regard for the whole legal system, the circumstances in which the law was drafted and the specific conditions at the time in which it is to be applied. The second rule of

interpretation is that the thinking of parliament cannot be taken into consideration by the interpreter which does not correspond in the minimum in the letter of law, even if it is imperfectly expressed. The third principle of interpretation is that in establishing the meaning and reach of law, the interpreter should assume that parliament established the most accurate solutions and was capable of expressing its thinking in adequate terms.

Guided by the above rules of interpretation, the Court of Appeal unanimously held that section 18(c) of the Law on Political Parties established two forms of election:

- 1 a vote of all members which had to be direct and secret; and
- 2 a vote of a representative assembly of members which did not have to be direct or secret.

According to the Court of Appeal, section 18(c) purposely required the direct vote of the members to be secret. This is because the words "direct and secret" were used together in relation to a vote of all members, but not in relation to a vote of a representative assembly. As a result, the Court was of the view that parliament did not seek to impose secrecy in relation to elections by a representative assembly.

The fact that section 18(c) did not require the vote by the representative assembly of members to be "direct and secret" had some important consequences. Firstly, it meant that the Congress did not violate section 18(c) when it passed by-laws which allowed a vote by show of hands to elect the President and Secretary General. Secondly, the FRETILIN Congress did not violate section 18(c) in electing by show of hands Lu-Olo for President and Alkatiri for Secretary General. Thirdly, the leadership of Lu-Olo and Alkatiri was not affected in its legitimacy because they were elected by a show of hands. Fourthly, there was no basis for the Court of Appeal to order FRETILIN to hold an extraordinary congress to elect a new leadership.

The Court of Appeal also held that article 17(2) of the FRETILIN statutes did not contravene article 17(1) of the same statutes. The Court stated that it was quite clear that article 17(2) was an exception to the general rule contained in article 17(1), quoting the dictum that "there is no rule without exception". According to the Court, in every statute, law document or rule document, there are often articles that contain both a provision establishing a rule and another provision establishing an exception. The fact that article 17(2) created an exception to article 17(1) did not do anything to advance the applicants' arguments in relation to the legality of the vote.

#### **Voting by show of hands is transparent and accountable**

The Court of Appeal disagreed with the applicants' assertion that a vote by show of hands did not allow Delegates the freedom to express their political beliefs. The Court recognised that there is some risk in voting by show of hands and that there is a need to impose secrecy in certain determined circumstances, such as when there is a direct vote by all members. However, in relation to a vote by show of hands by a representative assembly, the Court agreed with FRETILIN's assertion that a vote by show of hands is more transparent and accountable than voting by secret ballot. This is because a vote by show of hands by a representative assembly gives the party members a certain degree of control over the representatives that are acting on their behalf. It is this element control and accountability which is absent from a secret ballot.

The Court refused to take into account FRETILIN's previous history in relation to voting because there was no law or party statute in the past that regulated the party's practice in this regard. The Court also rejected the argument that the party leadership had to be elected by secret ballot because the Delegates to the Congress had been elected by a direct and secret ballot.

### **Parliament contemplated that there would be non-secret elections**

In the writer's view, if Parliament had intended that voting by an assembly be secret it would have drafted section 18(c) as follows:

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

The fact that the emphasised words were not included in respect of voting by an assembly, but were specifically included in respect of a direct vote of all party members indicates that Parliament had intended that voting by an assembly could take place by non-secret methods. This analysis is supported by the decision of the Court of Appeal in *Vitor Da Costa and others v FRETILIN*. Accordingly, it is highly arguable that, in addition to voting by show of hands, political parties are able to pass by-laws to adopt non-secret voting methods in relation to elections by a representative assembly. Provided that the by-laws do not contravene the Law on Political Parties or the Constitution, other voting options available to political parties are as follows:

- 1 voting by voices;
- 2 voting by acclamation;
- 3 vote of thanks;
- 4 straw vote; and
- 5 voting by division.

A discussion on the merits and lawfulness of alternative voting methods is beyond the scope of this paper. However, it is useful to comment that the appropriateness of a voting method is to be determined by a political party given its specific circumstances and also with regard to the Law on Political Parties and the Constitution. In the writer's view, given the challenges with illiteracy in Timor Leste, it is critical that political parties be given scope to adopt other forms of voting as not all political parties will have the appropriate resources to hold a ballot that is both secret and which allows its party members to participate fairly (the right to participate in political parties is enshrined under section 46(2) of the Constitution).

### **The President's declaration of illegality**

The decision of the Court of Appeal reinforced the principle of separation of powers enshrined in section 69 of the Constitution and the independence of the judiciary as established by sections 119 and 121(2) of the Constitution. This is because the Court rejected the President's declaration of the illegality of the vote by show of hands, stating that the declaration by the President could only have the value of opinion. It was the Court of the Appeal, not the President, that had the competence to make decisions in respect of the law.

## 5 Was it necessary to have an election?

The election of Alkatiri and Lu-Olo at the Congress raises some interesting issues which were not considered by the Court of Appeal in the decision of *Vitor Da Costa and others v FRETILIN*. The first is whether there was a need to have an election at all given that Guterres and De Jesus did not meet the requirements to contest.

Intuitively, the purpose of any election is to ensure that the most popular candidates, and in the case of the Congress, the most popular leadership package, wins. An important ingredient to any election is that there are more nominated candidates than there are vacancies. This ensures that there is an electoral contest and that voters are required to make a choice. It is highly arguable that there is no need to have an election if the number of nominated candidates is less than the available positions within the leading organs. In such a scenario, the candidates should automatically assume their positions.

A different view is that a political party is required to give effect to the intention of the party members by going through the motion of having an election despite there being less candidates than available positions. However, if the party is to have an election in these circumstances one would seriously have to question whether such an election would need to be secret. Apart from being a waste of resources, the election is not really an election in the traditional sense, but an affirmation giving effect to the intention of the party's members.

Another issue, related to the first, is to what extent would the conduct of the Congress have been illegal had the Court of Appeal ruled in favour of the applicants. One of the arguments of the applicants, and also of President Gusmao, was that an extraordinary congress should have been held by FRETILIN to elect a new leadership. However, unless the nomination process was also held to be illegal, it is hard to see what benefit the applicants would obtain from a retake of the vote because this would simply mean that the Delegates would be voting for the leadership package of Alkatiri and Lu-Olo and no one else.

The Law on Political Parties does not provide any real guidance as to how political parties are to deal with elections where there are less candidates than there are vacancies. This is certainly a gap in the law that may need to be addressed by National Parliament or perhaps by appropriate by-laws passed by a political party.

## 6 Conclusion

In the decision of *Vitor da Costa and Others v FRETILIN (12 August 2006)*, the Court of Appeal of Timor Leste upheld the legality of the election by show of hands of Lu-Olo and Alkatiri to the leadership of FRETILIN. In its decision the Court of Appeal recognised the importance of having secret ballots when electing holders of the leading organs of a political party where it is done by all members of the party in a universal way. Where there is a direct vote by all members of a political party it is essential to have a secret ballot because it minimises the risk of intimidation of party members and the manipulation of the electoral process. In the case of an election by a representative assembly, the Court stated that it was not necessary to have a secret ballot. This is because the risks of not having a secret ballot were counterbalanced by the

transparency and openness of a non-secret vote which made the representative assembly accountable to its constituency. The transparency and accountability of a non-secret vote in respect of an election by a representative assembly is important because in this case party members have transferred their personal right to vote to a delegate over whom they have no control.

The Court of Appeal's finding that a vote by a representative assembly did not have to be secret had some important consequences for the election of the FRETILIN leadership at the Congress. Firstly, it meant that Congress did not violate section 18(c) of the Law on Political Parties when it passed by-laws which allowed the party leadership to be elected by a show of hands. Secondly, the Congress did not violate section 18(c) in electing by show of hands Lu-Olo and Alkatiri to the FRETILIN leadership. Thirdly, the leadership of Lu-Olo and Alkatiri was not affected in its legitimacy because they were elected by show of hands. Fourthly, there was no basis for the Court of Appeal to order FRETILIN to hold an extraordinary congress to elect a new leadership as demanded by the applicants and President Xanana Gusmao.