



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA MONITORIZASAUN BA SISTEMA JUDISIÁRIU

Norms relating to the appointment of the President of the Court of Appeal and potential consequences of hurdles put in place by the National Parliament

Introduction

On 8 May 2017 the National Parliament (NP) approved Resolution No. 33/III on '*Rejecting the Ratification of the Appointment of Deolindo dos Santos as the President of the Court of Appeal*' and Resolution No. 34/III on '*Request for the Immediate Dismissal of the Prosecutor General, Jose Ximenes, on the grounds that he does not fulfil the objective requirements for the position*'.

JSMP will analyze this situation with reference to the legal framework of Timor-Leste, and practices that have been used to date. In addition, JSMP will also discuss potential consequences that could occur if no proper solution can be found for this situation, which will impact on the institutional relationships between the sovereign organs, important judicial decisions made previously, and will be particularly prejudicial to our justice system and democracy.

JSMP believes that the National Parliament should choose a path that respects standards of legality in relation to the appointment of the President of the Court of Appeal that have been adopted to date and the extension of the mandate of the Prosecutor General. This will avoid having any negative effect on the independent functioning of the State and functioning of the courts as sovereign organs.

This analysis and interpretation provides a reference on the current reality to help our State institutions engage in proper and thorough analysis before making any decisions and avoid creating confusion in society and leading to a lack of clarity about this situation. In particular, the objective is to ensure that the judicial institutions can carry out their functions without worrying about political pressure that can affect the integrity of the judicial system.

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Legal Analysis

Based on the judicial framework in Timor-Leste, it is clear that resolutions from the National Parliament do not have the same force of law. Resolutions are the same as political statements.

It is also clear that according to the law, only the President can appoint the President of the Court of Appeal, and this appointment does not require the ratification of the National Parliament. The legal basis for this authority comes from *Law No. 11/2004 Amending the Judicial Magistrates Statute*. This law amends *Law No. 8/2002 on the Judicial Magistrates Statute*. Law No. 11/2004 was approved by the National Parliament on 8 November 2004, and promulgated on 20 December 2004.

Article 110 of this law regulates the Court of Appeal. Article 110(1) and 110(4) states:

<i>Original in Portuguese</i>	<i>Translation in English</i>
(1) O Tribunal de Recurso exerce as competências próprias do Supremo Tribunal de Justiça até à sua entrada em funcionamento.	(1) The Court of Appeal shall exercise the competencies specifically falling under the purview of the Supreme Court of Justice until such a time as the latter becomes operational.
.....
(4) O Presidente do Tribunal de Recurso é nomeado pelo Presidente da República de entre os juízes desse tribunal, para um mandato de 4 anos renovável.	(4) The President of the Court of Appeal shall be appointed by the President of the Republic from among the judges of the said Court, for a four-year, renewable term of office.

These articles do not establish provisions and norms regarding the need for ratification by the National Parliament and do not define the position of the President of the Supreme Court of Justice, but actually regulate the *delegation* of the exercise of competencies of the Supreme Court of Justice.

Article 95(3) (a) and Article 124 (3) of the Timor-Leste Constitution on the Supreme Court of Justice do not apply to this situation, because Timor-Leste does not yet have a Supreme Court of Justice. The Court of Appeal exercises some of the competencies that the Supreme Court of Justice normally would exercise, pursuant to the aforementioned *Law No. 8/2002 on the Judicial Magistrates Statute*. The Court of Appeal is not mentioned specifically in the Timor-Leste Constitution.

The appointment of the Prosecutor General is regulated in *Law No. 14/2005 on the Statute of the Public Prosecution Service*. Article 12 of the aforementioned Law states that the Prosecutor General is appointed by the President, and can be appointed once more. This law does not refer to ratification by the National Parliament.

History regarding the appointment of the President of the Court of Appeal

Based on JSMP's observations, since Claudio Ximenes was appointed as the first President of the Court of Appeal up until now, the process of appointing the President of the Court of Appeal has been characterized by great confusion and much inconsistency. However it is clear that most appointments have not been subject to ratification by the National Parliament. Claudio Ximenes was appointed three times in a row and his third appointment was ratified by the National Parliament. After Claudio Ximenes, no other appointment was subject to ratification by the National Parliament.

The table below presents a list of appointments to the position of President of the Court of Appeal:

Cláudio Ximenes, first (10 March 2003) ¹ , was appointed by the President Xanana Gusmão.	Not ratified by the National Parliament
Cláudio Ximenes, second (12 June 2007) ² , appointed by the President José Ramos Horta.	Not ratified by the National Parliament
Cláudio Ximenes, third (4 October 2011) ³ , appointed by the President José Ramos Horta, but he then submitted a request to resign on 27 February 2014.	Ratified by the National Parliament
Guilhermino da Silva, (3 March 2014) ⁴ , appointed by the President Taur Matan Ruak.	Not ratified by the National Parliament
Deolindo dos Santos, (28 April 2017), ⁵ appointed by the President Taur Matan Ruak.	Not ratified by the National Parliament

Potential consequences that could arise from this situation

¹ Presidential Decree No. 06/2003, 10 March 2003

² Presidential Decree No. 57/2007, 8 June 2007

³ Presidential Decree No. 43/2011, 29 June 2011

⁴ Presidential Decree No. 11/2014, 28 February 2011

⁵ Presidential Decree No. 22/2017, 28 February 2017

The current situation has created serious doubt and confusion about the legitimacy of the position of the President of the Court of Appeal, as well as our entire system of democracy.

Due to the complexity and potential huge risk of confusion in relation to this process and our system, JSMP has tried to outline the potential impact if this conflict is not properly resolved. These Potential impacts are:

1. There will be problems with the Parliamentary Elections because there will be no President of the Court of Appeal to perform functions relating to electoral competencies, such as the preparatory process, registration of political parties, verification, accepting the political party candidates list, legislation and announcement of the parliamentary election results;
2. Could lead to judicial insecurity in relation to decisions originating from the Court of Appeal between 2014 - 2017, including results from the recent Presidential Elections and the legitimacy of the President-Elected, because the verification process, validation/legalization and announcement of the results of the election came from the previous President of the Court of Appeal, Guilhermino da Silva, who was not ratified by the National Parliament.
3. This confusion could have serious negative implications for the integrity of the judicial system and will affect the independence of the Court of Appeal as well as the relationships between our sovereign organs.

Recommendation

Resolutions from the National Parliament have created a huge amount of confusion regarding the process of appointing the President of the Court of Appeal, and considering the need to ensure the regular functioning of democratic institutions, in particular the judicial institutions, JSMP hereby recommends:

1. For all political parties to respect the legality of the appointment of the President of the Court of Appeal and extension of the mandate of the Prosecutor General;
2. The President and the National Parliament should engage in intensive dialogue and communication at a political level as well as a technical level to find the best way to resolve this situation, especially to ensure the stable functioning of judicial institutions and to address the legality of the electoral process;
3. JSMP requests for political leaders to carry out careful and thorough analysis before making any decisions;
4. Request for the relevant entities, including the Legislative Reform and Justice Commission, to propose harmonization of the provisions that are in conflict with each

other, in relation to the process of appointment and the functions of the relevant institutions.

5. Request for the National Parliament to amend Law No. 11/2004 on Amending the Statute of Judicial Magistrates to ensure consistency with the Constitution and to avoid confusion in the process of appointing the President of the Court of Appeal in the future.