

APPEALS COURT

(unofficial translation from Portuguese)

Case no. 02/2003 (Check on constitutionality)

The President of the Democratic Republic of East Timor requested from the Appeals Court, under articles 149 and 164 of the Republic's Constitution, the anticipatory review of the constitutionality of National Parliament Decree No. 15/I/1, of 6 May 2003, concerning "Immigration and Asylum", which had been sent to him for promulgation, because he had doubts about the conformity with the Constitution of some of the stipulations of that diploma, namely those of articles 11 and 12.

Having been notified that it should express itself regarding the request, the National Parliament replied in the terms that can be read in the document's pages 53 to 58, defending that the diploma in question does not contain any unconstitutionality.

The duty is to evaluate and decide.

The Constitution of the Democratic Republic of East Timor, which defines it as a State of democratic rule (article 1, no. 1), establishes that the State must subordinate itself to the Constitution and to the laws (article 2, no. 1), and that the laws and other acts of State are only valid if they are in compliance with the Constitution (article 2, no. 3).

According to the Constitution, the courts are ruling bodies with competence to administer justice in name of the people (article 118, no. 1), and they are independent and are subject only to the Constitution and to the Law (article 119); and the jurisdiction lies exclusively with the judges (article 121, no. 1), who, in performing that function, are independent and owe obedience only to the Constitution, to the Law and to their own conscience (article 121, no. 2).

The Constitution also establishes that it is the competence of the Supreme Court of Justice, in the domain of legal and constitutional matters, to provide an anticipatory verification of the constitutionality and the legality of the statutes and referenda (article 126, no. 1-b), and that "The President of the Republic may request the Supreme Court of Justice to undertake an anticipatory review of the constitutionality of any statute submitted to him or her for promulgation." (article 149, no. 1).

Finally, the Constitution establishes that "Until such a time as the Supreme Court of Justice is established and starts its functions all powers conferred to it by the Constitution shall be exercised by the highest judicial instance of the judicial organization existing in East Timor." (article 164, no. 2).

Because the new judicial system is not yet established, it remains in function in East Timor the judicial system established by UNTAET's Regulation no. 2000/11, of 6 March, amended by UNTAET Regulations nos. 2000/14, of 10 May, 2001/18, of July 21, and 2001/25, of September 14, in which the highest judicial body is the Appeals Court (articles 4 and 14).

According to the regulation in article 164, no. 2, of the Constitution, the Law no. 8/2002 of 20 September establishes that up until the start of functions of the Supreme Court of Justice, the Appeals Court exercises the competences that belong to the Supreme Court (article 110, no.1).

Of the cited constitutional and legal dispositions results that

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- a) In requesting from the Appeals Court the anticipatory verification of the constitutionality of National Parliament Decree no. 15/I/1, the President of the Republic is only “abiding by and enforcing the Constitution” as he swore to do when he took on [presidential] functions (article 77, no. 3);
- b) The Appeals Court has competence to perform the anticipatory check on constitutionality of the legal diplomas sent to the President of the Republic for promulgation;
- c) To the judges of the Appeals Court, exclusively belongs the duty to perform anticipatory verification of constitutionality of the laws and, in exercising that function of interpretation and application of the Constitution, they are independent and must obey only the Constitution itself and their own conscience;
- d) The process of anticipatory verification of constitutionality of the diplomas sent for promulgation is the appropriate mechanism to guarantee that the laws which may be published will be in accord with the Constitution and the values enshrined in it;
- e) The process of anticipatory control of constitutionality of the diplomas sent for promulgation, started by the President of the Republic, belongs to the normal and healthy functioning of the institutions of the State of democratic rule.

Entering now in the object of this process, we see that National Parliament Decree no. 15/I/1, of 6 May of 2003, sent to the President of Republic for promulgation contains two articles in relation to which constitutional questions clearly arise.

These articles read as follows:

*“Article 11:
Restrictions*

1. Foreigners cannot:

- a) *Own the majority of stock in a national mass media company, regardless of its legal nature, unless expressly authorized by the Government. This rule does not apply to written media directed exclusively to foreign resident communities for the purpose of disseminating foreign culture, literature or language;*
- b) *Own a majority of shares in a national commercial airline unless provided for by specific legislation;*
- c) *Participate in the administration of a trade union or professional organization, or in agencies that monitor paid activities;*
- d) *Provide religious assistance to the Defense and Security Forces, except in cases of absolute need and urgency;*
- e) *Engage in activities of a political nature or be involved, directly or indirectly, in affairs of State;*
- f) *Organize or participate in demonstrations, parades, rallies and meetings of a political nature;*
- g) *Organize, create or maintain associations or other entities of a political nature, even if solely to disseminate and publicize ideas, programs or platforms of political parties from their country of origin among co-nationals;*

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h) *Influence co-nationals or others to follow ideas, programs or platforms of political parties or factions from any country.*

2. *The restrictions stated in the previous number do not include:*

a) *Activities of a strictly academic nature.*

b) *Foreign technical assistance contracted by State institutions.*

c) *Activities of liberation movements recognized by the Government, in fulfillment of the Constitutional duty of solidarity.*

d) *Bi and multilateral assistance programs aimed at training and strengthening of democratic institutions that are constitutional and regulated by law.”*

*“Article 12:
National Interest*

The Ministry of the Interior by determination of the Prime Minister can, on good legal grounds, prohibit foreigners from holding conferences, congresses, artistic or cultural exhibitions whenever these may jeopardize relevant interests or international relations of the State.”

These two articles address matters which are part of the rights, freedoms and fundamental guarantees enshrined in Part II of the Constitution of the Republic. The fundamental rights are those “rights or active legal positions of persons, whether considered to be individuals or institutions”, which “include the basic values of society”, enshrined in the Constitution (note 1).

Of the list of fundamental rights enshrined in Part II of the Constitution there are some which are attributed exclusively to Timorese citizens, and there are others which are attributed to all people, whether they are Timorese citizens, foreigners, or without a nationality. To provide examples, those in articles 16, no. 1 (Universality and equality), 20 (Senior Citizens), 21 (Disabled citizens), 22 (East Timorese citizens overseas), 46 (Right to political participation), 48 (Right to petition), 50 (Right to work), 54, no. 4 (Right to private property), 56 (Social security and assistance), are fundamental rights exclusive of Timorese citizens.

Fundamental rights attributed to all people independently of their citizenship include, among others, those in articles 40 (Freedom of expression and information), 42 (Freedom of holding meetings and demonstrations), 43 (Freedom of demonstrating), 52 (Trade union freedom), 54, nos. 1 and 3 (Right to private property).

The Constitution itself allows without much effort to understand the distinction between the two groups of fundamental rights, through the usage of expressions such as “the citizen”, “the citizens”, “all citizens”, when it refers to those [rights] attributed only to national citizens.

To the general principles concerning the rights, freedoms and fundamental guarantees, belong those addressed by article 23 of the Constitution, about the interpretation of fundamental rights, which states: “*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*”, and those addressed by article 24, about restrictive laws, which states: “*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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The restriction has to do with the right itself and translates into a compression or amputation of abilities which *a priori* would have been included in that right [note 2].

There can only be place for a constitutionally valid restriction, under the terms of article 24 of the Constitution, when (a) the restriction in question protects a norm which protects a right, freedom or guarantee, (b) there is a constitutional authorization for that restriction, (c) the restriction corresponds to the necessity of safeguarding other rights or interests that are constitutionally protected, (d) the restrictive law observes the requirements of generality and abstraction.

Additionally, the restrictive law itself is subject to requirements that restrict it: (a) to be a formally and organically constitutional law; (b) there to have been granted express authorization from the constitution for the establishment of the restriction through that law; (c) to have a general and abstract character; (d) to not have retroactive effects; (e) for the restrictions established in the law to be necessary for safeguarding other rights or interests that are constitutionally protected; (f) to not diminish the extension and scope of the essential content of the constitutional stipulations.

In the Timorese legal-constitutional decision-making, the legislator does not have a general authorization for restricting rights, liberties and guarantees. The constitution explicitly identifies which rights may fall under the scope of a restrictive law.

The requirement of an express authorization of any restriction is intended to force the legislator to always look in the constitutional norms for the concrete basis for the exercising of his/her competence of restricting rights, liberties and guarantees, and is also aimed at creating juridical safety for the citizens who, in that way, will be able to count on there not existing measures restrictive of any rights except for those who were expressly considered by the constitutional norms as being subject to reservation of restrictive laws. Finally, it is also aimed at making the legislator aware of the meaning and scope of the limitation of rights, liberties and guarantees, and to constitute a norm of prohibition, because under the reservation made for a restrictive law one may not include any other rights [to be restricted] except for those authorized by the Constitution [note 3].

Now turning to articles 11 and 12 of the National Parliament Decree no. 15/I/1, we see that points a), b), c), f) and g) of article 11, as well as article 12 of National Parliament Decree no. 15/I/1, clearly violate the Constitution of the Democratic Republic of East Timor.

Through points a), b), c), f), and g) of article 11, that Decree restricts to foreigners fundamental rights that the Constitution recognizes for all people, whether they be national citizens, foreign citizens, or people without a nationality. The Constitution does not allow any restriction of those rights to those who are not Timorese citizens, and for that reason the restriction introduced by that diploma is not authorized by the Constitution. Additionally, one does not see, nor does the legislator explain, that there might be other rights or constitutionally-protected interests that are aimed to be safeguarded by this restriction or that this restriction is necessary for that effect.

There is, therefore, violation of the Constitutional norm in article 24 in the part where it only allows restriction of rights, liberties and guarantees in “those cases clearly provided for by the

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Constitution” and where it also demands that the restriction be intended to “safeguard other constitutionally protected rights or interests”.

Through article 12 of that Decree, it is restricted for foreigners to exercise fundamental rights which the Constitution recognizes for all people, whether they be national citizens, foreign citizens, or people without a nationality. The legislator tries to justify this restriction by the need to safeguard “relevant interests or the international relations of the State”.

But also on this point the Constitution does not allow any restriction of those rights from those who are not Timorese citizens, and for that reason the restriction introduced by that diploma is not authorized by the Constitution and, consequently, is in violation of the constitutional norm in article 24 in the part where it only allows restriction of rights, liberties and guarantees in “those cases clearly provided for by the Constitution”.

Let us see now in detail each one of the norms mentioned in the National Parliament Decree no. 15/I/1.

Point a) of article 11 of National Parliament Decree no. 15/I/1, in prohibiting to the foreigner to own the majority of the capital of a mass media, regardless of its legal nature, unless expressly authorized by the Government, as well as point b) of that article, in prohibiting the foreigner of owning the majority of the capital in a national commercial airline, unless provided for in specific legislation, violate the content of article 54, no. 1, of the Constitution, which establishes that “every individual has the right to private property”.

In effect, this norm clearly acknowledges that any individual, whether it may be a Timorese citizen, a foreign citizen, or a person without a nationality, has the right to own private property -- a recognition which is confirmed in no. 4 of the same article when it restricts the right to private property of land to national citizens only.

This restriction, which is not contemplated in the Constitution, disagrees with the principle contained in no. 2 of article 24 of Basic Law, in the part where it does not allow the restriction of rights, liberties and guarantees except for those cases expressly contemplated by the Constitution, as well as the principle contained in no. 2 of the same article, according to which “restrictive laws may not reduce the extent and scope of the essential contents of constitutional provisions”.

Point c) of article 11 of National Parliament Decree no. 15/I/1, in prohibiting foreigners from participating in the administration or social organs of a union or professional association, violates the norm in article 52 of the Constitution which grants the worker the right of organizing himself or herself into unions and professional associations for the defense of his or her rights and interests, and establishes that trade union freedom includes, namely, the freedom of establishment, freedom of membership and freedom of organization and internal regulation. The freedom of constitution, freedom of membership and freedom of organization and internal regulation of workers unions and professional associations are put into question when, at the forefront, the law prevents members of such organizations from choosing, if they wish to do so, foreign workers for their administration or social organs.

This same point violates also the norm in article 43, no. 1, of the Constitution, which guarantees to all the freedom of association, insofar that it is not intended to promote violence and is in accordance with the law.

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In prohibiting foreigners from participating in the auditing of remunerated activities, point c) of article 11 of National Parliament Decree no. 15/I/1 violates the principle of equality enshrined in articles 16, no. 2, and 23 of the Constitution, as well as article 23, no. 1, of the Universal Declaration of Human Rights.

These restrictions are counter to the principle in no. 1 of article 24 of Fundamental Law, in the part where it does not allow the restriction of rights, liberties and guarantees except for cases explicitly contemplated in the Constitution.

Point f) of article 11 of National Parliament Decree no. 15/I/1, in prohibiting foreigners from organizing or participating in demonstrations, parades, rallies and meetings of a political nature, violates the norm in article 43 [actually 42, translator] which guarantees to all the freedom to assemble peacefully and unarmed, without the need for prior authorization, and recognizes to all the right to demonstrate in accordance with the law.

This restriction is also counter to the principle in no. 1 of article 24 of Fundamental Law, in the part where it does not allow the restriction of rights, liberties and guarantees except for those cases explicitly contemplated in the Constitution.

Point g) of article 11 of National Parliament Decree no. 15/I/1, in prohibiting foreigners from organizing, creating, or maintaining membership in any entity of a political nature, even if its ends are solely to disseminate and publicize ideas, programs or platforms of political parties from their country of origin among co-nationals,” violates the norm in article 43, no. 1, of the Constitution which guarantees to all the freedom of association, insofar as it is not intended to promote violence and is in accordance with the law.

This restriction is also counter to the principle in no. 1 of article 24 of Fundamental Law, in the part where it does not allow the restriction of rights, liberties and guarantees except for those cases explicitly provided for by the Constitution.

Article 12 of National Parliament Decree no. 15/I/1, in allowing that the Minister of the Interior may, under orders from the Prime Minister, prohibit, on good legal grounds, foreigners from holding conferences, congresses, artistic or cultural exhibitions, whenever these events may jeopardize relevant interests or the international relations of the State, violates the right to freedom of expression which article 40, nos. 1 and 2, of the Constitution guarantees for all people, excluding any type of censorship, as well as the right to the freedom of peaceful and unarmed gathering, without need for prior authorization, and the right of demonstration, granted in its article 42.

The right to freedom of expression may not be limited by any kind of censorship and the right to freedom of peaceful and unarmed gathering does not require prior authorization. And therefore it is lacking here, from the onset, the constitutional authorization to legitimize the restriction of these rights.

Additionally, the right to demonstrate, even when subject to the terms of the law, cannot see its content diminished in its extension and scope, in the way of this article 12, because that violates what is stipulated in article 24, no. 2, of the Constitution, which establishes that “restrictive laws may not reduce the extent and scope of the essential contents of constitutional provisions”.

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In what refers to the other legal stipulations contained in National Parliament Decree no. 15/I/1, namely points e) and h) of no. 1, and no. 2, of its article 11, one does not see that they violate the Constitution.

From the above exposition, the judges of the Appeals Court deliberate

a) To rule unconstitutional the points a) and b) of article 11 of National Parliament Decree no. 15/I/1, of 6 May of 2003, for violating articles 24, no. 1, and 54, no. 1, of the Constitution of the Democratic Republic of East Timor;

b) To rule unconstitutional point c) of article 11 of National Parliament Decree no. 15/I/1, of 6 May of 2003, for violating articles 24, no. 1, and 52, of the Constitution of the Democratic Republic of East Timor;

c) To rule unconstitutional point f) of article 11 of National Parliament Decree no. 15/I/1, of 6 May of 2003, for violating articles 24, no. 1, and 42, of the Constitution of the Democratic Republic of East Timor;

d) To rule unconstitutional point g) of article 11 of National Parliament Decree no. 15/I/1, of 6 May of 2003, for violating articles 24, no. 1, and 43, no. 1, of the Constitution of the Democratic Republic of East Timor;

e) To rule unconstitutional article 12 of National Parliament Decree no. 15/I/1, of 6 May of 2003, for violating articles 24, 40, nos. 1 and 2, and 42, of the Constitution of the Democratic Republic of East Timor.

Take note and register.

Dili, 30 of June of 2003

The Judges of the Appeals Court

(signature)

Claudio de Jesus Ximenes

(signature)

Jose Maria Calvario Antunes

(signature)

Jacinta Correia da Costa

Footnotes:

(1) see Jorge Miranda, "Manual do Direito Constitucional" [Manual of Constitutional Law], volume IV, Coimbra Editora, 2000, page 7 and following pages.

(2) see Jorge Miranda, "Manual do Direito Constitucional" [Manual of Constitutional Law], volume IV, Coimbra Editora, 2000, page 329 and following pages.

(3) see J.J. Gomes Canotilho, "Direito Constitucional e Teoria de Constituição" [Constitutional Law and Constitutional Theory], Almedina, 4th Edition, pages 440 to 443.