

## COURT OF APPEAL

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To: His Excellency the President of the Republic

From: Cláudio Ximenes- President of the Court of Appeal

Ref. No. 40/2003

Date: 30.06.2003

Subject: File No. 02/2003 (Review of Constitutionality)  
Notice

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This is to notify your Excellency of the full contents of the ruling issued in the above-referenced file, whose copy is attached hereto, on the request for anticipatory review of the constitutionality of the National Parliament Decree-Law No. 15/I/1<sup>a</sup>, of 6.05.2003, on Immigration and Asylum.

With best regards.

## **File No. 02/2003 (Review of Constitutionality)**

Pursuant to sections 149 and 164 of the Constitution of the Republic, the President of the Democratic Republic of Timor-Leste has requested the Court of Appeal to undertake an anticipatory review of the constitutionality of the National Parliament Decree Law No. 15/I/1<sup>a</sup>, of 6 May 2003, on “Immigration and Asylum”, which has been submitted to him for promulgation, as he has doubts about the compliance of some provisions of that statute with the Constitution, notably those in sections 11 and 12.

Upon notification to express its opinion on such request, the National Parliament replied in the terms set out in the document that constitutes pp. 53 to 58 of the file, maintaining that the statute suffers no defects of a constitutional nature.

It behooves us to review and decide.

The Constitution of the Democratic Republic of Timor-Leste, which defines it as a democratic State based on the rule of law (section 1.1), provides that the State shall be subject to the Constitution and to the law (section 2.1), and that the validity of the laws and other statutes of the State depends upon their compliance with the Constitution (section 2.3).

Under the Constitution, the courts are organs of sovereignty with competencies to administer justice in the name of the people (section 118.1), and are independent and subject only to the Constitution and the law (section 119); and jurisdiction lies exclusively with the judges (section 121.1), who, in performing their functions, are independent and owe obedience only to the Constitution, the law and to their own conscience (section 121.2).

The Constitution also establishes that it is incumbent upon the Supreme Court of Justice, on legal and constitutional matters, to provide an anticipatory verification of the legality and constitutionality of statutes (section 126.1(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” (section 149.1).

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” (section 164.2).

Inasmuch as a new judicial system is not yet in place, the judicial system established by UNTAET Regulation No. 2000/11, of 6 March, as amended by UNTAET Regulations 2000/14, of 10 May, 2001/18, of 21 July, and 2001/25, of 14 September, remains operational, in which the highest judicial instance is the Court of Appeal (sections 4 and 14);

By adhering to the norm contained in Section 164(2) of the Constitution, Law No. 8/2002, of 20 September, establishes that 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 (Section 110(1)).

The following arises out of the constitutional and legal provisions cited above:

- a) In requesting the Court of Appeal to undertake an anticipatory review of the constitutionality of Decree-Law No. 15/I/1<sup>a</sup> from the National Parliament, the President of the Republic is just “abiding by and enforcing the Constitution” as he swore he would do when he assumed functions (section 77(3));
- b) The Court of Appeal has competencies to undertake an anticipatory review of the constitutionality of statutes submitted to the President of Republic for promulgation;
- c) Jurisdiction over anticipatory review of the constitutionality of laws lies exclusively with the judges of the Court of Appeal and, in performing that function of interpretation and application of the Constitution, judges are

independent and owe obedience only to the Constitution itself and to their own conscience;

- d) The process of anticipatory review of the unconstitutionality of statutes submitted for promulgation is the proper and adequate mechanism for ensuring that laws to be published are consistent with the Constitution and the values enshrined therein;
- e) The process of the anticipatory review of the constitutionality of statutes submitted for promulgation, initiated by His Excellency the President of the Republic, falls within the normal and healthy functioning of the institutions of a democratic State based on the rule of law.

Going into the object of this file, we notice that Decree-Law No. 15/I/1<sup>a</sup>, of 6 May 2003, from the National Parliament, submitted to the President of the Republic for promulgation has two articles in relation to which two issues of constitutionality arise.

These articles read as follows:

“ Article 11  
Restrictions

1. It shall be forbidden for a foreigner to:

- (a) Own the majority of stock in a national generalist media company, regardless of its legal nature, unless expressly authorized by the Government. Exception to the present rule is the written press, directed exclusively at foreign resident communities with the purpose of disseminating foreign culture, literature or language;
- (b) Own the majority of shares in a domestic commercial airline unless otherwise stipulated in specific legislation;
- (c) Participate in the administration or social organs of a union, corporation or professional organization, or in agencies that monitor paid activities;
- (d) Provide religious assistance to the Defence and Security Forces, except in case of extreme need or emergency;

- (e) Engage in activities of a political nature or interfere, directly or indirectly, in State affairs;
  - (f) Organize or participate in demonstrations, processions, rallies and meetings of a political nature;
  - (g) Organize, create or maintain an association or any entity which is political in nature, even if solely to disseminate or broadcast, exclusively among co-nationals, ideas, programmes or strategies of political parties from their country of origin;
  - (h) Pressurise co-nationals or third parties to adhere to ideas, programmes or strategies of political parties or factions from any country;
2. The restrictions provided for in the preceding item do not cover:
- (a) Activities of a strictly academic nature;
  - (b) Foreign technical assistance hired by State institutions;
  - (c) Activities by liberation movements recognised by the Government, in the fulfilment of the duty of solidarity as set forth in the Constitution;
  - (d) Bilateral or multilateral assistance programmes entered into with the aim of building capacities and strengthening the democratic institutions provided for in the Constitution and regulated by law.”

## Article 12

### National Interest

The Minister of the Interior can, as may be determined by the Prime Minister, prohibit, in a well-founded instruction, foreigners from organising conferences, congresses, artistic or cultural demonstrations, whenever these may undermine the State’s relevant interests or international relations.”

The two articles deal with matters that are part of the fundamental rights, freedoms and guarantees enshrined in Part II of the Constitution of the Republic. Fundamental rights are those “active legal rights or positions of people as such, considered individually or institutionally”, “which embody the basic values of society”, as set forth in the Constitution<sup>1</sup>.

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<sup>1</sup> See Jorge Miranda, *Manual do Direito Constitucional*, volume IV, Coimbra Editora, 2000, p. 7 and ss.

Among the set of the fundamental rights enshrined in Part II of the Constitution are those that are granted exclusively to Timorese citizens and the ones that are granted to all people, be they Timorese citizens, foreigners or stateless persons. For instance, fundamental rights exclusive to Timorese citizens are those enunciated in sections 16(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(4) (Right to ownership of land), 56 (Social security and assistance).

Fundamental rights granted to all people regardless of their citizenship, *inter alia*, are those in sections 40 (Freedom of speech and information), 42 (Freedom to assemble and demonstrate), 43 (Freedom of association), 52 (Trade union freedom), 54(1) to (3) (Right to private property).

The Constitution itself allows one to understand, without great effort, the distinction between the two groups of fundamental rights, through the use of expressions such as “the citizen”, “the citizens”, “every citizen” when alluding to those that are granted to national citizens alone.

Among the general principles relating to fundamental rights, freedoms and guarantees are those set out in section 23 of the Constitution, on 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 in section 24, on 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”.

A restriction has to do with the right in itself and is translated into the compression or suppression of faculties that would, *a priori*, be contained therein.<sup>2</sup>

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<sup>2</sup> See Jorge Miranda, *manual do Direito Constitucional*, volume IV, Coimbra Editora, 2000, p. 329 and ss.

A constitutionally valid restriction can only occur, under the terms of section 24 of the Constitution, where (a) the restriction is in the field of the protection of a norm that provides for a right, liberty or guarantee, (b) there is a constitutional authorisation for such restriction, (c) the restriction is related to the need of safeguarding other constitutionally protected rights or interests, (d) the restrictive law is in compliance with the generality and abstraction requirements.

On the other hand, a restrictive law itself is subject to requirements that restrict it: (a) it shall be a formally and organically constitutional law; (b) there shall be an express authorisation in the Constitution for the establishment of such restriction through the law; (c) a restrictive law shall have a general and abstract nature; (d) a restrictive law shall not have a retroactive effect; (e) and the restrictions established by a restrictive law shall be required to safeguard other constitutionally protected rights or interests; (f) and a restrictive law may not reduce the extent and scope of the essential contents of constitutional provisions.

In the Timorese legal and constitutional order a lawmaker does not have a general authorisation to restrict rights, freedoms and guarantees. The Constitution singles out those rights that may be covered by a restrictive law.

The requirement for an express authorisation to restrict rights, freedoms and guarantees is meant to compel the lawmaker to always seek in the constitutional norms solid grounds for the exercise of his or her competency to restrict rights, freedoms and guarantees, and is also aimed at creating legal security among the citizens, who can thus rely on the inexistence of measures to restrict rights, except the cases expressly considered by the constitutional norms as subject to reservations of a restrictive law. Finally, it also aims to make the lawmaker aware of the meaning and scope of the limitation of rights, freedoms and guarantees, and to constitute a prohibitive norm, for under the reservation of a restrictive law no other rights can be covered except those authorised by the Constitution<sup>3</sup>.

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<sup>3</sup> See J.J. Gomes Canotilho, *Direito Constitucional e Teoria de Constituição*, Almedina, 4ª edição, pp. 440 to 443.

In dwelling upon articles 11 and 12 of Decree-Law No. 15/I/1<sup>a</sup> from the National Parliament, we notice that paragraphs (a), (b), (c), (f) and (g) of article 11, as well as article 12 of that Decree-Law, clearly impinge upon the Constitution of the Democratic Republic of Timor-Leste.

Through paragraphs (a), (b), (c), (f) and (g) of article 11, that Decree restricts foreigners the fundamental rights that the Constitution confers upon all people, be they national citizens, foreigners or stateless persons. The Constitution does not allow for any restriction of those rights on foreign nationals. Hence, the restriction imposed by this statute is not authorized by the Constitution. On the other hand, one cannot see, nor does the lawmaker explain, the existence of other constitutionally protected rights or interests that are sought to be safeguarded through this restriction or that this restriction is required to that effect.

Therefore, there is a violation of the constitutional norms of section 24 in the clause that only allows for a restriction of rights, freedoms and guarantees in “cases clearly provided for by the Constitution” and also establishes that such restriction should be “in order to safeguard other constitutionally protected rights or interests”.

Through section 12 of that Decree-Law, foreigners are restricted the fundamental rights that the Constitution confers upon every individual, be he or she a national citizen, a foreigner or a stateless person. The lawmaker attempts to justify such restriction through the need to safeguard “the State’s relevant interests or international relations”.

But here too the Constitution does not allow for any restriction of those rights on non-timorese nationals. Thus, the restriction imposed by that statute is not authorised by the Constitution and, as a result, it conflicts with the constitutional norm of section 24 in the clause that only allows for a restriction of rights, freedoms and guarantees in “cases clearly provided for by the Constitution”.

Let’s now look in detail at each of the above-mentioned norms of Decree-Law No. 15/I/1<sup>a</sup> from the National Parliament.

Paragraph (a) of article 11 of Decree-Law No. 15/I/1<sup>a</sup> from the National Parliament, by prohibiting foreigners from owning the majority of stock in a national generalist media company, regardless of its legal nature, unless expressly authorised by the Government, as well as paragraph (b) of that same article, by prohibiting foreigners from owning the majority of shares in a domestic commercial airline, unless otherwise stipulated in specific legislation, impinge upon the provisions of section 54(1) of the Constitution, which establishes that “every individual has the right to private property”.

In reality, this norm clearly recognises that every individual, be he or she a national citizen, a foreigner or a stateless person, has the right to private property- a recognition that is confirmed in subsection 4 of the same section by limiting the right to ownership of land to national citizens.

This restriction that is not provided for by the Constitution thwarts the principle set forth in section 24(1) of the Fundamental Law, in the clause where it does not allow for a restriction of rights, freedoms and guarantees, except in cases clearly provided for by the Constitution, as well as the one set forth in subsection 2 of that same section, whereby “restrictive laws may not reduce the extent and scope of the essential contents of constitutional provisions”.

Paragraph (c) of article 11 of Decree-Law No. 15/I/1<sup>a</sup> from the National Parliament, by prohibiting foreigners from participating in the administration or in the social organs of a union or professional association, impinges upon the norm of section 52 of the Constitution that confers upon every worker the right to form or join trade unions and professional associations in defence of his or her rights or interests, and that establishes that trade union freedom is sub-divided, namely, into freedom of establishment, freedom of membership and freedom of organisation and internal regulation. Freedom of establishment, freedom of membership and freedom of organisation and internal regulation of trade unions are at stake when the law clearly prevents members of those organisations from choosing, if they so wish, foreign workers for their respective administration or social organs.

The same paragraph also impinges upon section 43(1) of the Constitution whereby everyone is guaranteed freedom of association, provided that the association is not intended to promote violence and is in accordance with the law.

In prohibiting foreigners from participating in entities that monitor paid activities, paragraph (c) of article 11 of Decree-Law No. 15/I/1<sup>a</sup> from the National Parliament impinges upon the principle of equality enshrined in sections 16(2) and 23 of the Constitution, as well as article 23(1) of the Universal Declaration of Human Rights.

These restrictions thwart the principle contained in section 24(1) of the Fundamental Law, in the clause where it does not allow for a restriction of rights, freedoms and guarantees, except in cases clearly provided for by the Constitution.

In prohibiting foreigners from organising or participating in demonstrations, processions, rallies and meetings of a political nature, paragraph (f) of article 11 of Decree-Law No. 15/I/1<sup>a</sup> from the National Parliament impinges upon the norm of section 43 whereby everyone is guaranteed freedom to assemble peacefully and unarmed, and without a need for prior authorisation, and whereby everyone is guaranteed the right to demonstrate in accordance with the law.

This restriction also thwarts the principle contained in section 24(1) of the Fundamental Law, in the clause where it does not allow for a restriction of rights, freedoms and guarantees, except in cases clearly provided for by the Constitution.

In prohibiting foreigners from organising, creating or maintaining an association or any other entity which is political in nature, even if solely to disseminate or broadcast, exclusively among co-nationals, ideas, programmes or strategies of political parties from their country of origin, paragraph (g) of article 11 of Decree-Law No. 15/I/1<sup>a</sup> from the National Parliament impinges upon the norm of section 43(1) of the Constitution whereby everyone is guaranteed freedom of association, provided that the association is not intended to promote violence and is in accordance with the law.

This restriction also thwarts the principle contained in section 24(1) of the Fundamental, in the clause where it does not allow for a restriction of rights, freedoms and guarantees, except in cases clearly provided for by the Constitution.

In allowing the Minister of the Interior, as may be determined by the Prime Minister, to prohibit foreigners, in a well-founded instruction, from organising conferences, congresses, artistic or cultural demonstrations, whenever these may undermine the State's relevant interests or international relations, article 12 of Decree-Law No. 15/I/1<sup>a</sup> from the National Parliament impinges upon the right to freedom of speech that every person is guaranteed by section 40(1) and (2) of the Constitution, excluding any sort of censorship, as well as the right to freedom to assemble peacefully and unarmed, without a need for prior authorisation, and the right to demonstrate, as set forth in section 42.

The right to freedom of speech shall not be limited by any sort of censorship and the right to freedom to assemble peacefully and unarmed does not require prior authorisation. Hence, a constitutional authorisation to legitimise the restriction of these rights is clearly non-existent here.

On the other hand, the right to demonstrate, even though subject to the terms of the law, cannot see its contents reduced in respect of its extent and scope, as is the case with article 12 that conflicts with the provision of section 24(2) of the Constitution, which establishes that "restrictive laws may not reduce the extent and scope of the essential contents of constitutional provisions".

With regard to other legal provisions set out in Decree-Law No. 15/I/1<sup>a</sup> from the National Parliament, notably paragraphs (e) and (h) of the said article 11(1) and (2), nothing is considered to be in breach of the Constitution.

Based on the exposition above, the judges of the Court of Appeal decide

- (a) To declare the unconstitutionality of paragraphs (a) and (b) of article 11 of Decree-Law No. 15/I/1<sup>a</sup>, of 6 May 2003, from the National Parliament, as they breach sections 24(1) and 54(1) of the Constitution of the Democratic Republic of Timor-Leste;

- (b) To declare the unconstitutionality of paragraph (c) of section 11 of the National Parliament Decree-Law No. 15/I/1<sup>a</sup>, of 6 May 2003, as it breaches sections 24(1) and 52 of the Constitution of the Democratic Republic of Timor-Leste;
- (c) To declare the unconstitutionality of paragraph (f) of article 11 of Decree-Law No. 15/I/1<sup>a</sup>, of 6 May 2003, from the National Parliament, as it breaches sections 24(1) and 42 of the Constitution of the Democratic Republic of Timor-Leste;
- (d) To declare the unconstitutionality of paragraph (g) of article 11 of Decree-Law No. 15/I/1<sup>a</sup>, of 6 May 2003, from the National Parliament, as it breaches sections 24(1) and 43(1) of the Constitution of the Democratic Republic of Timor-Leste;
- (e) To declare the unconstitutionality of article 12 of Decree-Law No. 15/I/1<sup>a</sup>, of 6 May 2003, from the National Parliament, as it breaches sections 24, 40(1)-(2), and 42 of the Constitution of the Democratic Republic of Timor-Leste.

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- To be notified and recorded.

Dili, 30 June 2003

The Judges of the Court of Appeal

Cláudio de Jesus Ximenes

[Signed]

José Maria Calvário Antunes

[Signed]

Jacinta Correia da Costa

[Signed]

