



THE CONSTITUTIONALITY OF EAST TIMOR'S IMMIGRATION AND ASYLUM LAW

JSMP'S ANALYSIS OF THE COURT OF APPEAL DECISION

The Court of Appeal of the Democratic Republic of East Timor (RDTL) has recently issued a decision on the constitutionality of certain provisions of the Draft Immigration and Asylum Law (Draft Immigration Law) which was passed by the Parliament on 30 April 2003.

The decision was delivered to the President, and also released to the public, on 30 June 2003. Because the issues of immigration and asylum are critically important to the future of Timor Leste as a mature and democratic nation, the draft law and the Court of Appeal's decision have generated considerable public interest and debate.

With this report, JSMP aims to provide the community with information on the Court's decision (which was written and delivered in Portuguese) as well as an analysis of its legal implications.

Background to the Decision

In accordance with the RDTL Constitution, sections 126(1)(b) and 149(1), the President is empowered to refer a Draft Law presented to him by Parliament for signature, to the Court of Appeal for an opinion as to the proposed law's constitutionality¹. In this case, the President referred only two articles, namely Articles 11 (restrictions on freedom of expression, association and assembly) and 12 (restrictions warranted on the grounds of national interest) of the Draft Immigration Law to the Court. It is not clear to JSMP the reasoning behind the President's choice to refer only a part of the Draft Law, and not the entire document.

¹ Indeed in terms of the Constitution, this jurisdiction should be exercised by the Supreme Court of Justice in terms of section 164.2. However, the Supreme Court of Justice has not yet been established in RDTL. Until such time as this occurs, UNTAET Regulations prescribe that the Court of Appeal is the highest court and may exercise its functions. See UNTAET Regulation 2000/11, as amended by UNTAET Regulation 2000/14, 2001/18 and 2001/25. See also Law 8/2002

In its decision², the Court of Appeal first identified the basis of their jurisdiction³. It ascertained that its task was to provide a preliminary opinion on the constitutionality of the entire Draft Immigration Law as presented to them by the President. The Court then went further, and stated that the purpose of this power is, in reality, a mechanism to guarantee that future laws would be in accordance with the Constitution. It is important at this stage to explain the differing mandate of the Court in terms of its functions under Section 126(1)(a) of the Constitution, and that under Section 126(1)(b): Section 126(1)(a) relates to the ability of parties affected by a particular law *which has already been enacted* to challenge the constitutionality of that law, and of its application, by bringing an appeal on constitutional grounds before the Court. In this case, the task of the Court was to provide a preliminary analysis of the constitutionality of the Draft Law *prior to its enactment* in accordance with the mechanism for referral by the President, as provided in section 126(1)(b).

In this instance, the President is believed to have referred the Draft Law to the Court of Appeal for advice upon its constitutionality largely as a consequence of widespread public debate about the draft law, and widespread concern that the Immigration Law, if enacted, would conflict with many basic human rights guarantees, the civil and political rights of non-citizens, and Timor Leste's international obligations towards refugees and asylum seekers under the Refugee Convention and other human rights instruments.

Relevant Human Rights Guarantees

The Court, in its decision, considered that some aspects of Articles 11 and 12 of the Draft Law raised constitutional challenges to Chapter II - the Fundamental Rights, Duties, Liberties and Guarantees - of the RDTL Constitution.

The constitutional rights and guarantees considered by the Court in this case were:

- Freedom of speech and information (Section 40);
- Freedom to assemble and demonstrate (Section 42)
- Right not to be subjected to discrimination (Section 16) ;
- Right to form and join trade unions (Section 52)
- Right to private property (Section 54)

² *Tribunal de Recurso, Proc No. 02/03 (controle de constitucionalidade).*

³ Same as above, p. 1-4.

Rationale for the Decision

The Court in its decision adopted the following approach:

First, it analysed the different rights of the Constitution, looking at how they were worded. In this the Court aimed at establishing who were the bearers of the rights in Chapter II of the Constitution. In making this analysis, the Court differentiated between the rights that are an entitlement of everyone, which includes foreigners, and are designated in the Constitution as universal rights by uses of expressions like ‘everyone’, ‘every individual’, ‘anyone’, et cetera. Examples of these rights, as provided by the Court, are freedom of speech and information (section 40), freedom to assemble and demonstrate (section 42), and the right to private property (section 54(1) - (3)), amongst others.

These universal rights were contrasted with other rights under Chapter II of the Constitution that are afforded only to citizens of Timor Leste, such as the right to political participation (section 46), rights of disabled citizens (section 21), and the right to social security and assistance (section 56).

After establishing to which classes of persons the rights are applicable, i.e. citizens or non-citizens, the Court turned its consideration to whether the restrictions and limitations on the activities of non-citizens prescribed in the Draft law might be validly instituted by reference to the power found in Sections 24 and 25 of the Constitution to impose restrictions upon peoples’ rights and freedoms in certain circumstances⁴.

In its decision, the Court found that any right guaranteed in the Constitution could only lawfully be restricted provided they were done so in accordance with the provisions of the Constitutional provisions authorising such restrictions, namely Section 24 and 25⁵ (see footnotes). In this case, the Court found that the restrictions imposed by Articles 11 and 12 of the Draft Immigration law went beyond the scope of those permitted by Section 24, and consequently found them to be unconstitutional.⁶

In its reasoning the Court expressed the view that the legislature does not have a blanket authorization to restrict individual rights guaranteed by the Constitution – but rather, it may only exercise its powers in accordance with the Constitution⁷.

⁴ Section 24- (Restrictive laws) of the Constitution 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.*

⁵ Section 25 of the Constitution provides for the suspension of certain rights, liberties and guarantees in circumstances where a State of Emergency has been declared.

⁶ The Court did not give detailed consideration to the power in Section 25 relating to suspension of rights during a State of Emergency as it is clearly not applicable to the present circumstances.

⁷ Ibid note 2, p. 8.

The Court then analysed each of the provisions of Articles 11 and 12 of the Draft Law taking into account the principles and interpretation highlighted above:

- **Article 11(a):**

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. 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;

The Court of Appeal found this provision would be in conflict with the right to own private property which is an entitlement for every person in terms of article 54(1) of the Constitution.

The Court went to consider that no justifications were put forward for limiting this right in terms of article 24.

- **Article 11(c):**

Foreigners cannot:

c) Participate in the administration of a union, corporation or professional organization, or in agencies that monitor paid activities;

In the opinion of the Court this provision would violate the labour rights guaranteed by the Constitution. Specifically, the Court found that the provision would limit the right of workers to join and participate in trade unions or associations as provided by Section 52 of the Constitution. In addition, it was also found to be in conflict with Section 43(1) which provides that every person has the right to peaceful association. Finally, the Court found that it would also amount in discrimination as its application would result in the violation of the equality principle found in Section 16(2) and Section 23 of the Constitution. The Court found no basis upon which the restrictions and limitations could be rendered lawful on the grounds provided by Section 24 of the Constitution.

- **Article 11(e):**

Foreigners cannot:

e) Engage in activities of a political nature or participate, directly or indirectly, in affairs of State;

The Court was of the opinion that this article of the Immigration Law did not challenge the Constitution, and hence is lawful.

- **Article 11(f):**

Immigrants cannot:

f) Organize or participate in demonstrations, processions, rallies and meetings of a political nature;

This provision of the Immigration Law was also considered by the Court as being unconstitutional as it limits the right of everyone to freedom of assembly and association.

Again, the Court was not able to identify any basis on which Section 24 of the Constitution could be employed to lawfully curtail or restrict these rights and freedoms in the manner proposed by the Draft law.

- **Article 11(g):**

Foreigners cannot:

g) Organize, create or maintain an association or any other entity which is political in nature, even if solely to disseminate and broadcast political ideas, programs or political action in the immigrant's country of origin and among co-nationals;

As before, the Court found Article 11(g) of the Immigration Law would be likely to infringe the right to peaceful assembly and association guaranteed by Section 43 of the Constitution. No further comment, or explanation was given by the Court as to the grounds upon which they had reached this conclusion. Similarly, and as before, no grounds were found under Section 24 to justify the limitations upon this right proposed by the draft legislation.

- **Article 11(h):**

Foreigners cannot:

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

The Court did not make any comment other than to state their view that they did not consider this provision of the Immigration Law to be unconstitutional.

- **Article 12:**

The Ministry of the Interior can, on good legal grounds, prohibit immigrants from organizing conferences, congresses, artistic or cultural demonstrations, whenever these may threaten the Nation's relevant interests or international relations.

The limitation of Article 12 restricting the right of foreigners or non-citizens to organize and participate in conferences and other cultural and educational events was considered by the Court to conflict with the right to freedom of expression and freedom of assembly (Section 40(1) and (2) and Section 43, respectively of the Constitution) as these rights are universal rights, extended to everyone, and not limited solely to citizens of the Timor Leste. Again, no grounds were found under Section 24 which would render the restrictions envisioned by the draft legislation to be constitutional.

JSMP COMMENT

The Court of Appeal's decision on the draft Immigration Law is important, as it is the first time in the history of this nation that the Court has been asked to pronounce on the constitutionality of a draft law. JSMP is encouraged by the manner in which the Court undertook this task, and believes the decision in this instance showed the Court is capable of upholding the Constitution and its guarantees in a professional way.

The decision showed that the Court is aware of the principles included in the Constitution of RDTL and can professionally apply the human rights that are so important to the strengthening of democracy and democratic institutions in RDTL.

Whilst JSMP considers the Court of Appeal's decision in this instance to be positive, JSMP would stress that our recent report critiquing the draft Immigration and Asylum Law (and prepared for the purpose of the Court of Appeal review) also concludes that many more provisions, in addition to Articles 11 and 12 of the draft law also challenge fundamental liberties, including rights to refuge and asylum, guaranteed in the Timorese Constitution, the Refugee Convention and several other human rights instruments to which RDTL is a signatory.⁸ Further discussion of these issues can be found in JSMP's Report on the *Immigration and Asylum Law (Short Version)* which is available on JSMP's website (www.jsmp.minihub.org).

Whilst JSMP welcomes the Court of Appeal's decision in this case, it is disappointed by the fact that only part of the law was referred to the Court for consideration. For the reasons outlined in our report, JSMP considers that far more than just Sections 11 and 12 require further amendment. The limited nature of the referral in this case, has in effect, therefore, prevented the Court from making a more detailed analysis of the complete legislation, and particularly, the human rights implications of this as it relates to refugees and asylum seekers.

Finally, JSMP would commend Parliament to carefully consider the findings of the Court of Appeal in this instance. In JSMP's view the Immigration and Asylum law proposed by the Government needs substantial revision, and to this end JSMP's Immigration and Asylum Law Report provides a number of recommendations for amendment to various provisions of the law. JSMP believes that the referral of this legislation back to the Parliament offers the legislature an opportunity to revisit these issues, and to ensure that the legislation ultimately passed by the Parliament is one which is truly compliant with the spirit and intent of international human rights law.

⁸ Judicial System Monitoring Programme, Report on the Immigration and Asylum Law (Short Version), Dili, East Timor, June 2003. The report is accessible in JSMP website: <http://www.jsmp.minihub.org>.