

COURT OF APPEAL

File No. 01/2005

(Review of constitutionality)

The judges of the Court of Appeal identified hereunder have agreed as follows:

1. His Excellency the President of the Republic has requested the Court of Appeal, under articles 149 and 164 of the Constitution of the Republic, to undertake an anticipatory review of the constitutionality of articles 5, 6, 7 and subarticle 15.2 of the Parliamentary Bill on “Freedom of Assembly and Demonstration” (hereinafter referred to as the Bill), which has been sent to him for promulgation.

Having been notified to express its opinion on the request, the National Parliament has replied in the terms set out in the pages 14 to 21 of the case file, holding that the bill under scrutiny suffers no defects of a constitutional nature.

It behoves the judges to consider the matter and issue a decision.

2. The Panel of Judges of the Court of Appeal fully subscribes to the exposition contained in the request regarding the normative framework that should form the basis for undertaking a review of the material constitutionality of the provisions in question, namely (a) that the Constitution of Timor-Leste has adopted the general principles of international law into the internal legal system of Timor-Leste and that the provisions of international treaties and agreements, duly approved by the competent authorities of Timor-Leste, including the international human rights law, take precedence over national legislation,¹; (b) that the understanding of the fundamental rights in the Timorese constitutional order has a supra-positive dimension and includes the international interpretive standards. In this sense, the admissibility of a restriction on rights by legislative means requires respect for the international standard of the “principle of proportionality” arising out of the principle of

¹ Art. 9 of the Constitution

the rule of law²; of the general regime on restrictive laws³; and of the specific regime on the state of siege and the state of emergency⁴; (c) that the list of fundamental rights also includes, in addition to those mentioned in the Constitution as such, “any other rights provided for by the law”, and (d) that it shall be interpreted in accordance with the Universal Declaration of Human Rights.⁵

On the issues raised in the request for an anticipatory review of constitutionality

3. His Excellency the President of the Republic calls into question the constitutionality of subarticles 1 and 2 of article 5 of the Bill, which impose a total and definitive prohibition of assembly and demonstration “within less than 100 metres from offices of organs of sovereignty (...) and impose the same distance in regard to the protection of military installations, diplomatic missions, seaports, airports, and water and fuel depots”.

On the other hand, His Excellency the President of the Republic proposes that the law establish a case-by-case definition of the minimal distance for protection in the phase when a prior notice is being reviewed by authorities in order to accommodate both the rights and interests at stake.

In our view, the 100-metre distance imposed by the Bill is not disproportionate, particularly in the sense that it does not impinge upon the effective exercise of the right to assemble or demonstrate enshrined in subsection 42.1 of the Constitution.

On the contrary, the determination of a single distance is the best solution to accommodate the interests at stake: the right to freely assemble or demonstrate, on the one hand, and, on the other, the security of officeholders of the organs of sovereignty and the facilities housing these organs, diplomatic and consular missions, offices of political parties, and certain installations and services of paramount importance.

² Art. 1 of the Constitution

³ Art. 24 of the Constitution

⁴ Art. 25 of the Constitution

⁵ Art. 23 of the Constitution

The determination of a reasonable minimal distance, as is the case, not only facilitates the work by those authorities responsible for security, but also enables the demonstrators themselves to know beforehand and without difficulty the distance they must observe and to better prepare for the demonstration.

Leaving to authorities the task of defining, on a case-by-case basis, the minimal distance might generate greater uncertainty, resulting from subjectivity, if not arbitrariness, on the part of those doing the job. In practice, this might also lead more easily to a restriction on the exercise of that right, especially if one takes into account the fact that the person determining it might be naturally tempted to increase the distance in those cases where he or she dislikes the demonstration being staged. To that extent, such a solution also entails the added risk of confrontation between demonstrators and authorities over the very decision regarding the determination of the minimal distance; and this risk ceases to exist if such a distance is determined beforehand.

Therefore, subarticles 1 and 2 of article 5 of the Bill suffer no defects of a constitutional nature.

6. The constitutionality of subarticle 3 of article 5 of the Bill, which prohibits “demonstrations with the intent of questioning the constitutional order, thus undermining the democratically elected organs and institutions”, is called into question in the request.

Here we assent to the statement that the concept of “constitutional order” encompasses values so diverse as the protection of life, national defence or the rule of proportionality of the electoral system, and that the possibility of questioning “the democratically elected organs and institutions”, by peaceful means, is inherent in democracy.

While in some cases the “constitutional order” being questioned by a demonstration undermines fundamental values such as those justifying the state of siege or the state of

emergency provided for in subsection 25.2 of the Constitution, and therefore, cannot be allowed by the State, there are other cases where this is not so. The prohibition of demonstration would be covered by section 24 of the Constitution in the first case, but not in the second case. In its broad formulation, the provision that prohibits demonstrations that undermine the “constitutional order” runs counter to subsection 24.1 by unjustifiably restricting the right to demonstrate, namely when the right or interest protected by the “constitutional order” does not have the same weight as the restricted right.

On the other hand, the right to question, by peaceful means, the democratically elected organs and institutions, as enshrined in section 42 of the Constitution, is inherent in democracy. By prohibiting any demonstrations that might undermine “the democratically elected organs and institutions”, the provision under scrutiny unjustifiably restricts that right, in contravention of subsection 24.1, of the fundamental law.

Thus, subarticle 3 of article 5 of the Bill suffers defects of a constitutional nature.

7. The constitutionality of subarticle 4 of article 5 of the Bill providing that “assemblies and demonstrations, whose objective constitutes contempt of the good reputation and respect due to (...) office holders of the State organs, are prohibited”, is questioned in the request. The argument adduced in the request is that “If the Constitution, the civil law and the criminal law already guarantee every citizen proper protection of their personal rights, why should such a hard and complex task of harmonizing and making these constitutional values compatible with the “right to criticise”, as provided for in that provision, be assigned to civil and police authorities?”.

The fact that the task of harmonizing and making personal rights compatible with the right to criticise is a hard and complex one for civil and police authorities does not, in and of itself, render unconstitutional the provision that assigns it to these authorities. Quite a number of provisions, the constitutionality of which would never be called into question, assign to police authorities the hard and complex task of harmonizing and making

constitutional values compatible, like the task of making a decision, under certain circumstances, to deprive a person of freedom or to use force to protect other values. What is really needed is a number of mechanisms in place to monitor the good exercise of that task. And such mechanisms are provided for in subarticle 15.3 and article 16 of the Bill in question.

Yet, while it is true that the right to criticise must be exercised having regard to the right to good reputation and respect of officeholders of the organs of sovereignty, the protection of this right may be effectively secured by other means, namely through the criminal law, without a need to resort to the mechanism provided for in subarticle 4 of article 5 of the Bill.

The provision that prohibits “assemblies and demonstrations, whose objective constitutes contempt of the good reputation and respect due to the Head of State and other office holders of the State organs” constitutes, in fact, an undue restriction on the exercise of the right to assemble or demonstrate and impinges upon subsection 24.1 of the Constitution. It prohibits, for instance, a demonstration intended to ask for the resignation of the officeholder of an organ of sovereignty who is blatantly incompetent or has practiced acts of corruption, as a denunciation of that personal quality or acts would always tarnish the good reputation and respect of the person being challenged.

This provision deprives citizens of the right to challenge, by peaceful means, officeholders of the organs of sovereignty, precisely in those cases where the challenge is most justified.

Thus, subarticle 4 of article 5 of the Bill suffers defects of a constitutional nature.

8. The constitutionality of article 6 of the Bill, which renders illegal any demonstrations staged between 6:30 p.m. and 8:00 a.m., is called into question in the request. The argument adduced is that such a provision prohibits any night vigil for a

humanitarian cause, like many of those that were staged across the world, in 1999, in solidarity with the people of Timor.

First and foremost, the provision under scrutiny prohibits only demonstrations, not assemblies.

Demonstration, as defined by article 3, is construed as meaning a public expression of opinions or feelings over political, social or other matters, and may cover rallies, parades and processions organised accordingly.

In turn, assembly is, as defined by article 2 of the Bill, a pre-organised crowd concentrating in a public or private place, or in a place open to the public, for purposes not contravening the law, moral, the rights of other people, or public order and peace.

In our view, the “night vigil” mentioned in the request falls under the concept of assembly and not under that of demonstration.

The provision that prohibits demonstrations between 6:30 p.m. and 8:00 a.m. does not impinge upon the essence of the right to demonstrate. It limits itself to making the exercise of that right consistent with the prevalent social practice in order to guarantee the right of people to calm and rest during the period of the day normally destined for that purpose, and to avoid that people become concerned at a time when they are less prepared and carefree. In the current context of Timor-Leste where power blackouts are frequent, people usually stop their chores soon after dusk and unusual movements, like those that are likely to occur during a demonstration, would obviously be a cause for concern.

On the other hand, the prohibition of holding nighttime demonstrations does not fully impede the exercise of the right to express an opinion, for such a right can always be exercised at night by way of an assembly.

For all the reasons above, the provision in question does not violate section 24 of the Constitution.

9. The constitutionality of article 7 of the Bill, which allows the police to interrupt assemblies or demonstrations “*if it is verified that the initial objective of the assembly or demonstration was shifted by actions that contravene the law or that have violated the restrictions provided for in article 5*”, is questioned in the request. The argument is that the likelihood of interruption provided for in that article would be too strong, thereby increasing the risk of undermining the essence of the right to assemble and demonstrate.

Article 7 has to be interpreted restrictively in accordance with the mandate conferred by section 147 of the Constitution upon the police to defend the democratic legality and guarantee the internal security of the citizens.

The risk of undermining the essence of the right to assemble and demonstrate is under strict control to the extent that, in addition to that restrictive reading, (a) the article itself requires that any interruption be immediately reported to the relevant civilian authority, (b) subarticle 15.3 considers authorities who impede or try to impede, outside the legal framework, the exercise of the right to assemble or demonstrate as having incurred a crime of abuse of authority and a disciplinary offence, and (c) article 16 of the Bill grants the right to appeal to a court against a decision made by authorities in contravention of the law.

Thus, the provision in question does not violate section 24 of the Constitution.

10. The constitutionality of subarticle 2 of article 15 of the Bill, which allows for the automatic criminalisation of “*any breach of the provisions of the present law*”, which would be a narrowing of the democratic constitutional order by the police, in breach of the principle of the rule of law and the right to political participation, and a ground to invoke the right to resist, is questioned in the request.

There is no doubt that article 15 criminalises any conduct that violates the Bill.

In using its exclusive competence, the National Parliament may legislate on the definition of crimes and their corresponding penalties.

That article criminalises not only any conduct by those who assemble or demonstrate in contravention of the law, but also any conduct by authorities impeding or trying to impede, outside the legal framework, the exercise of the right to assemble or demonstrate. In doing so, this article prevents police authorities from risking halting an assembly or demonstration when they are not sure of its lawfulness and the organisers of an assembly or demonstration from holding it in contravention of the law.

Furthermore, article 15 has to be interpreted along with article 7, for there can be no disobedience until after an order has been issued by the police authority.

In this context, article 15 of the Bill is not unconstitutional, for it does not violate sections 24 and 28 of the Constitution.

Conclusion

11. Having said this, the judges of the Court of Appeal rule as follows:

(a) to hold unconstitutional subarticles 5.3 and 5.4 of the Parliamentary Bill on “Freedom of Assembly and Demonstration”, for they violate subsection 24.1 of the Constitution;

(b) to hold consistent with the Constitution subarticles 5.1 and 5.2, as well as articles 6 and 7, and subarticles 15.1 and 15.2, of the Parliamentary Bill on “Freedom of Assembly and Demonstration”.

Dili, 9 May 2005.

The Judges of the Court of Appeal

Cláudio de Jesus Ximenes
[Signed]

José Maria Calvário Antunes
[Signed]

Jacinta Correia da Costa
[Signed]