



Note on the

Draft Constitution of the Democratic Republic of East Timor
of 9 February 2002

Focus on Provisions Affecting Freedom of Expression

by

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Introduction

East Timor is due to become officially and fully independent on 20 May 2002. As part of the process of preparing for this, the authorities have prepared a draft Constitution of the Democratic Republic of East Timor. Formal approval for this Constitution is expected on 16 March 2002.

This Note analyses various provisions in the draft Constitution of East Timor that are relevant to the right to freedom of expression. Key among these is Section 40, which contains the guarantee of freedom of expression, along with Section 41, which provides explicitly for freedom of the media. Other provisions which are analysed below include a provision on interpretation, provisions allowing for derogations (in emergencies) and for restrictions on rights, as well as the separate guarantee for honour and public image.

Analysis

Interpretation

Section 23 provides that the rights guaranteed by the Constitution shall not exclude other rights and shall be interpreted in accordance with the Universal Declaration of Human Rights. This is a positive provision, which should help to ensure that the rights

guaranteed by the Constitution are consistent with international human rights guarantees. It could, however, be improved by adding a reference to other international human rights treaties.

The Guarantee of Freedom of Expression

Section 40 of the draft Constitution guarantees the right to freedom of expression. Sub-Section (1) provides:

Every citizen has the right to freedom of speech and the right to inform and be informed impartially.

There are a number of shortcomings with this section. First, it is restricted to citizens, whereas most constitutional provisions apply to everyone. Under international law, States are responsible for protecting the rights of everyone subject to their jurisdiction, not only citizens. Second, it protects only the right to inform and be informed. This is a much more limited formulation than under international law, which refers to the right to “seek, receive and impart information and ideas.” Third, it does not protect freedom of opinion, a right that is protected unconditionally under international law. Freedom of religion is protected, in Section 45, but not the broader right to freedom of opinion. Finally, and most importantly, the right is conditioned by reference to the idea of impartiality. The right to freedom of expressions should apply regardless of impartiality; individuals have a right to impart information that others may consider biased or partial. Indeed, a key aspect of the guarantee under international law of the right to freedom of expression is protecting against having one’s expressions subjected to external “quality” controls such as impartiality or accuracy.

Sub-Section 40(3) provides for restrictions on the right to freedom of expression and is analysed below.

Section 41 protects freedom of the mass media. This is a positive section, which provides particular protection for certain mass media activities, including the right to protect confidential sources of information, the right of access to the mass media and the independence of the public media.

Derogations and Restrictions

Sub-Section 40(3) of the draft Constitution envisages the possibility of very broad-ranging restrictions on freedom of expression, as follows:

The exercise of the rights and freedoms referred to in this Section shall be regulated by law based on the imperative of respect for the Constitution and the dignity of the human person.

This provision is seriously deficient and fails to provide appropriate limits on restrictions on freedom of expression. In effect, it allows the government to impose practically any restrictions they please on freedom of expression, as long as they do so by law. In stark contrast, under international law and under many constitutions States

are only allowed to restrict freedom of expression where “necessary” to protect a limited set of listed interests, such as national security and the reputations of others. By not imposing a standard of necessity on restrictions, the Constitution effectively fails to provide constitutional protection for freedom of expression.

Section 24 provides for restrictions on rights either to safeguard other constitutionally protected rights or as provided for in the Constitution. Provisions similar to this may be found in other constitutions. This Section does not clarify how rights are to be balanced in case of the envisaged conflict, but this is a complex matter and should probably be left to the courts. However, it is of some concern that the draft Constitution provides special protection for the right to honour and good reputation, at Section 36, thus placing these rights on an equal footing with freedom of expression. Honour and reputation are widely recognised as grounds for restricting freedom of expression, but are not directly protected under international law. Article 17 of the International Covenant on Civil and Political Rights (ICCPR), for example, refers to “unlawful attacks” on honour or reputation, but does not directly protect these rights. Section 26 raises the possibility that legitimate criticism, even of political figures, will be deemed unconstitutional because it undermines their reputation. This would clearly bode ill for democracy in East Timor.

Section 25 allows for derogations from rights in case of an emergency and, in particular, “in case of effective or impending aggression by a foreign force, of serious disturbance or threat of disturbance to the democratic constitutional order, or of public disaster.” This is a much broader definition of the type of emergency that would justify derogation than under international law, which refers to, “a public emergency which threatens the life of the nation” (ICCPR, Article 4). In particular, the phrases “serious disturbance” and “public disorder” are excessively broad and vague.

Recommendations

ARTICLE 19 recommends that the East Timor authorities take steps to effect the following changes to the draft Constitution:

- Sub-Section 40(1) should be amended as follows:
 - it should apply to everyone, not just citizens;
 - it should refer to the right to seek, receive and impart information and ideas, not just to inform and be informed; and
 - it should not be conditioned on the impartiality of the expression; all expression should be protected.
- Sub-Section 40(3) should be amended to include a test for restrictions on freedom of expression that requires such restrictions, in addition to being regulated by law, to be necessary to protect a limited list of aims set out in that sub-section.
- Protection for the right to freedom of opinion should be added to the Constitution.
- The references to “honour, good record and reputation, protection of his or her public image” should be removed from Section 36.
- Section 25 should allow for derogation from rights only in the context of a threat to the life of the nation.