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SUMMARY

NATIONAL PARLIAMENT:

LAW No. 2 / 2009 of 6th of May

Protection of witnesses..... 3152

RESOLUTION OF NATIONAL PARLIAMENT No. 11/2009 of 6th of May

Approves the accession to the Agreement on the Granting of Visas for National Students from Member States of the Community of Portuguese Speaking Countries 3157

RESOLUTION OF NATIONAL PARLIAMENT No. 12/2009 of 6th of May

Approves the accession to the Cooperation Agreement between Member States of the Community of Portuguese Speaking Countries on the Fight against Malaria..... 3158

RESOLUTION OF NATIONAL PARLIAMENT No. 13/2009 of 6th of May

Ratifies the accession to the Convention on Assistance in Criminal Matters between Member States of the Community of Portuguese Speaking Countries..... 3161

RESOLUTION OF NATIONAL PARLIAMENT No. 14/2009 of 6th of May

Approves the accession to the Portuguese Language Orthographic Agreement between Member States of the Community of Portuguese Speaking Countries..... 3166

RESOLUTION OF NATIONAL PARLIAMENT No. 15/2009 of 6th of May

Ratifies the accession to the Convention on Extradition between Member States of the Community of Portuguese Speaking Countries..... 3180

RESOLUTION OF NATIONAL PARLIAMENT No. 16/2009 of 6th of May

Approves the accession to the International Instrument which Establishes a Legal and Judicial Cooperation Network of Portuguese Speaking Countries..... 3185

RESOLUTION OF NATIONAL PARLIAMENT No. 17/2009 of 6th of May

Approves the accession to the Cooperation Protocol between Portuguese Speaking Countries as regards Public Security. 3188

RESOLUTION OF NATIONAL PARLIAMENT No. 18/2009 of 6th of May

Approves the accession to the Second Protocol Altering Portuguese Language Orthographic Agreement between Member States of the Community of Portuguese Speaking Countries..... 3190

RESOLUTION OF NATIONAL PARLIAMENT

No. 19/2009 of 6th of May

Approves the accession to the Protocol Altering the Portuguese Language Orthographic Agreement between Member States of the Community of Portuguese Speaking

Countries.....
. 3191

GOVERNMENT:

DECREE-LAW NO. 20/2009 of 6th of May

Order of Timor-

Leste.....3191

DECREE-LAW NO. 21/2009 of 6th of May

Funeral Transport

Services.....3194

FINANCE MINISTRY:

Ministerial Diploma no. 1/2009 of 30th of April

Institutional Status of the Department of State

Finances.....
.3197

Ministerial Diploma no. 2/2009 of 30th of April

Institutional Status of the Department of Corporate

Services.....
. 3210

Ministerial Diploma no. 3/2009 of 30th of April

Institutional Status of the Department of Revenues

and

Customs

.....3216

Ministerial Diploma no. 4/2009 of 30th of April

Institutional Status of the Department of Analysis and

Research.....
..3226

Ministerial Diploma no. 5/2009 of 30th of April

Institutional Status of External Aid

Efficiency.....3235

LAW No. 2 / 2009

of the 6th of May

PROTECTION OF WITNESSES

Faced with the need to safeguard the rights, freedom and guarantees of citizens in the exercise of the most elementary of civil rights, and given the need to ensure social peace in an unsettled period for the Nation, the political leaders of Timor-Leste have set out the establishment of measures for the protection of witnesses as one of the priorities in the ongoing drafting of legislation.

It should be noted that the normative solutions established, in addition to respecting the specific socio-cultural reality of Timorese society, shall receive contributions from different judiciaries operating in Timor-Leste and lessons drawn from comparative Law.

This is an exceptional mechanism which can only be applied, in concrete terms, if the need for such mechanism proves to be necessary and it proves to be appropriate for the protection of the persons and the

purposes of the proceedings, in the pursuance of Justice as an inalienable value.

Thus, the National Parliament decrees that the following shall be considered law under the terms and conditions set out in No. 1 of article 95 of the Constitution of the Republic:

CHAPTER 1

General Provisions

Article 1

Object

1. This law regulates the application of measures for the protection of witnesses, in civil or criminal proceedings, when their lives, physical or psychological integrity, freedom or assets of considerable value are jeopardised due to their contributing to ascertaining the proof of facts or to the discovery of the truth which constitute the object of the proceedings.

2. The measures paragraph 1 above refers to may cover the spouse, the relatives in the ascending line, the children or the siblings of the witnesses and other persons close to them.

3. The measures set out in this law are of an exceptional nature and may only be applied if such measures prove to be necessary and appropriate for the protection of the persons and the accomplishment of the purposes of the proceedings.

4. The cross-examination in the proceedings shall be guaranteed to ensure a fair balance between the parties, the right of the defence and the discovery of the truth.

Article 2

Definitions

For the purposes of this law:

a) “*Witness*” means any person who, notwithstanding his/her status towards procedural law, is in possession of information or knowledge necessary to the disclosure, apprehension or evaluation of facts subject to investigation and which are likely to present a danger to himself or to spouse, relatives in the ascending line, children or siblings and other persons close to the witness, under the terms set out in paragraphs 1 and 2 of article 1 above;

b) “*Intimidation*” means any kind of pressure or threat, direct, indirect or potential exercised by any person over a witness with a view to influence his/her testimony or statement;

c) “*Teleconference*” means any kind of testimony or statement taken in the witnesses' physical absence by using technical means of transmission, at long distance and in actual time, either of sound or animated images;

d) “*Identification feature*” means any features which, separately or jointly, enable a person's individualisation, thus distinguishing him from any other person;

e) “*Residence*” means the place the witness lives or where he can be contacted;

f) “*Of considerable value*”, a sum exceeding USD50,000.

Article 3

Appeals

1. The delay for any appeal from the decisions set out in this law is

reduced to half its usual duration. The appeal shall be immediately and separately committed to the competent court.

2. The appeal from the decisions to apply protective measures for witnesses shall not have suspensory effect.

3. The fact the appeal from the decisions to apply protective measures for witnesses shall render the testimony invalid and shall require that the act be repeated.

CHAPTER II

Concealment and teleconference

Article 4

Witnesses' concealment

1. The court may decide, either unofficially, upon the request of the Public Prosecutor, or upon the demand of the defendant or of the witness, that the testimony or the statement must be taken by means of either concealing the witness's image or distorting his voice, or both, instead of taking the form of a public procedural act or of a cross-examination, in order to avoid the witness's recognition.

2. The decision must be based upon facts or circumstances which reveal intimidation, or a high risk of intimidation of the witness, and it shall also refer to the degree of concealment of image or distortion of voice.

3. In the event the measure to conceal the witness is applied there can be no confrontation.

Article 5

Teleconference

1. The court may decide, either unofficially, upon the request of the Public Prosecutor, or upon the demand of the defendant or of the witness, that the testimony or the statement must be taken by means of teleconference, instead of taking the form of a public procedural act or of a cross-examination, in order to avoid the witness's recognition

2. Teleconference can include the resort to concealment of image or distortion either of image or voice, or of both, with a view to avoid the witness's recognition.

Article 6

Location

The long-distance testimony or statement shall be taken in a public building, whenever possible in the Courts, or in the Police or prison premises which offer the appropriate conditions to the installation of the necessary technical devices.

Article 7

Access to the Location

The court may restrict the access to the place where the testimony or the statement shall be taken, allowance being granted to the technical staff, the officials or the security personnel deemed strictly indispensable.

Article 8

Commitment

Whenever the witness's recognition by image or voice is to be avoided or his identity is to be kept concealed, the technical staff intervening in the teleconference shall render a commitment not to disclose the location or the witness's identification features. Should the technical staff fail to do so, the punishment for aggravated disobedience shall apply.

Article 9

Escorting Judge

The judge presiding to the act shall guarantee the presence of a judge at the location where the testimony or the statement shall be taken, on whom shall be incumbent namely:

- a) To identify and take the oath to the witness whose identity is to remain concealed or whose recognition is to be avoided;
- b) To receive the commitment mentioned in the previous article;
- c) To ensure that the witness will make a free and spontaneous testimony or statement;
- d) To provide for the clear understanding of the questions by the witness and for the transmission of the answers in actual time;
- e) To act as interlocutor of the judge presiding to the act, by calling his attention to any incident occurring during the testimony or statement;
- f) To guarantee the authenticity of the video recording to be enclosed to the proceedings;
- g) To take all the preventive, disciplinary and restraining measures legally admissible, which prove adequate to enforce the access restrictions to the location and, in general, to guarantee the security of all persons present.

Article 10

Questions

The questions to which the witness is required to answer during the collection of evidence are made through the judge presiding to the act, and they shall observe the terms of the procedural law.

Article 11

Recognition

If, during the testimony or the statement, any recognition of persons, documents or objects becomes necessary, the witness shall be allowed

the respective visualization.

Article 12

Non-disclosure of Identity

Where the witness's identity is to remain concealed, it is particularly incumbent of the judge presiding to the act to avoid asking any question likely to induce the witness to the indirect disclosure of his identity.

Article 13

Access to Sound and Image

1 - In case of the concealment of the witness's image and voice, the access to the undistorted sound and image is to be allowed in exclusive to the judge presiding to the act or the court, should the technical means available enable it.

2 - The autonomous and direct communication between both the judge presiding to the act and the escorting magistrate, as well as between the defendant and his counsel, shall be guaranteed in any circumstance.

Article 14

Proximity

The testimonies and statements made through teleconference, according to this Diploma, are deemed, for all purposes, as having been made in the presence of the judge or of the court.

CHAPTER III

RESTRICTION REGARDING THE DISCLOSURE OF THE WITNESS'S IDENTIFICATION FEATURES

Article 15

Prerequisites

1. The non-disclosure of the witness's identity may cover one or all the phases of the proceedings provided the following conditions occur concurrently:

- a) The witness, spouse, relatives in ascending line, children, siblings or other persons in close contact with him face a serious danger of attempt against their lives, physical or psychological integrity, freedom or property of considerable value;
- b) The witness's credibility is beyond reasonable doubt;
- c) The testimony or the statement constitutes a relevant probative contribution.

2. Besides having met all the conditions set out in the

paragraph above, the application of the measure not to disclose the having been heard, in case he is not the requesting party. witness's identity shall only take place when:

a) The proceedings relate to a crime, the maximum penalty of which corresponds to more than five years imprisonment;

b) The guardianship of minors is at stake;

c) Assets of a considerable value are at stake.

Article 16

Jurisdiction

1. The non-disclosure of the witness's identity is decided by the Examining Magistrate, ex officio or upon request.

2. The measure taken not to disclose the witness's identity may be requested by the Public Prosecutor during the inquiry.

3. The measure taken not to disclose the witness's identity may be requested by any of the parties, by the Public Prosecutor, by the defendant or by the injured party during the proceedings.

4. The request contains the grounds for the non-disclosure of the identity in casu, as well as the reference to the evidence that must be offered thereto.

Article 17

Supplementary proceedings of non-disclosure of identity

1. For purposes of decision on a request for non-disclosure of identity a supplementary proceeding of a confidential and urgent nature shall be separately prepared, to which only the Examining Magistrate and whoever he appoints for that purpose shall have access.

2. Unofficially or upon request the Examining Magistrate makes the investigation he deems indispensable to meet the requirements needed for the granting of such a measure.

3. Once the investigation has been concluded, the Examining Magistrate notifies the parties of the grounds for the request so they can, should they so wish, within five days, express their opinion in writing and within this time limit request that further measures be taken.

4. The Examining Magistrate is responsible for the supplementary proceedings and corresponding confidentiality and therefore the notification referred to in paragraph 3 above may not contain elements which may point to the disclosure of the identity of the witness to be covered by the measure on protection.

5. The possibility of carrying out further investigations is taken by the Examining Magistrate.

6. The decision allowing the requested measure confers the witness a codified reference, by which he shall be referred afterwards in the proceeding. The reference is transmitted to the judicial authority with jurisdiction over the proceedings.

7. As soon as it is deemed unnecessary, the measure is revoked by the Examining Magistrate upon the request of the Public Prosecutor or upon the demand of the interested party or upon the witness's demand, the proper procedural acts having been carried out and the Public Prosecutor

8. The decision taken by an Examining Magistrate on the request not to disclose the identity of a witness prevents him from subsequently taking part in the main proceedings.

Article 18

Witnesses' s testimony or statements and respective probative value

1. The witness to whom it has been granted the measure of non-disclosure of identity may make his testimony or statement either by concealing his image or distorting his voice, or through teleconference, pursuant to articles 4 and 5 hereabove.

2. No condemning decision can be based, exclusively or significantly, upon the testimony or the statement made by one or more witnesses whose identity has not been disclosed.

CHAPTER IV

SECURITY AND SPECIAL MEASURES AND PROGRAMMES

Article 19

Sporadic Measures of Security

1. Where significant grounds for security so justify and where the criminal offence may result in a maximum penalty of over five years imprisonment, entails the guardianship of minors or assets of a considerable value, without prejudice to other measures of protection set out in this law, the witness may benefit from sporadic measures of security, namely:

a) Mention in the proceedings of an address different from the one he uses or which does not coincide with the domicile locations provided by the civil law;

b) Being granted immediate reimbursement of the expenses incurred with his displacement to testify or give statements;

c) Being granted a room, eventually put under surveillance and security, located in the Court or the Police premises, to which he must displace himself and inside which he may stay without the presence of other intervening parties in the proceedings;

d) Benefiting from police protection extended to his spouse, relatives in ascending line, children, siblings or other persons in close contact with him;

2. The measures laid down in the previous paragraph are ordered by the Public Prosecutor during the enquiry, either unofficially, upon the demand of the witness or his legal representative or upon proposal of the criminal police authorities. Subsequent to the

enquiry the said measures are ordered by the Judge presiding to the current phase of the proceeding, ex officio or upon the request of the Public Prosecutor.

3. In civil proceedings, the measures set out in paragraph 1 are ordered by the Examining Magistrate, unofficially or upon request by the Public Prosecutor, the witness or his legal representative.

4. The judicial authority undertakes the necessary procedures to assess in casu the need and the suitability of the measures.

5. Every third month the judicial authority re-appreciates the decision, either maintaining or modifying it, or revoking the applied measures

6. The police protection stated in paragraph 1, sub-paragraph d) hereabove shall generally be at the charge of a police entity.

Article 20

Special Security Programme

Any witness, the respective spouse, relatives in ascending line, children, siblings or any other persons in close contact with him, may benefit from a special programme of security during the running of the proceedings or even after its closure, provided the following concurrent conditions occur:

a) The testimony or statement concern the criminal offences which may result in maximum penalties of imprisonment of over five years;

b) There is a serious danger to their lives, physical or psychological integrity or freedom;

c) The testimony or statements constitute a contribution which is deemed, or has proved to be, essential to the ascertainment of the truth.

Article 21

Contents of Special Security Programme

1. The special security programme includes the enforcement of one or several administrative measures of police protection and support, eventually supplemented by duly combined rules of behaviour to be complied with by the beneficiary.

2. For the purposes of the previous paragraph the following measures are regarded, among others, as measures of protection and support:

a) Granting of police protection, within the scope and for the time to be determined;

b) Delivery of documents officially issued, including identification features different from those previously inserted or that should be inserted in the replaced documents;

c) Granting of a new place to live in the country or abroad, for a period to be determined;

d) Free transportation of the beneficiary, his close relatives and the respective property, to the new place of living;

e) Implementation of conditions for the obtaining of means of subsistence;

f) Granting of a survival allowance for a specific period of time;

g) Changes in the physiognomy or the body of the beneficiary.

3. Where the special security programme includes rules of behaviour, their intentional non-compliance entails the exclusion from the programme.

Article 22

The Special Security Programmes Committee

1. A Special Security Programmes Committee is hereby established under the direct supervision of the Minister of Justice, on whom the definition and the implementation of special security programmes shall be incumbent.

2. The Special Security Programmes Committee consists of a president and a secretary - both appointed by the Minister of Justice -, a judge and a public prosecutor indicated by the Supreme Judicial Council and the Public Prosecutor's Supreme Council respectively, by a representative appointed by the Secretary of State for Security's Office indicated by the respective Secretary of State and by a representative of the Human Rights and Justice Ombudsman appointed by such Ombudsman.

3. The decisions of the Committee shall be taken by a simple majority of votes, and the president shall have the casting vote.

4. The members of the Committee are nominated for a renewable three-year period, which may be renewed for a similar period of time for a maximum of two times.

Article 23

Procedure

1. Whenever possible, a unique confidential proceeding covering the witness and the persons mentioned in article 20 shall be organised for each special programme of protection.

2. With a view to the establishment and enforcement of the programme the Committee shall be given the most effective and prompt cooperation by all public authorities.

3. The enforcement of the programme is subject to the beneficiary's agreement, who shall sign the declaration agreeing thereto and shall commit to respect the programme.

4. The special programme of protection can be modified whenever necessary. It shall be obligatorily reviewed from time to time as specified therein.

Article 24

Impeachments

The personal intervention in specific criminal

proceedings constitutes an impeachment to become a member of the Special Security Programmes Committee in the field of the definition and the enforcement of the programme.

CHAPTER V

FINAL PROVISIONS

Article 25

Ruling Orders and their Enforcement

1. Within a time limit of ninety days from the date of entry into force of this law, the Government shall take the necessary measures of an organisational and technical nature and shall guarantee the infrastructures and other technological means necessary for the enforcement of this law.

2. The measures set out in the preceding articles may be requested and adopted from the date this law becomes effective and in accordance with the conditions set out in the regulatory legislation of this law.

Article 26

Repeal

The provisions contrary to those set out in this legal diploma shall be repealed.

Article 27

Entry into force

This legal diploma shall enter into force on the sixtieth day subsequent to its publication.

Approved on 17th February, 2009

Vice-president of the National Assembly

Vicente da Silva Guterres

Promulgated on 30th April, 2009

To be published

The President of the Republic

Dr. José Ramos Horta