



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

JUSTICE UPDATE

Period : January 2009

Issue : January /2009

Legitimacy of the Court's Decision in the case relating to the Economic Stabilization Fund (ESF)

On 29 August 2008, 16 members of the National Parliament submitted a request for a material review on the state budget that had been previously been approved by the National Parliament on 5 August 2008. Basically the petitioners requested for the Court of Appeal to declare illegal the Economic Stabilization Fund approved by the National Parliament. The 16 petitioners referred to the Constitution and the 2005 Petroleum Fund Law as legal grounds for their request.

At the request of the 16 members of Parliament, on 13 November 2008 the Timor Leste Court of Appeal decided that the economic stabilization fund was unconstitutional and illegal. Three judges from the Court of Appeal sitting as a panel issued a decision in response to several requests submitted by the 16 members of Parliament. The Court of Appeal's decision on the request for a material review of the ESF was as follows:¹

1. The US\$240 million **Economic Stabilization Fund** violates Articles 145.2, 95.2 (q) and 115 (d) of the RDTL Constitution.

¹ JSMP accessed a copy of this decision at: www.laohamutuk.org. The decision has been summarized in accordance with our needs and is based on an unofficial translation from Portuguese into Indonesian by JSMP.

2. The withdrawal of funds totaling US\$290.7 million also violates Articles 8 & 9 of the 2005 Petroleum Fund Law and therefore the fund is declared illegal.

Basically, in its decision the Court of Appeal stated that the ESF violated Articles 145.2, 95.2(q) and 115(d) of the RDTL Constitution as well as Articles 8 & 9 of the 2005 Petroleum Fund Law.

Pursuant to the first decision issued by the Court of Appeal, the President of the National Parliament submitted an appeal against the decision with the aim of having the first decision annulled. However on 22 December 2008, the Court of Appeal issued a second decision reinforcing the first decision.²

After the decision from the Court of Appeal was submitted to the National Parliament lively debate continued about the material review of the state budget that had been approved by the National Parliament. JSMP observed this protracted debate and identified 2 main positions, namely that the majority considered the decision to be negative whilst the remainder considered it to be positive. What is more ironic, during the ensuing debate several circles did not just take issue with the decision but also questioned the status of the presiding judge who issued the decision, and the status of the President of the Court of Appeal and the Superior Council for the Judiciary.

JSMP believes that despite the fact that some circles believe the decision of the Court of Appeal to be controversial, careful examination of the decision leads to the conclusion that several considerations contained therein are legally correct. The court's reasoning relates specifically to the scope of authority set out in the Constitution which states that the execution of the Budget shall be monitored by

² Timor Post, 7 January 2009, p. 12

the High Administrative, Tax and Audit Court³, however considering that the aforementioned court is not yet established then the Court of Appeal is authorized to examine such a request pursuant to Article 164 of the Constitution.⁴

The purpose of this update is for JSMP to merely state its view on the legitimacy of the court's decision, and to consider to what extent the various components of the nation have valued and upheld the rule of law with the opinion that the court's decision has authority over any institution in accordance with the principle of legal supremacy⁵ (Constitution). Pursuant to these legal facts, JSMP will now attempt to analyze the various articles mentioned above which were the basis for the court's decision. This legal analysis is merely based on reference to the applicable law.

With the Court of Appeal finding the ESF to be unconstitutional and illegal, then it is logical to assume that legally speaking the Parliament is ultimately responsible and not the Government as the executor of the budget, because it was the National Parliament that approved the proposed budget submitted by the Government. Why is this so? Before the National Parliament approved the proposed budget it should have first examined and considered all of the legal instruments relevant to the proposed budget (Constitution and Petroleum Fund Law). It is quite ironic that it was the legislative body (law-making body) who approved a proposed budget that was found to be unconstitutional and in conflict with another law. Basically the National Parliament approved the proposal for the ESF submitted by the government, however it should have first amended any relevant laws to ensure that there were no legal impediments.

³ Refer to Article 145. 3 of the RDTL Constitution

⁴ Article 164 of the RDTL Constitution deals with the transitional competence of the Supreme Court of Justice

⁵Article 118 .3 of the RDTL Constitution states that court decisions shall be binding and shall prevail over the decisions of any authority.

It is important to note that in principle and in accordance with the RDTL Constitution, when performing their functions (issuing decisions), judges are independent and owe obedience only to the Constitution, the law and to their own conscience.⁶ This principle provides a response to certain opinions on the ESF case that state that the judges of the Court of Appeal should also take into account social realities currently facing the community in Timor Leste. JSMP believes that this view is unacceptable from a legal perspective and it also violates the principles of law and the Constitution.

Since its establishment, JSMP has on many occasions witnessed the failure of the executive to adhere to decisions issued by the courts (judicative power). This is not the first time that the executive has ignored a decision of the courts. This has happened repeatedly in previous cases, in particular the case of *besi tua*, the border control case in 2003 and the case involving money confiscated from gambling activities in 2003.

For more information please contact:

Roberto da Costa Pacheco

Coordinator of Legal Research, JSMP

E-Mail: bebeto@jsmp.minihub.org

Landline: 3323883

⁶ Article 121.2 of the RDTL Constitution.

