



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA MONITORIZASAUN BA SISTEMA JUDISIÁRIU

Opinion:

Amendments to Law No. 3/2014 on the creation of the Special Administrative Region of Oecusse Ambeno and the Establishment of a Special Zone for Social Market Economy (RAEOA-ZEESM): Issue of Constitutionality and Concept of Territorial Division

Submitted to:

- 1) The President of the Republic**
- 2) National Parliament**
- 3) Court of Appeal**
- 4) Relevant Bodies and Institutions**

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Introduction

Firstly, JSMP would like to congratulate the distinguished members of parliament as the representatives of the people at the National Parliament for performing their role on behalf of the people as provided for in the Constitution or as set out in Article 96, namely to make laws, carry out supervision and political decision making.

Since 2010 JSMP has been regularly supervising or monitoring the National Parliament during meetings of the plenary and Committee A. During this monitoring period JSMP has observed and followed the discussions between members of parliament relating to draft laws, including Draft Law No. 3/V (1^a) – First Amendment to Law No. 3/2014¹ on the Creation of the Special Administrative Region of Oecusse-Ambeno-the Establishment of a Special Zone for Social Market Economy (RAEOA-ZEESM) in the plenary which just recently was discussed and amended under Agenda Item No. 119/V (1^a), 8 July 2019. Therefore JSMP is familiar with and has adequate knowledge relating to these processes within the National Parliament.

The articles that were amended were Article 19 paragraph 1) which sets out the criteria to become the President of the RAEOA-ZEESM, the appointment process and mandate. In the original provisions the competence to appoint the President of RAEOA-ZEESM was granted to the President of the Republic based on a proposal from the Prime Minister and in the amended provisions the competence to appoint the President of RAEOA-ZEESM is granted to the Government, which automatically grants competence to the Prime Minister. Article 21 paragraph 1) relates to the dismissal of the President of the RAEOA –ZEESM, whereby in the original provisions competence was granted to the President of the Republic and in the amended provisions competence is granted to the Prime Minister.

Based on JSMP observations, the main reason that MPs made this proposal was because they believed that the original provisions were “unconstitutional” because the provisions in Article 86 of the Timor-Leste Constitution did not grant competence to the President of the Republic to appoint the President of the RAEOA-ZEESM.

JSMP also observed that during the discussion process the opposition bench Fretilin left the plenary and did not participate in the discussion and vote because the government bench did deem this law to be a structural law and only dealt with it urgently without consulting the opposition bench, or civil society. The Fretilin Bench was open to amendments, but wished to examine the implications of any proposed amendments. Meanwhile from the PD bench, only two MPs participated in the discussion, however they did not vote to approve the proposed amendments to this law.

In relation to this matter, JSMP feels obliged to contribute its thoughts by conducting research on theoretical concepts relating to the concept of a territorial administrative division known as a “Special Administrative Region” and the concept of an economic territorial division known as a “Special Economic Zone”. In addition, JSMP has analysed the relevant provisions in the Constitution and Law No. 3/2014 itself.

¹ Please refer to the State Gazette: <http://www.mj.gov.tl/jornal/?q=node/6670>

These observations, analysis and interpretations are independent and based on JSMP's own point of view and are not subject to any other interest or bias to support or benefit any group or party linked to this issue and are also open to discussion. Also, this opinion provides an alternative notion and 'interpretation' for the consideration of the competent institutions before they make a decision on this issue to strengthen our democracy and democratic institutions.

In this opinion JSMP is not making a statement on the issue of unconstitutionality because this is the competence of the Court of Appeal/Supreme Court of Justice if the President of the Republic decides to use this channel to seek an appraisal and examination before vetoing or promulgating the law.

This opinion is merely an opinion, therefore there is nothing binding or forcing other parties to follow it. This opinion simply outlines some thoughts and it is up to the organs of the State to consider and decide on the matter. JSMP's objective is to merely ensure that all decisions made by the State are based on the provisions in the Constitution and relevant laws related to this issue to promote and guarantee the national interest based on the principles of the Democratic Rule of Law.²

JSMP believes and is certain that if the sovereign organs of the State do not make sound and prudent decisions based on constitutional norms and the legal framework this will establish a bad precedent for the next generation and will have negative consequences and threaten the development of democracy in Timor-Leste.

Background

Based on JSMP's observations, in 2014 members of parliament, particularly the larger parties such as CNRT, FRETILIN and PD, actively participated in the discussion and approval of Law No. 3/2014 to create the RAEOA-ZEESM via a unanimous final vote on 23 May 2014 with a total of 55 votes in favour, 0 against and 0 abstentions.³ At that time, no MP or bench questioned the issue of "unconstitutionality" and everyone participated in the vote. However, 5 years later, the political party CNRT, who at that time was the party with the majority who approved this law, questioned the constitutionality of the law that they themselves had approved. JSMP believes that in a democracy, politics are always dynamic but they should always reflect the constitutional norms and the applicable laws to strengthen our democracy and sovereignty of the State.

JSMP believes that these political actions and decisions do not convey a good image of the political principles and the consistency of the politicians who previously approved this law, because they challenged their own decision. Such practices establish bad precedents for future politicians. Such political actions can lead to public doubt about decisions taken by the National Parliament on behalf of the people.

² Please refer to this article, pp. 23-24: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/%20viewFile/45920/44126>

³ Please refer to the JSMP annual report on the National Parliament 2014, page 6: http://jsmp.tl/wp-content/uploads/2012/05/150428-Relatorio-PWP-for-printing_TETUM.pdf

JSMP's considerations and questions mainly relate to the position of the MPs who suggest that Law No. 3/2014 on the creation of the RAEOA-ZEESM is unconstitutional. This position has legal implications on the existence of the Special Administrative Region as a political entity. This notion has legal and judicial implications because if the original articles on appointment are considered unconstitutional, this means that the work and administrative processes or acts relating to the development of the RAEOA-ZEESM are not valid or are null and void as the original process regarding the appointment of the President of the RAEOA-ZEESM, as the highest authority to execute the policies of the RAEOA-ZEESM, was considered unconstitutional. Therefore, decisions and administrative acts carried out pursuant to this law need to be annulled because any legislative acts that do not adhere to the Timor-Leste Constitution are considered to be invalid, as set out in Article 2.3 of the Timor-Leste Constitution.

Concept of a Special Administrative Region

The concept of a special administrative region is a policy on administrative territorial division which is a policy of State management on how to easily manage issues relating to land and citizens or to better deal with State services or the administration of citizens.⁴ This administrative division creates a sub-national entity that is granted some degree of autonomy by the State to carry out its own management and administration through the local government. Some of the main factors that the State can consider in pursuing such a territorial division are history, culture-customs, economy, geographic location, etc.

There are various models and types of administrative division. In Portugal, such a division starts with the central Government, then there are districts that are further divided into municipalities and the municipalities are further divided into boroughs and also autonomous regions.⁵ In Spain such divisions start with the central Government, then the provinces and municipalities, as well as autonomous communities and cities.⁶ Provinces, municipalities and boroughs are local governments with the responsibility of managing their own territory but they do not have the competence to execute and enact legislation on areas linked to education, health and housing like autonomous regions and communities or cities. In Federal states, administrative divisions are called federated states with a higher degree of autonomy in comparison with autonomous regions and community or cities. Federated states have political autonomy and the capacity for self-organization and self-legislation, self-government and self-administration.⁷

The concept of an administrative division called a "Special Administrative Region" applies to the Chinese State.⁸ This special administrative division is not the same as a general or common administrative division or those mentioned above. The Chinese administrative division applies the concept of a special administrative region to Macau and Hong Kong, and also Taiwan. These regions have their own head of government, their own parliament, their own courts and laws, as well as their own money or currency, and

⁴ Please refer to this article on territorial division in Brazil relating to the creation of municipalities: http://jsmp.tl/wp-content/uploads/2012/05/150428-Relatoriu-PWP-for-printing_TETUM.pdf
<http://www.ub.edu/geocrit/coloquio2012/actas/11-A-Cigolini.pdf>

⁵ Please refer to a detailed description at: <http://www.mslima.com/sop/divisoaes/>

⁶ Please refer to this article:

http://www.cnse.es/inmigracion/index.php?option=com_content&view=article&id=499&Itemid=640&lang=pt

⁷ Please refer to more detailed information in this article: <https://lpneto.jusbrasil.com.br/artigos/168976102/a-natureza-juridica-dos-estados-federados>

⁸ Please refer to this article at: https://pt.wikipedia.org/wiki/Regi%C3%A3o_administrativa_especial

their own military, such as Taiwan⁹ and Taiwan has a separate political system known as "one country two systems".¹⁰

This means that the State grants this special administrative region considerable autonomy and competence in comparison with the common administrative divisions such as provinces, districts and municipalities. The government of the special administrative region cannot deal with external political issues and national defence issues. Therefore, the head of this government is at the same level as the president of district and municipal authorities. In the context of Macau and Hong Kong the head of government has the same level as the "Prime Minister", because in this government there is an Executive Council which is the same as the Council of Ministers. However, in Taiwan the head of State is elected and the head of government is appointed. Therefore, the head of government of this Special Administrative Region is automatically a "member of government". This Special Administrative Region only owes obedience to the Constitution of the Republic, because it has autonomy and competence to create its own laws and has its own head of government.

When examining this concept and the existing reality the following issue arises: Does the specific law that deals with the creation of a special administrative region for Oecusse Ambeno reflect this concept and the current reality and does it guarantee that the State will provide special treatment to this administrative division in accordance with the provisions of Article 5 and Article 71 of the Timor-Leste Constitution? Are the original provisions, or the amended provisions, more relevant and in harmony with the Constitution? To respond to these issues it is necessary to analyse and interpret relevant provisions in the Constitution and Law No. 3/2014 and the new or amended version on the topic of the Constitutional Basis provided in Law No. 3/2014.

Concept of a Special Economic Zone

This special economic zone is also linked to the territorial division that focuses on the policies of the State relating to how to carry out proper and effective management in economic terms and in terms of taxation. The Government of China created and adopted this concept when it opened up its economy or market to foreign investment.¹¹ In a region that adopts and applies a special economic zone, the law grants different economic and taxation rights to other territories to attract domestic and foreign investment and to provide incentives for the economic development of the region.

Therefore, this special economic zone is properly aligned with a special administrative region because the government of this region has the competence to create its own laws to regulate its economy, taxation and financial activities. Therefore, the special economic zone adopted and applied in Oecusse Ambeno truly reflects the nature of this special economic zone. It is important for the State through Law No. 3/2014 to grant even more competencies, rather than to further restrict these competencies.

⁹ Please refer to this article at: https://www.wikiwand.com/pt/Regi%C3%A3o_administrativa_especial

¹⁰ Please refer to this article at:

http://www.ipm.edu.mo/cntfiles/upload/docs/research/common/1country_2systems/issue1/pt/p65.pdf

¹¹ Please refer to this article at: https://pt.wikipedia.org/wiki/Zonas_Econ%C3%B4micas_Especiais_da_China

Constitutional basis of Law No. 3/2014

Law No. 3/2014 was established pursuant to the provisions of Article 5 paragraph 3) and Article 71 paragraph 2) of the Timor-Leste Constitution that provides for special administrative and economic treatment for Oecusse Ambeno. However, it is necessary to carefully examine and analyse the contents of this law, both the original version and the amended version to ensure that this law truly reflects the concept and nature of this administrative division and to see if it is in harmony with the Constitution.

Law No. 3/2014 original version

After examination and analysis, JSMP believes that this version of the law grants some limited forms of autonomy and competence to the government of this special administrative region. This law does not yet properly reflect the concept and nature of territorial division according to the model of this special administrative region. This is reasonable in the context of Timor-Leste, and specifically in regards to Oecusse Ambeno, however more competencies need to be granted.

Meanwhile, the provisions of Articles 19 and 21 on the process of appointment grant competence to the President of the Republic, and JSMP believes that these provisions are in harmony with the Constitution, because the President of the Special Administrative Region is the Head of Government and as a member of government he is appointed by the President of the Republic as provided for in Article 86 h) of the Constitution regarding the competence to appoint, swear in and remove members of government, unlike the presidents of district or municipal authorities. According to the provisions of Article 104 paragraphs 1) and 2) of the Constitution, the Government shall comprise the Prime Minister, Ministers, Vice-Ministers and Secretaries of State. If the President of the Special Administrative Region is treated like the president of a district or municipal authority, he/she loses his/her special administrative status and therefore the region loses its characteristics as a special administrative region. Therefore, JSMP believes that these provisions are not in conflict with the Constitution and if amendments are made, it would be better to increase the degree or level of autonomy, rather than reducing it.

Law No. 3/2014 amended version

JSMP believes that the amendments to the provisions in Articles 19 and 21 that grant competence to the Government or Prime Minister to make appointments, in fact further limit or reduce the autonomy and competence of this special administrative region and remove its special administrative treatment because it has less competencies and the character of this special administrative region is completely removed.

Regarding alignment with the Constitution, JSMP's examination and analysis indicates that the two amended provisions are in conflict with the Constitution. The provisions set out in Articles 5 and 71 of the Constitution provide for special administrative treatment for Oecusse Ambeno and the provisions of Article 115 on the competence of the Government and Article 116 on the competence of the Council of Ministers do not grant competence to appoint and remove a member of that government or a member of another government. The appointment of members of government is the exclusive competence of the President of the Republic as set out in Article 86 h) of the Constitution. Therefore, JSMP believes that the amended provisions of these articles do not properly reflect, and have removed, the character and concept of a special administrative region and are in conflict with constitutional provisions related to this issue.

Principle of Separation of Powers and Declaration of Unconstitutionality

Article 2 paragraph 3) of the Timor-Leste Constitution states that laws and other actions of the State and local government are only valid when they comply with the Constitution or are not in conflict with the Constitution. To ensure compliance with this norm and principle, the Constitution also attributes this responsibility and competence to the judicial organs. The provisions of Article 124 paragraph 2) of the Timor-Leste Constitution state that the Supreme Court of Justice Court has the competence to administer justice on matters of legal, constitutional and electoral nature. The provisions of Article 126 paragraph 1) a) state that the Supreme Court of Justice has the competence to review and declare the unconstitutionality and illegality of normative and legislative acts by the organs of the State. Therefore, to ensure that the sovereign organs of the State can function properly and to avoid conflict amongst them, the Constitution also sets out the principle of separation of powers enshrined in Article 69 which states that organs of sovereignty, in their reciprocal relationship and exercise of their functions, shall observe the principle of separation and interdependence of powers established in the Constitution.

Pursuant to these constitutional grounds, the National Parliament has no constitutional powers to declare that some of the provisions of Law No. 3/2014 are unconstitutional, and this act itself can be considered unconstitutional because it has violated the principle of separation of powers and represents an interference with the power of the judiciary.

If the National Parliament discovers that some legal provisions are in conflict with the Constitution, then the Constitution allows for the National Parliament or members of parliament to request for the Supreme Court of Justice to review legislative acts and make a declaration of unconstitutionality as set out in Article 150 e). Article 150 (e) establishes the requirements for making a declaration of unconstitutionality, namely a minimum of one fifth of the members of the National Parliament from the total number of effective MPs in the National Parliament, or at least 13 of 65 members. Therefore, while the Supreme Court of Justice, whose role is currently carried out by the Court of Appeal, has not declared the unconstitutionality of these provisions, then these provisions remain valid. The National Parliament amended this law based on grounds of unconstitutionality without requesting a review by the Supreme Court of Justice/Court of Appeal which is an act that can itself be considered in conflict with the Constitution.

When the National Parliament does not comply with the fundamental provisions and principles enshrined in the Constitution then such acts are a violation and major threat the fundamental principle of the Democratic Rule of Law and this can establish a bad precedent for the future. Practices like this give a negative impression to the international community of undermining the constitutional obligations of the State of Timor-Leste in relation to promoting and strengthening democracy in Timor-Leste.

Conclusions and Recommendations

Based on the current reality, analysis, and existing legal and constitutional grounds, especially regarding the national interest, JSMP concludes that the idea and initiative of the National Parliament to amend Law No. 3/2014 may have been well-intentioned, however this act does not properly reflect the reality, the concept of territorial division, spirit of the Constitution and the national interest, as also there are no constitutional grounds to impose these amendments.

Therefore, JSMP recommends for:

- 1) The President of the Republic to give careful consideration before promulgating this law;
- 2) Before developing any draft laws or proposing any amendments to existing laws, the National Parliament needs to engage in careful and thorough analysis, study and discussion, including examination of the issue of constitutionality;
- 3) The National Parliament should amend Law No. 3/2014 to provide more competencies to the Special Administrative Region of Oecusse-Ambeno-the Establishment of a Special Zone for Social Market Economy (RAEOA-ZEESM) to engage in more effective and efficient regulation and management in all areas, particularly the economy and taxation, rather than removing or further reducing such competencies;
- 4) Members of parliament and the parliamentary benches should consider the reality and context of Timor-Leste, rather than walking out of meetings in the plenary and the Committees when dealing with issues of major importance to the national interest, so they can continue to contribute their thoughts and statements relating to political positions on relevant issues and they are obliged based on the law to vote when attending meetings, even if the right to leave the plenary is a political right and freedom based on the democratic rule of law;
- 5) The National Parliament should observe or respect the principle of separation of powers enshrined in the Timor-Leste Constitution to avoid confusion and conflict in the exercise of functions;
- 6) The Court of Appeal needs to carefully analyse and consider the issue of unconstitutionality relating to Law No. 3/2014 when the President of the Republic requests the opinion of the Court.

Dili, 25 July 2019

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