

COURT OF APPEAL

Dili, 14 August 2008

Your Excellency,

I hereby inform the Government through Your Excellency of the Court of Appeal's ruling on the constitutionality of Decree-Law 22/2008 of 16 July, as requested by 1/5 of the Members of Parliament. A copy of the ruling is attached hereto.

Yours sincerely,

[signed]

Cláudio Ximenes
President of the Court of Appeal

H.E. the Prime Minister

COURT OF APPEAL

Case no. 03/2008

Ruling by the Panel of Judges of the Court of Appeal composed by Cláudio Ximenes, Ivo Nelson de Caires Batista Rosa and Antonino Gonçalves

I. Pursuant to article 150(e) of the Constitution of the Republic, Members of Parliament Aniceto Guterres Lopes, Francisco Miranda Branco, Domingos Maria Sarmiento, Francisco Jerónimo, Joaquim Amaral, Manuel Tilman, Arsénio Paixão Branco, Osório Florindo, Antoninho Bianco, Estanislau da Silva, António Cardoso C Machado, David Dias M A Ximenes, José Augusto F Teixeira, Ilda Maria da Conceição, Jacob Xavier, Josefa A P Soares, Maria Maia Reis, Cipriana da Costa Pereira, Joaquim dos Santos and José Manuel Fernandes have requested that the Court of Appeal declare the unconstitutionality of Decree-Law no. 22/2008 of 16 July whereby the Government established the Economic Stability Fund on the grounds that it violates article 95(2)(q) of the Constitution.

The aforementioned Members of Parliament have argued:

- that by adopting Decree-Law no. 22/2008, the Government has established an autonomous fund that was named Economic Stability Fund (ESF);
- that, however, no Board of Directors was appointed and there is no mention in the decree-law to a Supervisory Board nor is anything said about the fund's mode of operation;
- that decree-law no. 22/2008 defers to a specific regulation the definition of the fund's funding procedure as well as what shall constitute the fund's expenses and revenue;
- that the subsequent endowment of the ESF with USD 240 million truly embodies an exercise in unbudgeting and financial indiscipline (*desorçamentação*);
- that the present circumstances amount to a blank cheque being passed by the National Parliament giving the Government leeway to use the aforementioned amount in any way it deems fit, and that the Parliament is thus relinquishing its duty to duly monitor any possible revenue;
- that decree-law no. 22/2008 negates the National Parliament's functions that are incumbent upon it pursuant to the Constitution;
- that the Government cannot make laws on what looks like an Autonomous Fund, pursuant to articles 95(2)(q) and 97(2) of the Constitution, as this is a matter that is exclusively incumbent upon the National Parliament to legislate on.

The Government has replied to the aforementioned request by Members of Parliament and has argued that such request is unfounded.

II. The Court of Appeal has been asked to decide in this case whether decree-law no. 22/2008 or any of its provisions violates the Constitution of Timor-Leste, namely its articles 95(2)(q) and 97(2).

Decree-Law no. 22/2008 consists of the following 8 articles:

*Article 1
Designation*

1. The Economic Stability Fund, hereinafter referred to as Fund, is hereby established with the Ministry of Finance.

*Article 2
Objectives*

The objectives of the Fund shall be:

- a) To ensure the supply of goods and food security;*
- b) To stabilise prices by intervening in the market;*
- c) To ensure the supply of construction materials.*

*Article 3
Establishment of the Fund*

The Fund is funded from the State Budget.

*Article 4
Funding*

The procedure for obtaining financial support from the Fund shall be as approved in a specific regulation .

*Article 5
Expenditure*

The expenses of the Fund shall be the expenses resulting from the application of the provisions laid down in the specific regulation mentioned in article 4 above.

*Article 6
Revenue*

The proceeds resulting from the sale by economic agents of the goods funded under article 4 shall be considered State revenue.

*Article 7
Monitoring and reporting*

UNTAET Regulation no. 2001/13 on budget and financial management shall apply to monitoring and reporting activities.

*Article 8
Collaboration of other entities*

The Ministry of Finance may request from relevant entities the information it deems necessary to pursue the objectives of the Fund.

1. In the face of the above, the requesting Members of Parliament argue that the Government has stepped into the Parliament's exclusive competence to make laws on the budget system, thus violating the provisions of article 95(2)(q) of the Constitution.

However, the decree-law is not concerned with the budget system. There are no provisions in the decree-law about the organisation of the budget or its execution, or about the principles that should guide one and the other.

The requesting MPs have assumed that Decree-Law no. 22/2008 establishes an autonomous fund through which the Government aims to engage in an "exercise in unbudgeting and financial indiscipline" (*desorçamentação*) and to subtract from parliamentary scrutiny a significant part of public money.

However, the requesting MPs themselves acknowledge that the decree-law "*does not establish a Board of Directors, nor does it mention a Supervisory Board or clarifies its mode of operation*". The essence of the decree-law may be summarised in one sentence: An Economic Stability Fund is established with the Ministry of Finance that will be funded from the State Budget, the purpose of which is to ensure the supply of goods and food security; to stabilise prices by intervening in the market; and to ensure the supply of construction materials.

Indeed, it is not possible to conclude from the text that the decree-law will establish a specialised financial body, a legal person governed by public law or a legal person governed by private law, that is, an entity that would exist autonomously with respect to the State/Public Administration that would be granted legal personality or administrative or financial autonomy. Nor can it legitimately be said that the decree-law defers the definition of what are expenses and revenue to a specific regulation.

Moreover, unbudgeting and financial indiscipline is reflected in the existence of public funds that elude the discipline of the budget, thus jeopardising the principle that there should be a single budget (principle of budgetary unity) and that the budget should include an estimate of all State expenses and revenue (principle of budgetary universality), pursuant to article 145(2) of the Constitution.

It is only possible to talk about unbudgeting and financial indiscipline when there is an autonomous fund with its own private budget that adheres to less rigorous rules, even though it may be under the State Budget, or when there are public funds that lie completely outside the budget estimates and the rules for budget execution. Unbudgeting arises whenever special legal rules are adopted for the management of public funds assigned to entities that are legally distinct from the State. The notion covers a wide set of circumstances, ranging from off-budget situations, financial autonomy and administrative autonomy to the management of public funds by private entities.

Decree-Law no. 22/2008 does not give rise to off-budget situations, financial autonomy, administrative autonomy or the management of public funds by private entities.

With the aforementioned decree-law, the Government simply creates a budget line within the Ministry of Finance “*to ensure the supply of goods and food security; to stabilise prices by intervening in the market; and to ensure the supply of construction materials*”. In no way are the powers of the Parliament to monitor the fund affected, for said fund originates entirely from the State Budget which has to be approved by the Parliament and whose execution is monitored by it. The allocation of USD 240 million to the Fund that was mentioned by the requesting Members of Parliament takes place by means of a rectifying budget that was recently approved by the Parliament. The execution of that specific amount will be subject to parliamentary scrutiny just like any other budget line and hence the statement that such allocation is an exercise in unbudgeting and financial indiscipline is unfounded.

The establishment of the aforementioned budget line falls under the constitutional powers of the Government “*to lead and co-ordinate the activities of the ministries*” and “*to take actions and make all the arrangements necessary to promote economic and social development and to meet the needs of the Timorese people*” (article 115(1)(l) and (o) of the Constitution). Thus, instead of stepping into the powers of others, the Government is simply exercising its own powers.

2. The requesting Members of Parliament further claim that by adopting Decree-Law no. 22/2008, the Government has violated the provisions laid down in article 97(2) of the Constitution.

Article 97 of the Constitution concerns the Parliament’s legislative initiative and reads as follows:

Article 97
(Legislative initiative)

1. The power to initiate laws lies with:

a) the Members of Parliament;

b) the parliamentary groups;

c) the Government.

2. There shall be no submission of bills, draft legislation or amendments involving, in any given fiscal year, any increase in State expenditure or any reduction in State revenues provided for in the Budget or Rectifying Budgets.

3. Bills and draft legislation that have been rejected shall not be re-introduced in the same legislative session in which they have been tabled.

4. Bills and draft legislation that have not been voted on shall not need to be re-introduced in the ensuing legislative session, except in case of end of the legislative term.

5. Draft legislation shall lapse with the dismissal of the Government.

Even though the Government is barred from adopting decrees-law that involve, in the current fiscal year, an increase in the State expenditure or revenues provided for in the State Budget or rectifying budget, we do not see Decree-Law no. 22/2008 as violating in any way the provisions laid down in article 97(2) of the Constitution.

The decree-law does establish a budget line of the Ministry of Finance that shall only have access to the funds and to incur in expenses once there are expenditure commitments (*cabimentação orçamental*) in the State Budget or rectifying budget.

Thus, Decree-Law no. 22/2008 does not involve, by itself, any increase or reduction in the State expenditure or revenues provided for in the budget for the current fiscal year.

In short, Decree-Law no. 22/2008 does not violate articles 95(2)(q) and 97(2) or any other provision in the Constitution.

III. Conclusion

Bearing in mind the arguments above, the Judges that make up the Panel of the Court of Appeal agree to rule that Decree-Law no. 22/2008 of 16 July does not violate articles 95(2)(q) and 97(2) or any other provision in the Constitution.

Dili, 14 August 2008

The Judges of the Court of Appeal

[signed]

Cláudio de Jesus Ximenes – President and Rapporteur

[signed]

Ivo Nelson de Caires Batista Rosa

[signed]

Antonino Gonçalves