

Rough unofficial translation from scanned Portuguese by La'ó Hamutuk.

For information on the 2011 Budget, see <http://www.laohamutuk.org/econ/OG11/100JE2011.htm>



Honorable Judge Councillor President of the Court of Appeal

Honourable Judges Councillors:

The Constitution entrusts the Court of Appeal the normative place of the Constitutional Court judges to decide as a precautionary measure, whether unedited standards conform with principles and fundamental precepts. The President of the Republic is entitled to request a ruling, under this this jurisdictional plan, before promulgating laws discussed and approved in the National Parliament.

Because of doubts about the constitutionality of some provisions of National Parliament Decree 45/II that Adopts the General State Budget of the Democratic Republic of Timor-Leste for 2011, submitted for promulgation asks the Court of Appeal to precautionarily consider the constitutionality of this statute, under Articles 149 and 164 of the Constitution of the Democratic Republic of Timor-Leste, setting a deadline of 10 days for reasons of urgency.

And it does so because of the lively debate that this legislation has generated: the arguments supporting the unconstitutionality submitted, underpinning this application.

Then these are the reasons for this action:

CREATION OF SPECIAL FUNDS

1. The Timorese legal system governing the establishment of funds through Article 145.2 of the Constitution and Article 32.1 of Law No 13/2009 of 21 October, which deals with Budget and Financial Management.
2. The Article 145.2 of CRDTL provides that “The Budget law shall provide, based on efficiency and effectiveness, a breakdown of revenue and expenditures of the State, as well as preclude the existence of secret appropriations and funds.”
3. Article 32.1 of the Budget and Financial Management Law, in turn, provides that “The Minister of Finance may, when authorized by law, establish special funds that are not part of the consolidated fund”

4. From a simple examination of the constitutional provision and the regulation, it can be concluded that there are two conditions for the creation of special funds, namely, (1) the approval by law and (2) transparency / specification of the expenditures that fund is intended to cover.

(1) Approval by Law

5. In fact, the interpretation of the provision in Article 145.2 of CRDTL, it is clear that the Constitution itself allows the creation of funds through the Budget Law, to the extent that the Budget Law is not allowed to create secret funds, leads to the conclusion there is no barrier if funds are not secret.
6. But this reference of the Constitution allows them to raise another issue: although the piece of legislation approved by the National Parliament, which has been submitted to the President for promulgation, has the nature of law, can ask whether the creation of Funds for Infrastructure and Human Capital Development, provided for in Article 9 and following of Decree of the National Parliament No 45/II, should not have been the subject of its own law.
7. There are good reasons to argue that yes, given the constitutional principle of separation of budgetary matters, from other matters of financial legislation, requiring framework laws and not of immediate and particular item.

(2) Transparency / specification of the expenditures that the fund is intended to cover.

8. Further, it is necessary to examine the transparency of Funds for Infrastructure and Human Capital Development laid down in legislation approved by National Parliament, in order to identify whether it fulfills the minimum requirements in terms of specification of expenditures, as required in Article 145.2 of CRDTL.
9. Such requirement for specification of expenditures to the fund refers is intended to monitor the Government's actions against the powers that were conferred on it by National Parliament in budgetary terms.
10. That said, and analyzing clauses 2 and 4 of Article 9 of the statute enacted by the National Parliament and the proposal from Government as a whole, it appears that the requirements of transparency required by Section 145.2 of CRDTL were not met, in that are not identified point by point, so specify which expenses will be covered by resources allocated to these funds.
11. Article 9.2 of the 2011 state budget provides only vague areas of government where spending can be generated, such as telecommunications, for example; line h) of the legal document itself provides that resources for Infrastructure Fund earmarked for the acquisition, construction and development of "other infrastructure that promote strategic development."
12. In truth, the entire approved statute and its annexes do not have any effective description of the actual expenditures which should be covered by the Infrastructure Fund.
13. That is, it can be argued that the government received a "blank check" from the National Parliament to use the resources intended for this fund according to your

convenience, contrary to the provisions of Article 95.2(q) of the Constitution, which empowers the National Parliament to legislate on budgetary arrangements, and in Article 115(d) of the Constitution, which gives the Government the power to implement the budget as approved by the National Parliament.

14. The same argument applies to Article 9.4 of the budget law which provides that the Human Capital Development Fund is intended to fund projects and programs of training of human resources, without discriminating which programs and projects, but only as giving as examples “programs to increase the training of Timorese professionals in key sectors of development such as justice, health, education, infrastructure, agriculture, tourism, petroleum management and financial management, among others ...”
15. There is also in this case no specification of how the resources allocated will be spent, leading to a total lack of accountability and transparency on the executive activities of the Government.
16. And enjoying a very similar situation on the constitutionality of Articles 1 and 2 of Law No 12/2008 of 5 August, which amended Law No. 10/2007 of 31 December, which established the General State Budget for 2008, creating the Economic Stabilization Fund, the Appeal Court confirmed the following understanding:

“... Being approved by the Budget Act of the Parliament, without specifying the expenditures, allows the Government, which has the power to execute, to alter it as they wish. In this respect Teixeira Ribeiro in Lessons in Public Finance: However, in approving the budget, the Assembly set the amount of expenditures as total expenditure on each chapter and each function and sub-function. Hence, in principle, the Government is prohibited from transferring funds from chapters to sub-function or sub-function to function and to cover claims which result in increased total expenditure of the budget or the expenditure of any chapter and any function or sub-function”

In turn, Sousa Franco, Studies on Financial Constitution 1976-1982, No 510, says: The budget may be amended, whilst respecting the original form: legislative initiative of the Government (due to its exclusive jurisdiction not delegatable in this area) and amend with a revision law.

Thus, once approved the Government Budget is bound by its own lower levels of specification of that document with respect to organic classifications, chapters and functional.”

17. Further, the Court of Appeal concluded on the absence of breakdown of expenditures contained in the Economic Stabilization Fund, which had been approved by the National Parliament:

“... To give the Government the allocation in question, the National Parliament has given it a blank check in the amount of two hundred and forty million U.S. dollars, leaving to executive discretion in a large area of Budget expenditures. It is, therefore, a power that the Government cannot have and that the National Parliament cannot confer on the Government.

...

... A breakdown of expenditure is required by the Constitution ... as a foundation

the truthfulness, accuracy, transparency, accuracy, precision and freedom of political commitment and the corresponding administrative obligations.”

18. Moreover, besides the lack of appropriate breakdown of expenditures to be covered by the respective funds, Article 9.6 of the legal diploma under discussion states that “The Administrative Councils are responsible for effecting the amendments to the appropriations allocated to programs within the ceiling of the budget authorized by the National Parliament for their respective goals,” thus violating the constitutional separation of powers laid down in Articles 95.2(q) and 115(d) of the Constitution.
19. Another was not the opinion of the Court of Appeal in the previously mentioned case:

“The National Parliament shall not authorize the Government to amend the budget. This constitutional principle of division of budgetary powers between Parliament and the Government necessarily translates to give Parliament the power to decide the politically significant options in budgetary matters; volume of revenue and overall expenditures, options in respect of expenditure, distributing, according to certain political criteria, the appropriations for each heading. Parliament cannot delegate its power to the Government as such points cannot renounce the exercise of those powers, leaving the Government more or less discretionary powers.”
20. Finally, it is worth noting the opinion prepared by the Committee on Economy, Finance and Anti-Corruption of the National Parliament (Committee C) regarding the creation of special funds under examination.
21. In accordance with the provisions of the above document *“The proposal of the funds listed in Appendices 2B and 2C is not broken down in relation to revenue and expenditure, as required by art. 145.2 of the Constitution. Nor was Parliament given estimates of revenue and expenditure of special funds for financial year 2011 as required by art. 32.6 of Law No 13/2009.”*
22. Also according to the same document, with regard to the recommendations of Committee C of the National Parliament, this adds *“Parliament should not approve the funds without first receiving information from the Government to enable a reasoned decision. The approval should be dependent on the legally established commitment that funds in the State Budget documents submitted to Parliament will be effectively executed as expected unless the Parliament approves the reallocation of funds.”*
23. Therefore, we conclude that the normative guidelines criticized in the GSB 2011 damage the constitutional provisions that subsequently invited criticism.

TRANSFER OF AMOUNTS FROM THE PETROLEUM FUND FOR THE STATE BUDGET IN EXCESS OF THE ESTIMATED SUSTAINABLE INCOME

24. The preamble of the draft law now under examination includes a summary of the allocations of the State Budget for fiscal year 2011, approved by the National Parliament.
25. From the brief reading of the final part of the above documents, as well as their annexes, it appears that the value corresponding to the fiscal deficit of 2011 State

Budget amounts to \$1.196 billion, with \$1.055 billion to be financed from the Petroleum Fund.

26. The report prepared by Deloitte ToucheTomatsu determines the estimated sustainable income of the Petroleum Fund for 2011 amounting to \$734 million.
27. In accordance with the provisions of Article 4 of the proposal approved by Parliament notes that the Government intends to finance the 2011 state budget in the amount of \$1,055 million dollars through the Petroleum Fund and the transfer of the amount of \$734 million U.S. dollars, corresponding to the estimated sustainable income from the Petroleum Fund, made in compliance with Article 8 of Law No 9/2005 of 3 August (Petroleum Fund Law) and transfer the amount of \$321 million, an amount that exceeds the sustainable income, to be made after completion of paragraphs "a", "b" and "c" of Article 9 of the previously cited Law.
28. The Petroleum Fund Law establishes strict criteria for transfers from the Petroleum Fund both with respect to the amount within the estimated sustainable income, and the amount that exceeds this parameter (Articles 8 and 9 respectively).
29. The above mentioned Article 9 provides:

"Article 9

Transfers exceeding the Estimated Sustainable Income

No transfer shall be made from the Petroleum Fund in a Fiscal Year in excess of the Estimated Sustainable Income for the Fiscal Year unless the Government has first provided Parliament with:

(a) the reports described in paragraphs 8.(a) and 8.(b);

(b) a report estimating the amount by which the Estimated Sustainable Income for Fiscal Years commencing after the Fiscal Year for which the transfer is made will be reduced as a result of the transfer from the Petroleum Fund of an amount in excess of the Estimated Sustainable Income of the Fiscal Year for which the transfer is made;

(c) a report from the Independent Auditor certifying the estimates of the reduction in Estimated Sustainable Income in paragraph (b) above; and

(d) a detailed explanation of why it is in the long-term interests of Timor-Leste to transfer from the Petroleum Fund an amount in excess of the Estimated Sustainable Income."

30. According to the article transcribed above, it appears that in addition to the mandatory reporting by the Government to the National Parliament of the reports described in paragraphs "a," "b" and "c," which are authorized for transfers that exceed the Estimated Sustainable Income, it is essential for the Government to comply with paragraph "d" of that section, which is the *"detailed explanation of why it is in the long term interests of Timor-Leste to transfer an amount in excess of the Estimated Sustainable Income."*
31. Accordingly, there is doubt as to the prior and sufficient explanation from the Government to Parliament in accordance with the provisions of paragraph "d" of Article 9 of the Petroleum Fund Law, once that under Article 4 of the act now under examination, the Government refers only to compliance with the provisions of paragraphs "a", "b" and "c" of Article 9 of the Petroleum Fund Law, excusing itself from compliance with paragraph "d" of that Article.

32. This question has been examined by the Court of Appeal, in its ruling published in the Official Gazette on November 26, 2011 (sic, actually 2008), which dismissed the application for subsequent abstract review of the constitutionality of Articles 1 and 2 of Law No. 12/2008 of 5 August, which approved the amendment to Law 10/2007 of 31 December (the 2008 State Budget) and dismissed the illegality of the same law for breach of the legislative process; criticized:

"... The Economics and Finance Commission's Report and Opinion, placed in the file, it appears that the Government, when submitting the draft law to amend the General State Budget, did not present the requirements of art. 9(d) of Law 9/2005, i.e. the detailed explanation in the long term interest of Timor-Leste. The file does not, well, neither the agency issuing the rule was added a detailed explanation about the reasons why he considers it in the long-term interest of Timor-Leste to transfer an amount greater than the Estimated Sustainable Income."

33. On the other hand, the jurisprudence of the Court of Appeal itself (See decision published in the Official Gazette on November 26, 2008) recognizes that the Petroleum Fund Law has superior force, and therefore could not be repealed by a subsequent law, namely the State Budget Law:

"In any case, these criteria will have to read considering the linguistic statements of the Constitution itself. Article 139.2 is not a sufficient factor to warrant the conclusion that, the constitutional system, the Petroleum Fund Law, benefits from a superior force. Indeed, the provision that mandatory financial reserves should be established in accordance with law, the constitution contains this reference in various other provisions.

Thus, the linguistic utterance does not follow that the Petroleum Fund Law is fundamentally more valid than any other law, or receiving a special derogatory capacity for protection against derogation or exemption by subsequent law.

However, even without any specific indication in the letter of the Constitution, taking a teleological interpretation, we believe that the Petroleum Fund Law is intended as "constitutionally required" in the sense that defines a legal framework for the use of natural resources due the special role assigned to this by the Constitution and the importance they represent for the country in present and future.

It is also true that the Constitution does not postulate any self-restricting system to Parliament on the legal use of natural resources, but in any case we can speak of a self-restricting Parliament resulting from ordinary law, self-restricting this, which was aimed at create a model to ensure the fair use of natural resources.

Indeed, the text of the Petroleum Fund Law - Article 4 - yields a clear idea of the National Parliament implementing a self-restriction with regard to relations between this law and the budget law.

Thus, there is no doubt that the Petroleum Fund Law has the nature of a law with "superior force".

34. Therefore, also the 2011 State Budget Law is seen to have the same vice of illegality in violation of the legislative process.

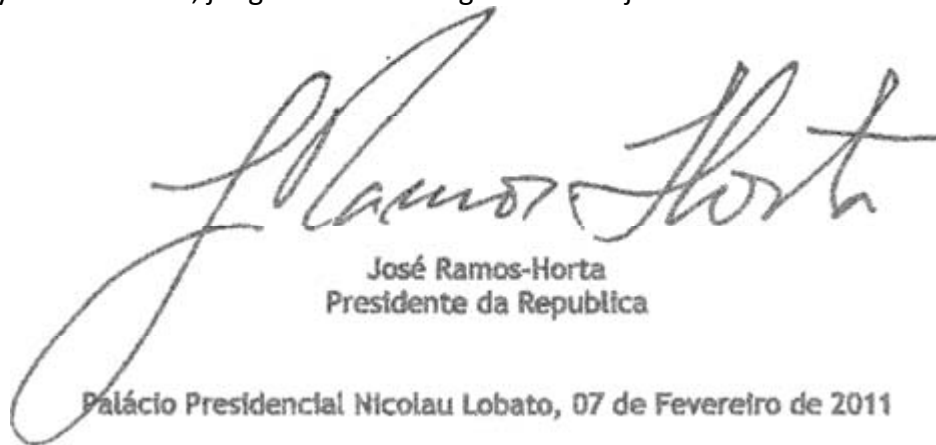
CONCLUSIONS

A. The creation of Infrastructure and Human Capital Development Funds, referred to in Article 9 and subsequent articles of National Parliament Decree No 45/II, through the

2011 state budget, not by specific law, violates Article 145.2 of the Constitution;

- B. The creation of Infrastructure and Human Capital Development Funds, referred to in Article 9 and subsequent articles of National Parliament Decree No 45/II, by not identifying the specific expenditures which will be covered by resources allocated to these funds violates the transparency requirements in the specification of expenditures required by Article 145.2 of the Constitution.
- C. The transfer of the amount of \$321 million U.S. dollars, an amount that exceeds the sustainable income, without a detailed explanation about the reasons why it is in the long term interests of Timor-Leste to make such a transfer, infringes Article 9 of the Petroleum Fund Law, which has superior force.

Your Excellencies Judges-Councillors, heard through the National Parliament and His Excellency the President, judge well according to law and justice.



Handwritten signature of José Ramos Horta in cursive script.

José Ramos-Horta
Presidente da Republica

Palácio Presidencial Nicolau Lobato, 07 de Fevereiro de 2011