Appeals Court advice to President on constitutionality of the 2016 Budget Law.
Unofficial translation by La'o Hamutuk.
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CASE NO: 02 / CONSTITUTIONALITY / 2016 / TR

Judgment by the Judges constituting the Court of Appeal, Maria Natércia Gusmão, Deolindo dos Santos and Jacinta Correia da Costa.

I. Report

His Excellency the President of the Democratic Republic of Timor-Leste, pursuant to articles 150(a), 85(e) and 164, in conjunction with article 126.1(b), all of the Constitution of the Democratic Republic of Timor-Leste (CRDTL), submit for abstract review of the constitutionality of Law no. 1/2016, of 14 January approving the State Budget for 2016, concluding:

Article 11 of Law no. 1/2016 of 14 January (State Budget for 2016) created the new "Infrastructure Fund" as an autonomous fund with its own legal, administrative, patrimonial and financial personality.

The organization and functioning of the Government is the exclusive legislative competence of the Government, pursuant to article 115.3 of the Constitution, and specifically with regard to the creation of legal persons of public law, other than the State, integrated in the indirect administration of the State, as referred toin article 10 of Decree-Law n. 12/2006 of 26 July.

It is contradictory that the government wants to benefit from the rules of indirect state administration without, however, letting go of absolute control over its implementation - ~~if the government wants to drive the "Infrastructure Fund" it will have to integrate it in the Direct Administration and it cannot be integrated as an autonomous fund in the Indirect Administration, which public authorities can only oversee or supervise, without calling into question the principle of functional separation of powers provided for in article 69 of the Constitution.~~

Even assuming a different solution, the new ~~"Infrastructure Fund" can hardly benefit from the system of autonomous funds provided for in article 2.2(c) of the Law on Budget and Financial Management (LOGF), since this requires the existence of its own revenues,~~ which are an expressed requirement of this article for the benefit of this system.

The inclusion of " Infrastructure Fund" as autonomous fund of the state budget, ~~also violates the rule specification, provided for in article 7 of LOGF and article 145 of the Constitution as it reduces to one line of Annex III of OGE about one third (1/3) of the state budget~~, more seriously considering the possibility of changes to the budget of the legal person with administrative and financial autonomy, without governmental control, in accordance with article 38 of the LOGF.

In these terms and in the best of law, it is required in terms petitioned, by Your Excellency for ~~Successive Abstract Supervision of the Constitutionality of article 11 of Law no. 1/2016, of 14 January,~~ which creates the "Infrastructure Fund" and extinguishes the "Infrastructure Fund established pursuant to Article 32 of Law No. 13/2009 of 21 October" by:

a) Substantive unconstitutionality violates article 1 of the Principle of the Rule of Law, of article 115.3, for full legislative reserve to the Government of article 145.2 of the Constitution, relative to the rule of specificity and article 69 of the Constitution for violating the Principle of Separation of Powers;

b) Illegality of the legal acts provided for in article 126 of the Constitution understood as an "indirect unconstitutionality" for violation of the provisions of article 2.2(e) regarding the requirements for creation of autonomous fund, and article 7 of Law no. 13/2009 of 21 October for the rule of specificity and article 11 relative to publicity of the OGE.

Notified the National Parliament, in the person of its President, in legal terms and for the purposes of paragraphs 2 and 3 of Article 190 in conjunction with nos. 1 and 2 of article 119 of the CPC to rule, wanting on the request, fighting the constitutionality of the provision in question, came to present their claims to the Court of Appeal, concluding that:

1. The Constitution confers an exclusive right to the Government to define its organization and operation, and to submit to Parliament its Program and Budget.

2. The exercise of this right, even through his proposal of the State Budget Law, is a full consecration of separation of powers, the rule of law and the proper functioning of the organs of sovereignty.
3. The autonomy of the Infrastructure Fund is, in this context, essential to the implementation of the Government Program for 2016 and complies with established policy objectives.
4. It is understood that the Government must transform the previous Fund into an autonomous fund with greater management flexibility that allows a more efficient response to its challenges.
5. This solution ensures the continuity of financing multi-year infrastructure investment projects more efficiently and allows the National Parliament and the Audit Chamber continue to fully exercise their inspection and auditing mandates, maintaining responsibility for budget execution and project implementation, transparency and budgetary rigor that the law and the nature of the strategic projects of this kind require.
6. The State Budget Law is, by its nature, a suitable vehicle for the definition of norms with financial and budgetary impact, as well as the repeal of the previous special fund of Infrastructure, created in the previous Law of the 2011 State Budget.
7. The Content of the monitored Article determines transparency and objectivity the purposes for which it is intended, and does not violate or exceed the regulatory degree of constitutional and legal requirements of LOGF for the creation of autonomous funds, conveying all rights and obligations of the dissolved fund.
8. Several of the arguments supporting the request for oversight refer to matters that are not, and should not be, regulated by Article 11 of the Law 1/2016 of 14 January approving the State Budget for 2016 and, therefore, should not be considered by the Court. At issue are the functioning, adopted model, operation, revenues, and monitoring of the new autonomous Fund that will only be determined by the Government in legal Diploma of regulation, which should of course respect the constitutional and applicable legal provisions.

Accordingly, we hold that should not *Mui Douto Tribunal* to declare unconstitutional the Article 11 of Law n. 1/2016 of 14 January, approving the State Budget for 2016, since it has not violated any rules of the Constitution of the Democratic Republic of Timor-Leste, and meets the standards laid down in Law no. 13/2009 of 21 October, which approves the Law on Budget and Financial Management.

Also notified under way and for the purposes of paragraphs 2 and 3 of Article 190 in conjunction with n. 1 and 2 of article 119 of the CPC, to rule on the request from the General Prosecutor of the Republic to give its opinion concluding the following:

Thus far, it is given to see that the question is reversed, after all, whether the Infrastructure Fund may or may not be constituted as an autonomous fund, and thus benefit from the specification of income and expenses with a minimum degree of disaggregation, as allowed in the budget sub-sector for autonomous services and funds.

As above, we are inclined to consider that the Infrastructure Fund does not meet the requirement of article 2.2(c) of Law No. 13/2009, the Budget and Financial Management Law.

And not apply to the Fund rules of specificity relating to autonomous funds and services, it should be considered that their expenses are insufficiently disaggregated, which also does not cease to be a viable basis for the raised substantive unconstitutionality, for violating article 145.2 of the Constitution of the Democratic Republic of Timor-Leste.

Finally, a brief reference to the alleged infringement on the exclusive legislative competence of the Government.

A priori, this claim seems antinomian, since the standard was issued as a result of the government's proposed law.

But the legislative initiative, which means proposing the law, is one thing, while legislative power, which means enacting the law, is another.

The truth is that the contested rule formally creates a government agency and does not leave intangible the organization and functioning of the Executive, a constitutionally reserved matter to the legislative competence of the Government (article 115.3, the CRDTL).

The Government was also notified, in the person of the Prime Minister, in legal terms and for the purposes of paragraphs 2 and 3 of Article 190 in conjunction with n. 1 and 2 of article 119 of the CPC, to comment on the request, concluding with these allegations (point 75-83):

75. The autonomy of the Infrastructure Fund is essential for the implementation of Government Program for 2016 and compliance with established policy objectives.

76. On the importance of achieving the political objectives of the government, and all, we quote "Taur Matan Ruak – A Life for Independence", Maria Ângela Carrascalão, Lídel, 2012: "For without investing in infrastructure and other strategic areas, of course it will be very difficult to absorb the manual labor that we have ... fifteen thousand young people and the number is increasing - available for work each year. It is urgent to develop! And the Strategic Development Plan of this government is a very positive step."

77. We agree with the Government that it must transform the previous Fund an autonomous fund with greater management flexibility that enable a more efficient response to its challenges.

78. This is appropriate, consultation between the Government and the Parliament, in full respect of the separation of powers principle, could develop strategic infrastructure defined in the Strategic Development Plan in order to meet the significant challenges cited by His Excellency the President the Republic in that book.

79. The attempt of interference of another sovereign body to prevent the Parliament from creating a financial instrument and placing it at the disposal of the Government to regulate and execute its program lines properly and with parliamentary support, constitutes, truly, a serious violation of the constitutional principle of separation of powers.

80. This solution ensures the continuity of financing of multi-year investment infrastructure projects more efficiently and allows the National Parliament and the Audit Chamber to continue to fully exercise their inspection and auditing mandates, maintaining responsibility for budget execution and project implementation, transparency and budgetary rigor that the law and the nature of the strategic projects of this kind require.

81. The State Budget Law is the most appropriate vehicle for the definition of norms with financial and budgetary impact, as well as the repeal of the previous special Infrastructure Fund, created previously in the 2011 State Budget Law.

82. The Content of the monitored Article determines transparency and objectivity the purposes for which it is intended, and does not violate or take exception to the rules of constitutional and legal requirements of LOGF for the creation of autonomous funds, conveying all rights and obligations of the dissolved fund.

83. Several of the arguments supporting the claim of supervision refer to matters that are not, and should not be regulated by Article 11 of Law no. 1/2016 of 14 January approving the state budget for 2016 and therefore they should not be considered by the Court. The functioning, model adopted, operations, revenues, and monitoring of the new autonomous Fund will only be determined by the Government in legal Diploma of regulation, which should of course respect the applicable constitutional and legal provisions.

Accordingly, you should not *Mui Douto Tribunal* to declare unconstitutional Article 11 of Law n. 1/2016, of 14 January, approving the state budget for 2016, since it has not violated any rules of the Constitution of the Democratic Republic of Timor-Leste, and meets the standards laid down in Law no. 13/2009 of 21 October, which approves the Law on Budget and Financial Management.

We must now consider and decide

II-Grounds

It must first of all proceed to the precise delimitation of the object of assessment, taking into account the terms on which the request made by His Excellency the President of the Republic is made.

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The President of the Republic presented the application for constitutional oversight of Art 11 of Law 1/2016 of 14 January, which established the Infrastructure Fund as an autonomous fund.

The Court of Appeal, being within the scope of its Constitutional jurisdiction given in article 124.2 and article 126, in conjunction with article 164.2 of the RDTL Constitution, will consider the request of Abstract Supervision of Constitutionality required by H.E. the President of the Republic.

Plea:

Subordination of the Contents of the 2016 Budget Law to the LOGF

H.E. the President of the Republic asked the question that even if the Constitution does not expressly provide for the enhanced force of any law (other than the Constitution itself), in systematic terms it is not sustainable for the National Parliament to pass legislation, in the case of Law no. 13/2009 of 21 October, which does not intend to comply, namely, that there is a subordinate linking all the State Budget laws to the Budget and Financial Management Law, law no. 13/2009 of 21 October, as amended by Law no. 9/2011 of 17 August.

Supporting his argument, he cites case law of the Court referring to the proceedings n. 04/2008 and 01-CONST-11, which in the abstract control of constitutionality, linked the State Budget to the content of Law no. 9/2005 of 3 August (the Petroleum Fund Law). In view of the illegality of normative acts provided for in Article 126. of the Constitution, breach of parametric standards was built as an "indirect unconstitutionality" Ac. TR, Case n. 04-CONST-2008 published in Series I of the *Official Gazette* n. 44 of November 26, 2008 page 2737) for breach of "common law bound, specifically" Ac. TR, Case n. 01-CONST-11, published in Series I, Official Gazette n. 5, 14 February 2011, page 18).

He said that *the National Parliament extends this same parametric rules regarding the relationship between the Budget Law and the Financial Management (Law No 13/2009 of 21 October or LOGF.) And OGE itself - in this sense, see Jorge Bacelar Gouveia, Constitutional Law of Timor-Leste, IDLP, PN, Lisbon, Dili, 2012, page 516.*

The National Parliament said that (*point* 4-6):

4. As is stated in Section 3 of the Oversight Order, as well, the Constitution does not provide for the enhanced force of any legislation.
5. In this context, imports of constitutional concepts foreign to our legal system, in addition to causing its dysfunctionality, introduce legal solutions that hurt the Constitution itself.
6. Not being assigned by the Constitution, the LOGF does not have, nor can the constitutional framework have, enhanced force.

But the prosecutors said *(...) considering the parametric value of the Budget and Financial Management Law to the law establishing the budget, it should be considered feasible to raise indirect unconstitutionality of the contested provision.*

On this matter the government joined, in full, the reply sent by the National Parliament.

Let's see,

CRDTL says in article 2.3 that [this] law and other state acts and local government are only valid if they were in conformity with the Constitution, not making the Basic Law reference to laws or hierarchy to its enhanced value.

See in this regard, see the note 3 to Article 126 of the Annotated Constitution of the Democratic Republic of Timor-Leste (Jorge Bacelar Gouveia, Human Rights - Interdisciplinary Research Center, School of Law of the University of Minho, Braga, p 401.):.

3 - The Constitution provides the legal cases the legislator binding, such as the laws of legislative authorization, defined in article 96; the legal development of the "bases" schemes, for example, the education system or social security and health system, exclusively devoted to the PN by article 95.1, paragraphs m and n, respectively. Could it will find yet another limitation to the legislature a ban on presenting projects or proposed law or amendment involve, in the year in which they are presented, increased spending or reduction in State revenues provided for in the State Budget in terms of article 97.2. ***Out of these cases, there is in the***

Constitution, no reference to a hierarchy system of legislative acts. In the relationship between legislative acts, out of these cases, it is therefore the principle lex posterior derrogat legi priori *(bold added).*

Whereas the CRDTL does not recognize enhanced force of laws, only the Constitution can define the formal and material limits of intervention of the various organs of sovereignty, in this case the National Parliament, why can not the Constitutional Jurisdiction enjoy the constitutionality of article 11 of the GSB law only based on the possible infringement of LOGF, as indeed it is defended by the National Parliament.

So, not being assigned by the Constitution, the LOGF may not have in the current constitutional framework, enhanced force, and cannot prevent the National Parliament to legislate on budgetary matters.

As well said by the Parliament in its reply, *(...) no law can prohibit changes by subsequent legislation with the same legal force.*

As mentioned in the judgment of the Constitutional Court of Portugal n 358/92 of 11/11/1992, published in the Journal of Portugal Series IA Republic of 26.1.1993, quoted the judgment of the Court of Appeal n 01/Const/2011/RT, the Budget law has special force of law of economic and financial programming of state activity, whose preparation and approval forms part of the exercise of political leadership role of the State in which directly participates in the parliamentary institution on the basis of which are assessments of political, economic and social relief that explain the "expansive force" of the budget document and the ineluctable overcoming its traditional vocation of mere accounting framework of income and expenditure fully linked to the implementation of the existing legal system.

Admittedly, as pointed out by H.E. the President, to ensure consistency of the legal system, the National Parliament should not pass legislation on the terms that must be drawn up, approved and executed the state budget that can be every year violated by the budget itself.

However, and as stated in the same judgment of the Court of Appeal n. 01/Const/2011/TR. *[A] Budget Law is now considered a substantive law and not merely formal, nothing stopping in principle that it creates new institutes, amends or revokes existing substantive laws. Only incur illegality if the law amended or repealed Is an "enhanced" law.*

Therefore, in our view, as the LOGF does not have enhanced value, we cannot delimit the exercise of the constitutional right of legislative action of Parliament.

Questions raised by H.E. the President of the Republic:

A). If article 11 of Law no. 1/2016 of 14 January (State Budget for 2016) that created the new "Infrastructure Fund", as an autonomous fund with its own legal personality, administrative, patrimonial and financial autonomy violates article 1 of the rule of law principle, article 115.3, for full legislative reserve the Government of article 145.2 of the Constitution, respect the rule of specification and Article 69 of the Constitution for violation of the Separation Powers of Principle;

B). If there is illegality of normative acts provided for in Article 126 of the Constitution constructed as a "indirect unconstitutionality" for violation of article 2.2(e), for the requirements for creation of autonomous funds, in article 7 of Law no. 13/2009 of 21 October, as the rule of specification and article 11 in relation to the publicity of the State Budget.

Let us begin with the first question:

H.E. the President of the Republic raised the material unconstitutionality of art 11 of Law 1/2016 for violating the Rule of Law Principle, the principle of the Reserve of Absolute Legislative powers to the Government, the Rule of Specifity and the Principle of Separation of Powers.

<u>The Rule of Law</u>

Refers H.E. the President of the Republic that the consecration of RDTL as democratic state under rule of law by article 1 of the CRDTL imposes a basic principle of legislative production that determines the binding of the legislature to previous legislation under which new legislation is approved.

The principle of a State under rule of law expressed in the primacy of law, which means the duty of all and the state itself to comply with national laws but does not impose an immutability of law. Now, in a democratic constitutional state a parliamentary law is, also, the privileged expression of the democratic principle and the most appropriate and safe instrument to define certain material systems. That is, in general terms, the principle of supremacy of law and the principle of law reservation point to the legal and constitutional linkage of executive power, but not the legislature, since the use of its constitutional power, cited in the plea.

Hence it is considered rejected this argument as set out by H.E. the President of the Republic.

Legislative Government Reserve and separation of powers.

Through Law no. 1/2016, of 14 January, approving the State Budget for the year 2016, the Infrastructure Fund was dissolved as a "special fund" created under article 32 of the law no. 13/2009 of 21 October, the Budget and Financial Management law (LOGF) through Law no. 1/2011 of 14 February, which approved the State Budget for 2011.

The n. 2 of the same article 11 has set up a new Infrastructure Fund as "autonomous fund", "(...), with legal personality, administrative and financial autonomy, its own assets and its own revenues assuming all the rights and obligations of the dissolved Fund".

In this application of constitutionality is questioned article 11 of Law 1/2016, which creates the "Infrastructure Fund" as autonomous fund with legal personality and administrative and financial autonomy, its own assets and its own revenues and extinguishes the previous "Infrastructure Fund", established under article 32, of Law no. 13/2009 of 21 October.

The Article reads:

"Article 11 - Infrastructure Fund

1. The Infrastructure Fund established under Article 32 of Law no. 13/2009 of 21 October, by Law no. 1/2011, of February 14, is dissolved.
2. It created the Infrastructure Fund as an autonomous fund, with legal personality and financial autonomy administrative, its own assets and own revenue, assuming all the rights and obligations of the dissolved Fund, referred to in the preceding paragraph.
3. The Infrastructure Fund is intended to finance programs and strategic projects for the acquisition, construction, development, maintenance and rehabilitation of:
   a) Road infrastructure, including roads, bridges, ports and airports;
   b) Social - oriented infrastructure, including hospitals, schools and universities;
   c) Infrastructure protection against floods and landslides;
   d) Treatment facilities for water and sanitation;
   e) Power generation and distribution lines;
   f) telecommunications;
   g) Logistics facilities, including storage infrastructures;
   h) Government buildings and public facilities;
   i) Other infrastructure to promote the development strategy.
4. The entity responsible for the Infrastructure Fund's operations is the Administrative Council, which is composed of the Government member responsible for planning and strategic investment, presiding, the Government member responsible for public works, transport and communications, and the Government member responsible for finance.
5. The Infrastructure of the Fund is regulated by the Government.

The creation of public funds with legal personality and with administrative, financial and patrimonial autonomy, which include autonomous funds, is in the legal system Timorese subject to the legal framework defined by article 2.2, of Law no. 13/2009 of 21 October (Budget and Financial Management) and article 10 of Decree-Law no. 12/2006 of 26 July (Organic Structure of Public Administration).

Art 2.2, of the Budget and Financial Management Law, in turn, postulates that are *autonomous services and funds that meet all of the following requirements: a) not of the nature or form of a business, foundation or public association even if subject to the system of any of these other diploma; b) has administrative and financial autonomy; c) controls its own revenues to cover its costs in accordance with the law.*

And article 10 of Decree-Law no. 12/2006 (Public Administration Organic Structure), entitled Indirect Administration states that *1). The Government may, by decree law, create public legal persons, with administrative, financial and asset autonomy, under the supervision of the competent government member for the respective area, in order to proceed to meet community needs, when verified that the modality of indirect administration is most appropriate to the public interest and the satisfaction of those needs. 2). The public authorities referred to above may take the form of public institutions, public establishments, public foundations and public companies, as defined in its organic law. 3). The regime of the various modes of public legal persons, including the scope and limits of their administrative and financial autonomy, is defined in their own diplomas.*

Nevertheless, DL n. 12/2006, makes no reference to creating "autonomous funds."

The organization and functioning of the Government is the exclusive competence of the Government, pursuant to article 115.3 of the Constitution and specifically, with regard to the creation of legal persons of public law, other than the State, integrated in the Indirect State Administration, as article 10 of Decree n. 12/2006, of 26 July, cit.

In turn, Article 95.2(q) of the Constitution assigns to the National Parliament the exclusive power to legislate on the budget system. That is, to the question of public finance and budget system is exclusively assigned to the National Parliament.

Similarly, as to the creation of autonomous funds, *as the National Parliament said in its response*, it distinguishes two levels: the exclusive legislative competence of the Parliament in budgetary matters and the exclusive legislative competence of the Government for its organization and functioning and the direct and indirect administration of the State.

The Infrastructure Fund set up by Article 11 of Law no. 1/2016, of 14 January, it is a tool whose purpose is to fund strategic infrastructure projects of national importance. The same understanding has been expressed in the judgment in Case n. 01/CONST/2011/TR, to be said that (...) the *autonomous funds are the major instrument for the realization of investments.*

Parliament to determine the organization of financing as an autonomous fund, with legal personality, administrative and financial autonomy, own assets and own income does not mean that is available to be integrated into the administrative organization of the state.

That the fact that Article 11, as the article that in 2011 created the predecessor fund, noted that the entity responsible for the Infrastructure Fund's operations is a Board of Directors, with the integration of certain members of the Government, once more does not mean that is available to be integrated into the administrative organization of the state.

I.e. the Parliament on the use of its legislative powers in budgetary matters proceeded to just create Infrastructural Fund as an "autonomous fund", while financing instrument of investment required for physical infrastructure, not having defined the terms in which it will be integrated into the administrative organization of the state or how the fund will operate.

In the National Parliament response states that it is for the Government to define the legal-institutional framework of the Autonomous Fund in terms article 11.5 of LGSB 2016 "The Infrastructure Fund is regulated by the Government."

Consequently, the Parliament further states, in respect of the powers constitutionally assigned to it, the Government may decide to subject the Infrastructure Fund to supervision (inspection, integrative, penalty, rescinding or substitutive) or oversight, more or less demanding and also define what type of legal person of public law can take for this autonomous fund. These options described are truly the exercise of the power reserved to the Government in respect of its organization and operation.

The argument is based on the fact that the National Parliament is limited to create the Infrastructure Fund as "autonomous fund" while *(...) imminently financial figure, taking options of a budgetary nature, without any legislative choice as to their integration in Administration by giving the Government the power to regulate the Infrastructure Fund.*

Concluding that *(...) Parliament created the autonomous fund within its exclusive power over budget matters, leaving the government regulation of the same under the jurisdiction of that body to define the rules on the functioning and organization of the State Administration.*

Indeed, although they agree with the arguments presented, it is essential that regulation of even the Government is set, inter alia, the scope and limits of its administrative and financial autonomy, as well as how it will integrate into the State administration.

In any case, as left expressed above as a preliminary issue, it should be understood as constitutionally permissible the creation of the "Fund", in the Law of the State Budget, in the face of the nature of the Budget Law as a special law of economic and financial programming of State activity.

Given the above, and considering that the LGSB 2016 through its article 11, just merely defining global options as to the characteristics of the Fund, as a financial instrument, and the purposes for which it is intended, it is concluded that there is no violation of the exclusive legislative reserved to the Government or the principle of Separation of Powers.

The Rule of Specificity and Publicity

According to the provisions of article 145.2 of the CRDTL, the budget law *shall provide, based on efficiency and effectiveness, a breakdown of revenues and breakdown of expenditures (...)* not realizing, however, how should this "breakdown" will be materialized.

Pursuant to article 7 of LOGF, the state budget should sufficiently specify the revenue provided for and the expenditures set out therein.

Article 27 adds that the revenue and expenditure contained in the budget are specified by their overall amounts. But article 8 of the same law stipulates that the Government ensures *(...) publication of all documents that are necessary to ensure adequate disclosure and transparency of the state budget and its implementation, using whenever possible, the most advanced media existing at the moment.*

The dissolution of the Infrastructure Fund, as a "special fund" and the creation of the Infrastructure Fund as an "autonomous fund" brought significant changes to the level of information included in the State Budget Law.

In fact, the Law no. 6/2014 of 30 December, which approved the State Budget for 2015, contains, in its Annex IV, a detailed list of all programs and projects to be carried out during that year under Infrastructure Fund, "special fund".

Already the Law no. 1/2016, cit., reduces the information on the programs and projects undertaken by the Infrastructure Fund, "autonomous fund" in the year 2016, following the "specificity", "Goods and Services" "Minor Capital" and "Development Capital", in Annex III.

If in the case of the Infrastructure Fund, "special fund" as happened for 2015, the National Parliament to approve their budgets, also approved the budgets for each of the included programs and projects.

In the case of the Infrastructure Fund, "autonomous fund", Parliament only approved the overall amount of expenditure to be carried out in 2016, specified by "Goods and Services" ($804,000), "Minor Capital" ($4,000) and "Development Capital" ($392.96 million).

It might be asked, what are the programs and projects included in the new Infrastructure Fund, asks that, taking into account the information contained in the Law no. 1/2016, cit., No one can answer, not even National Parliament.

Does this mean that this amendment to the law can constitute a "blank check" passed by the National Parliament to the Administrative Council of the Infrastructure Fund, as the Council may conduct programs and projects to understand, within the total spending limit included in the State Budget for 2016.

Article 9.6 of Law no. 1/2011, cit., established as a "limit" to the changes in the power of the Administrative Council of the Infrastructure Fund, "special fund", which the *Administrative Council is empowered to make the changes of the allocations to programs within the limits of the total appropriation authorized by the National Parliament and met their objectives.*

In contrast, the Law no. 1/2016, cit., sets no limit to the changes to the budget, with the exception of the Fund's total spending limit.

Although we consider that the information on the programs and projects included in Law no. 1/2016, cit., is much reduced, compared to that which was in previous years GSBs, which reduces the transparency of the state budget for 2016, it is also true that the information contained in Annex III of that law is that which is legally required by article 27 of the LOGF, which is why it is considered that there is no violation of Article 145.2 of the CRDTL, or of articles 7 and 11 of the LOGF.

Question of the alleged violation of the LOGF by article 11 of Law no. 1/2016, of 14 January

H.E. the President of the Republic said in his petition that the Infrastructure Fund now created *(...) could hardly benefit from the scheme of autonomous funds, referred to in article 2.2(c) LOGF, since it does not have its own revenues.*

In its reply the Government came to note that *(...) the first condition that must be rebutted is that the financing of an autonomous fund for own revenue must be substantial, adding that (...) the legal and infra-constitutional framework contains no standard defining the minimum percentage of revenue that must be met for an autonomous fund to be regarded as such.*

Even in the opinion of the Government, *another argument that should be rebutted is that the Infrastructure Fund does not have its own revenues. (...) After all Article 11.2 of the State Budget states that the Infrastructure Fund is an autonomous fund with its own revenue.*

In the analysis of the constitutionality and legality of the creation of the Infrastructure Fund as an "autonomous fund" it is necessary to consider two aspects.

- First, the competence of the Parliament to proceed with the creation of a "legal person" which includes the indirect state administration, which has been addressed above.

- On the other hand, it is necessary to consider whether the creation of this "autonomous fund" meets the legal requirements (cumulative) established by Article 2.2 of the LOGF. They are: a) do not have the nature and form of business, foundation or public association, even if subject to the system of any of these other diploma; b) have administrative and financial autonomy; c) control of its own revenues to cover its costs in accordance with the law.

Despite the Government's right to say that the Timorese law is not attached to *(...) minimum percentage of income that has to be fulfilled for an autonomous fund be regarded as such,* we cannot ignore what is provided for in LOGF on this matter.

Indeed, Article 2.2 of the LOGF establishes the cumulative legal requirements for the creation of "autonomous funds" as follows: *a) do not have the nature and form of company, foundation or public association, even if subject to the system of any of these other diploma; b) have administrative and financial autonomy; c) control of own revenues to cover its costs in accordance with the law.*

Thus, we would understand the reading of the law that "percentage" was 100%, i.e. it would need its own resources to cover all expenditures.

The Government also states that another argument that should be rebutted is that the Infrastructure Fund does not have its own revenues, adding that *(...) how can the request for review of the constitutionality raise the matter without any support in the letter of the law of Article 11 of the State Budget.*

The Law no. 1/2016, cit., does not envision, however, its own revenue for the Infrastructure Fund. See Annex III to that law which is an integral part of it through article 2(c).

Another argument presented by the government is that article 11.2 noted that the Infrastructure Fund is an autonomous fund with its own revenue.

By its own revenue we should understand the values of collection services or state organizational units, resulting from its specific activity, administration and disposal of its assets or any other that by law or contract them should belong, these excluding, obviously, the appropriations that it eventually receives from the state budget.

According to Article 145.1 of the Constitution of the Democratic Republic of Timor-Leste (CRDTL*) the preparation of the State Budget (OGE) is up to the Government and its approval is the power of the Parliament.* This means the Government's initiative in drawing up the state budget and subsequent submission to the National Parliament for approval in accordance with its exclusive competence and its relationship to independence.

N. 2 of the same article states that the state budget should provide, based on efficiency and effectiveness, a breakdown of revenue and the breakdown of expenditure and avoid the existence of secret appropriations and funds.

Already article 115.3 of CRDTL states that (...) the matters concerning its own organization and operation, as well as on the direct and indirect administration of the State is the exclusive legislative competence of the Government.

The LOGF sets out the principles and rules concerning the preparation and content of the State Budget Law, the budget execution, budgetary control, accountability and financial responsibility.

Are subject to the application of this law the budgets of services without administrative and financial autonomy and the budgets of services and autonomous funds, all included in the state budget, according to its article 2.1.

Therefore, all services with or without administrative and financial autonomy and all autonomous funds are subject to the principles and rules laid down in LOGF.

They are still subject to LOGF "special funds" created under article 32 of LOGF, which lays down specific rules for budget execution, different from those applicable services with or without administrative and financial autonomy and autonomous funds.

They can be autonomous services and funds, in accordance with the provisions of article 2.2 of the LOGF, who cumulatively:

a. Do not have the nature and form of business, foundation or public association, even if subject to the system of any of these other diploma;
b. Have administrative and financial autonomy;
c. Disposal of its own revenues to cover its expenditures, under the law.

DL n. 12/2006, cit., defines the model of organization and functioning of the organs and services that comprise the structure of Government and Public Administration under its oversight.

Under this law the regime and rules of organization for bodies and services of the public administration is the "direct management" of the state (Article 9). It provides, however, that diploma in n. 1 of article 10, the possibility of the Government to create, by decree-law, *(...) public legal persons, with administrative, financial and patrimonial autonomy, under the supervision of competent government member for the respective area, in order to proceed to meet community needs, where it appears that the modality of indirect administration is the most appropriate to the public interest and the satisfaction of those needs.*

According to n. 2 of that article, those entities may take the form of public institutes (IP), public establishments, public foundations and public companies (EP), as defined in its organic law, setting in n. 3 that the modalities and the scope and limits of their administrative and financial autonomy are defined by specific statutes.

In this regard relates Daniela Barros da Silva, in "The budgetary management in the autonomous funds and services", University of Coimbra, 2011, p. 22, *"The autonomous funds and services possess a high degree of autonomy, as they have administrative and financial autonomy. Having administrative and financial autonomy presupposes having legal personality, which means that these agencies have their own budget. They have no*

budgetary independence. May have their own assets as well as the ability to manage, sell or purchase (patrimonial autonomy). Another important feature relates to the existence of their own cash and balances with the capacity to transition from the previous management to the next. In addition, they manage their money independently and can borrow up to certain amounts, assuming all liabilities (credit autonomy).”

Indeed, if one of the objectives behind the creation of these services and funds, through the allocation of administrative and financial autonomy, is to ensure a more autonomous and more flexible management, it is also necessary that this “autonomy” extends to its financing needs.

This means that the law intends to assign administrative and financial autonomy to state entities that have their own revenues and for this reason, are less dependent on the State Budget.

H.E. the President of the Republic refers in his application to the Infrastructure Fund, “autonomous fund” now created does not have its own revenues.

It happens, however, that the rules of the Fund hereby created are left to the government.

It is not required, nor would it be constitutionally acceptable, as has already been said, for the National Parliament in LGSB to completely regulate the concerned Fund.

It is only constitutionally acceptable to create it, but leaving to the government the law for its implementation.

Now at this time is what matters is to determine the income of the Fund, and only then can verify whether it is or is not also funded by own revenues.

Hence, one cannot conclude from the fact that it was planned to transfer a certain sum in LGSB to such a fund, that it will not also come to be financed by its own revenues.

That is, only in the face of the statute that regulates the Fund can we assess whether or not it meets the legal requirements.

The result of the law at issue here is the transfer of a certain amount to the Fund, but it cannot be assumed that it will not have its own revenues, so in terms mentioned above, one cannot conclude that the Law is illegal, leaving hope that the future regulation of the Fund and the accounts that it will have to pay to help achieve the objective of transparency in the management of public goods.

Nevertheless, even if the Fund will not have, in fact, its own revenue, considering what was left expressed above as “objection” in the absence in the Timorese legal and constitutional order of laws of “enhanced” force, it does no harm to the Budget Law, hence, the illegality of this flaw.

III. Conclusion

From the foregoing, it is concluded and decided that:

A) Article 11 of Law no. 1/2016, cit., creating the Infrastructure Fund, as “autonomous fund” does not violate Article 1 of the Rule of Law Principle, article 115.3, for full legislative reserve to the Government, article 145.2 on the rule of specificity and article 69. of the Separation of Powers Principle, all of the Constitution of the Democratic Republic of Timor-Leste;

B) Article 11 of Law no. 1/2016, cit., creating the Infrastructure Fund as “ autonomous fund “ does not violate the provisions of article 2.2(c), article 7 and not article 11 all of Law n. 13/2009, cit., relating, respectively, to the creation of autonomous funds requirements and the principles of specificity and publicity.

Notify and publish pursuant to article 153 of CRDTL.

Dili, March 8, 2016

Maria Natércia Gusmão - rapporteur

Deolindo dos Santos

Jacinta Correia da Costa