

We Must Respect the Constitutional Principles of the President's Duties

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Printed in Tetum in Timor Post and Diario Nacional, 11 February 2011

Introduction

On 15 November 2010, the Government presented a State Budget 2011 proposal to Parliament, after the Government had delayed the process by a month. The proposal would spend \$985 million, of which \$734 million would come from the Petroleum Fund.

For this budget, the Government Estimated the Sustainable Income (ESI) – 3% of Timor-Leste's petroleum wealth including the Petroleum Fund – at \$734 million, which means that for this budget, the Government intended to stay within the ESI.

However, on 28 January 2011, Parliament approved the State Budget in the amount \$1,306 million. Of this amount, the Government will take \$1,055 million from the Petroleum Fund, and \$141 million from the unspent balance from 2010, and \$110 million from domestic revenues.

Parliament amended the budget to spend \$321 million more from the Petroleum Fund, of which \$282 million is for the heavy oil electricity project.

At this point, the Budget is pending promulgation by the President of the Republic.

Why did the President ask the Court of Appeals for advice?

Timor-Leste is a democratic nation under rule of law, and every citizen – including the President of the Republic, Government, Parliament and Courts – must respect and comply with the laws, respect the separation of powers and the mandate of each organ. Article 69 of Timor-Leste's Constitution explains: *"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."* Each organ should consider that Timor-Leste's long-term national interest is in respecting our laws and Constitution. The law is not partisan politics; the law is an obligation for a democratic state.

President of the Republic Dr. José Ramos-Horta sent a petition to the Court of Appeals on 7 February 2011, to ask for preventive appraisal before he promulgates the State Budget (GSB 2011). This week, many newspapers in Timor-Leste have published inaccurate news about this development.

We all need to understand the mandate and powers of the President which are given by RDTL Constitution Article 85(e): *"To request the Supreme Court of Justice to undertake preventive appraisal and abstract review of the constitutionality of the rules, as well as verification of unconstitutionality by omission."*

The President Republika needs a thorough, legal analysis of the fundamental Constitutionality and legality of the State Budget before he promulgates or vetoes it, as explained in Constitution Article 88.1: *"Within thirty days after receiving any statute from the National Parliament for the purpose of its promulgation as law, the President of the Republic shall either promulgate the statute or exercise the right of veto, in which case he or she, based on substantive grounds, shall send a message to the National Parliament requesting a new appraisal of the statute."*

When President has received the appraisal from the Court of Appeals, then the President can **promulgate** the state budget to be implemented, or he can use his **right to veto** the budget when he is advised that it contains some illegality, and give it back to Parliament for drafting.

Therefore, when the President uses his powers, it doesn't mean that the President is making accusations or creating a political sensation (*Diario* newspaper, 9 and 10 February 2011), but that the President is carrying out his Constitutional responsibilities to safeguard independence, economic stability and economic justice, since according to Constitution Article 74.1, *"The President of the Republic is the Head of State and the symbol and guarantor of national independence and unity of the State and of the smooth functioning of democratic institutions."*

What is happening in the 2011 State Budget?

This year, for the first time, Timor-Leste is creating two Special Funds (Infrastructure Fund and Human Capital Development Fund), with \$599 million allocated to them. These funds will be managed by the National Development Agency (ADN)

The Government is basing the creation of these funds on the Budget and Financial Management Law (No. 13/2009), whose Article 32.1 explains *"Whenever authorized by law, the Minister of Finance may establish special funds that are not part of the Consolidated Fund."* The Minister of Finance is responsible for managing and controlling the funds, whose expenditures can be shifted from one allocation to another, or from this year to the future, as long as Parliament is informed.

However, Constitution Article 145.2 states that *"The Budget law shall provide, based on efficiency and effectiveness, a breakdown of the revenues and expenditures of the State, as well as preclude the existence of secret appropriations and funds."*

From our point of view, the Government's interpretation of the Budget and Financial Management Law undercuts the requirement that Parliament, as stated in Constitution Article 95.3(d and e) *"deliberate on the State Plan and Budget and the execution report thereof"* and *"monitor the execution of the State budget."*

Even though Parliament itself approved the Budget and Financial Law in 2009, this interpretation creates a bad precedent for Timor-Leste's future, and Parliament cannot abandon its Constitutional responsibilities.

Because of this controversial use of the Budget and Financial Management Law to create Special Funds, it is very important for the President to make a wise and prudent decision to ensure efficiency, efficacy, and avoiding secret budgets.

In addition, taking more money than the Estimated Sustainable Income (ESI) from the Petroleum Fund may be illegal, because the Government has not yet given the detailed explanation required by Article 9(d) of the Petroleum Fund Law: *"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."*

However, we all know that the Government itself did not ask to spend more than the ESI, but that Parliament added this amount to the budget, so we really need the Court's advice on this process, as the President has requested the court's opinion.

Therefore, if the Court decides that taking more than the ESI is illegal, Timor-Leste could cancel the heavy oil electricity project, or if the project is to be continued, the Government must take more than the ESI from the Petroleum Fund.

Because the Government has already made contracts with Indonesian companies including Puri Akraya Engineering Limited to build these power stations. According to ELC/Bonifica, the company Timor-Leste hired to supervise this project, in their October Monthly Progress Report, Timor-Leste is obligated to pay \$380 million (not including the \$2 million paid to ELC/Bonifica every year) during 2011. If the Court decides spending more than the ESI is illegal, Timor-Leste has only \$163.7 million for this project.

What is the President asking Court of Appeals?

The letter the President of the Republic sent to the Court of Appeals asked the following three important questions:

1. Is creating the Special Funds via the Budget Law, rather than with a separate specific law, permissible under Constitution Article 145.2?
2. Does creating the Special Funds without specifying detailed expenditures to be paid from these funds violate the transparency requirement specified in Constitution Article 145.2?
3. Does transferring \$321 million more than the Estimated Sustainable Income without a detailed explanation of why this is in the long-term interests of Timor-Leste violate Article 9 of the Petroleum Fund Law, which has superior force?

What will happen when the President hasn't yet promulgated the budget?

Until the President promulgates the 2011 State Budget, Timor-Leste's budget system can apply the *Duodecimal Regime* explained in Article 31 of the Budget and Financial Management Law. When the State Budget has not been enacted by the beginning of the fiscal year, the Government can make *temporary budget appropriations* to continue its activities.

Under this temporary regime, the Government can spend up to one-twelfth (1/12) of the budget allocation from the previous year (2010).

And when the President promulgates the budget, after receiving advice from the Court of Appeals, the temporary appropriations based on Article 31 will become part of the new legal budget, and spending under the temporary regime will be subtracted from the new budget's appropriations, which will continue to be implemented.

Therefore, there will not be an economic or financial crisis, and there is no risk of interrupting Government services like health or infrastructure, as politicians and commentators are worried about.

In addition, we should all be aware that the Government itself (with Parliamentary agreement) delayed the process of submitting the 2011 Budget to Parliament by a month. Therefore, Parliament and Government cannot prevent the President from carrying out his constitutional duties.

Finally, we hope that this article can help our people, civil society (NGOs), journalists and leaders to understand the President's Constitutional responsibilities and his petition to the Court of Appeals, to provide educational information to our society and all our people. **Thank you.**