



LEGAL ANALYSIS ON THE INTERDEPENDENT COMPETENCES BETWEEN STATE AGENCIES IN ENACT OF THE VOLUNTAR ARBITRATION LEGAL REGIME (A STUDY FROM TIMOR-LESTE GOVERNMENT)

Law

**Jose Edmundo
Caetano**

Bc.IP.S.H., Year Two Student at Master of Law Program Post Graduate at Universidade da Paz, Dili, Timor-Leste.

ABSTRACT

The adoption of separation of power principles given by Montesquiu in governing the state in Timor-Leste is clearly granted by its 2002 Constitution. However, the debate on its interdependent competence in regard to the legislatif initiative and authority delegation to enact any regime remain doubted. Include in this study on these two major organs of executive lead by the government and the legislatif led by the parliament on its interdependent competence on enacting of the Voluntary Arbitration Legal Bill in Timor-Leste. Early this year, the Timor-Leste Government enacted a new Voluntary Arbitration Legal Bill aligned with passing a Government Resolution on the Convention on the Recognition and Enforcement of Foreign Arbitral Award (convention on the recognition and implementation of foreign Arbitration Awards). This Convention has been ratified by the Timor-Leste National Parliament through the Resolution number 3/V/2 dated 20 January 2021 concerning Timor-Leste's accession to the 1959 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

This study examined the interdependence on the separation of powers in a two dominant competence system which are the government with the competence of Delegation Authorities to initiate a legislation and the parliament with the attribution to enact a legal regime and more over to the political decision on proposed law of the Voluntary Arbitration Legal Bill. Hence, this study resume that, although the government competence attribute by the constitution were stipulated clearly in Timor-Leste Constitution in article 115 (3) such as its competence to has exclusive legislative competence on matters concerning its own organization and functioning, as well as on the direct and indirect administration of the State. Hence this competence provide authorities to propose and drafting any legal regime that matters to government concern only as authorized by the parliament only as compared to the article 96 point 1 line k) on legislatif authorities as well as article 97 point 1 line 3) on legislatif initiative which government hold the delegation authorized only by the parliament to initiate legislation and in regards to the general rules and regulations for the requisition and expropriation for public utility; furthermore to enact the Voluntary Arbitration Legal Regime for its citizens.

KEYWORDS

Voluntary Arbitration Legal Regime, Timor-Leste, Interdependence in Competencies, Legislative Authorities and Legislatif Initiative

1. BACKGROUND

The administration of government is generally guided by regulations, both written regulations and unwritten regulations¹. In the authority The administration of government is the basis for the formulation and implementation of democratic state policies. The phenomenon of democracy is marked by the strengthening of control between state institutions over the administration of government, which is marked by interdependence between State Institutions. Language interdependence comes from the word "Dependence or Dependand" which means dependent or still dependent.² Meanwhile, interdependence means a state of mutual dependence.³

According to modern scientists as quoted in Elaine B. Johnson said that everything in the universe is interdependent and interconnected.^{4,5} If the principle of interdependence does not exist, then humans cannot develop good relationships with others. They can not share experiences. As said by Humberto Maturana⁶, "conversation" comes from the Latin con, which means "with", and "versare", which means "to turn with others, we embrace each other's language", (Maturana and Bunnell are quoted by Elaine B. Johnson).

The principle of interdependence invites State / Government Agencies to recognize the relationship between one State Institutions with other State Institutions. This principle asks the State Sovereignty Institution to build deep relationships, everything the Institute does is based on constitutional rules.

The principle of interdependence exists in everything to enable State / Government Agencies to make meaningful relationships.

Both of these processes are involved in identifying the relationships that will produce new understandings. This interdependence concerns problems between group members Because the principle of interdependence allows us to attach clear objectives to high academic standards and this principle of interdependence also supports cooperation.

With the cooperation of the State Sovereignty Agency, it is assisted in finding problems, designing plans, and finding the solutions to these problems. Working together will help the Institute and others State Sovereignty to know that listening to each other will lead to success to achieve a just and prosperous community welfare in accordance with the state's goals, as stipulated in article 6 of the Timor-Leste Constitution on State objective.

Legislation is a written regulation that contains legally binding norms and is established or stipulated by a state institution or competent official through a procedure stipulated in statutory regulations. Legislation in general does not contain detailed or detailed regulatory provisions, so in order to implement these provisions it is necessary to make further regulations in a legal instrument of similar or lower statutory regulations. An order to establish further provisions in statutory science is called the delegation of authority.

The drafting of the Bill between the National Parliament and the Government is coordinated by the National Parliament through the National Parliamentary Equipment, namely Commission A of the National Parliament which specifically handles the field of Legislation. In Timor-Leste the administration of the State Government is largely based on statutory regulations. Namely various types (forms) of regulations published in the *Jornal da Republika*⁷. The intended regulation can have a binding power made by the Official or State Sovereignty Institution in charge of either the Authority of legislation from the National Parliament or legislative initiatives owned by members of the Parliament, Faction.

Faction within the Parliament as well as by the Government. The highest order of statutory regulations is the Republic of Timor-leste Constitution, constitutional law, and proposed revisions to the constitution. Therefore, in running the government in Timor Leste it must be based on the rules set forth in the Timor-Leste Constitution.

Law number 1 of 2002 article 10 paragraph 2, 3) has given an important role to the Timor-Leste Ministry of Justice as planning, harmonizing, unifying, and strengthening the conception and drafting of a bill regarding the legal provisions of the Volunteer Arbitration to National Parliament, related to substance which will discussed in coordination with the Timor-Leste Ministry of Justice in preparation for the discussion of the Draft Law at the National Parliament through Commission A of the National Parliament and implementing legislation in order to destroy the State (*inicio de Vigência*), this is as stated in article 10 paragraph 3 letter d) and article 16 of Timor Leste Law number 1 of 2002 on Publication of Acts.⁸

In general, the administration of state governance is guided by the functional principle, where the government has exclusive legislative authority over the order concerning its own arrangement and working procedures, as well as on the administration of the State, either directly or indirectly. Meanwhile, state administrators in Timor-Leste are

referred to as State institutions, namely the President of the Republic, the National Parliament, the Government and the Court, this is stated in article 67 of the Constitution, which is the embodiment of the principle of separation of powers and functional interdependence in accordance with the Constitution as stipulated in article 69. Power is generally divided into 3 groups, namely powermake regulations (legislative), power to implement regulations (executive), and judicial power (judiciary) which is better known as Trias Politica⁹. Montesquieu¹⁰ argued that independence could only be guaranteed if the three functions of power were not held by one person or body but by three separate persons or bodies. He said "if the legislative power and executive power are controlled by only one State institution, then there will be no freedom in democracy, it will be a disaster if only one State Institution is in power, whether it consists of the aristocracy or the common people, it is entrusted with exercising the three powers. that is, the power to make laws, carry out general decisions, and adjudicate matters between individuals"^{11,12}.

Based on the Trias Politica theory the Timor-Leste constitution, has four power functions of State Sovereignty Institutions which are mutually dependent on one another, called the Interdependence Principle, namely the President of the Republic as Head of State, exclusive authority and in relation to other bodies, the National Parliament, have the power to make laws and may authorize the Government to make laws, the Government, the authority of statutory initiatives and the power of other institutions to submit bills and resolutions to the National Parliament and Courts, the power to administer the law independently and only subject to the Constitution and the Laws.

This is as regulated in Articles 74, 85, 86, 95, 96, 97 and 115 paragraph 2 of Timor-Leste Constitution¹³, hereby it can be called interdependent and interconnected.

So the Executive power (Government) is the sovereign body of the State which has the authority and responsibility for the control and implementation of the general politics of the State and is the highest body of the General Government, and also deals with other state institutions in submitting bills and resolutions to the national Parliament. In line with the Timor-Leste constitutional firmness mentioned above, Bagir Manan also revealed that the government system is an understanding (begrip) which relates to the accountability procedures for government administrators (executives) in a democratic rule of law order. In a democratic country, there is a principle of interdependence, there is no power without a principle of accountability. The government is accountable to the President of the Republic and to the Parliament National over the control and implementation of internal and external politics, based on the Constitution and Laws, based on article 107 of the Timor-Leste Constitution¹⁴. It should be noted that every authority possessed by each state institution basically derives from two types, namely attributive and delegative authority. Attributive authority in the formation of statutory regulations can be interpreted as a form of giving or creating the authority to form statutory regulations given by the Constitution (freewet) or laws (wet) to a state institution or government agency. Attribution can also be interpreted as the authority attached to a position¹⁵. This attribution points on the original authority based on a constitutional order or a valid statutory regulation. Meanwhile, the delegation of authority to form statutory regulations carried out by a higher statutory regulation to a lower level statutory regulation, whether the delegation is clearly stated or not¹⁶. Based on the description above, this paper is intended to explain on **Legal Analysis On The Interdependency Competences Between State Agencies In Enact Of The Voluntary Arbitration Legal Regime, A Study From Timor-leste Government.**

2. The Authority of the Government to Submit Legislative Drafts.

There are developments in the business world and traffic in the trade sector, both national and international as well as legal developments in general, so the regulations contained in the Act or Discretionary. 1/2006, 21 *Fevereiro Sobre Aprova Código de Processo Civil* which is used as an arbitration guideline is no longer appropriate and the presence of this draft law is to be able to fill the void of law or statutory regulation in its implementation. For this reason, the Government took the initiative to form a draft law regarding the provisions of voluntary arbitration bill to adapt to people's lives because international trade regulations are a requirement of the *sine qua non* condition, whereas this is not regulated in civil procedural law both philosophically and

substantially when it is carried out and settlement dispute in a long time. For this reason, the administration of the government must make policies to resolve the vacuum of the law or statutory regulation.

Government authority is an authority owned by the government based on statutory regulations to form and submit a draft law. The legal basis for authority for the Government in article 97 paragraph 1 letter c) of the Timor-Leste Constitution states that the Government has the initiative to form laws, and article 115 paragraph 2 letter a) The Timor-Leste Constitution states that the Government can have the authority and responsibility to guarantee relations with State Institutions¹⁷. Another to submit a draft law and resolutions, namely to the National Parliament regarding the definition of Civil Procedure Law, as stipulated in article 96 paragraph 1 letter b) of the Timor-Leste Constitution.

The basis of authority for the government in the formation of the laws and regulations referred to above, then there is a proposed bill regarding the Legal Provisions for Volunteer Arbitration and proposed resolutions on *Adesão de Timor-Leste à Convenção de Nova Iorque de 1959 sobre o Reconhecimento e a Execução de Sentenças Arbitrais Estrangeiras* by the Council of Ministers, then the government or an authorized official submits the Bill and international conventions mentioned above to the National Parliament. This is as regulated in Article 116 letter c) of the Timor-Leste Constitution¹⁸.

3. Delegation On Legislation Initiative To Government

Legislation is a written regulation and contains legally binding legal norms and is established or stipulated by the State sovereignty agency or an authorized official through a statutory procedure which is stipulated in the authority in an initiative and formally (*Iniciativo, Admissão, Apreciação da Comissão A, Discussão e Votação da Generalidade, discussão e votação da especialidade do plenário, votação final global, redacção final, decreto ao Parlamento Nacional e promulgação Presidente da República*) as stipulated in the provisions of the laws of the National Parliament, namely articles 86, 87, 96 (1), 91, 96 (1), 98, 101 (1,2), 103 (1,2), 104, 102, 105, 106 (1, 3), 107 (3), 108, in the provisions of the National Parliamentary Law (*Timor-Leste Regimento Parlamentu Nacional*) and 88 (4) of Timor-leste Constitution on presidential competence to either promulgate or veto against the proposed law submitted¹⁹.

According to H.D. van Wijk and Willem Konijnenbelt define delegation as " *overdracht van een bevoegdheid van het ene bestuursorgaan aan een ander*," which means transfer of power from one administrative body to another.²⁰delegation is therefore always logically preceded²¹. The delegation of authority in the formation of statutory regulations can be divided into two forms, namely:

1. Delegation of Attribution Authority
2. Delegation of Authority

Delegation of authority Attribution is the granting of authority to form laws and regulations given by the Constitution or laws to a State or Government Institution.

Delegation of authority Attribution is the granting of authority to the government by the National Parliament to have the authority and responsibility for forming laws and regulations as can be seen in article 10 paragraph 2 and article 11 paragraph 1) Law number 1 of 2002, and the delegation of authority (Delegation of Authority Legislation) of proposed materials for the draft law.

This is as emphasized in article 96, 97 paragraph 1 letter c) and article 115 paragraph 2 letter a) of the Timor-Leste Constitution²².

Whereas Delegation of Authority is the delegation of authority to form laws and regulations carried out by higher statutory regulations to lower laws and regulations, whether the delegation is explicitly stated or not.

However, in reality there are still laws and regulations that do not clearly state the order for the delegation of legislation clearly and completely, so that in carrying out the delegation the executor experiences difficulties. Besides that, there are also laws and regulations that make orders inconsistent, so that it can lead to multiple interpretations in their implementation. Therefore there is a government proposal to submit a draft law on Volunteer Arbitration Legal Provisions²³ and a proposed draft law concerning amendments to

article 671 paragraph 2), article 694 paragraph 2) and repeal of article 841, article 679 paragraph 2) as outlined in Constitution (Decreto-Lei n.º 1/006, 21 februari tentang Hukum Acara Perdata (*Código de Processo Civil*) Law number 1 of 2002, and the delegation of authority (Delegation of Authority Legislation) of proposed materials for the draft law. This is as emphasized in article 96, 97 paragraph 1 letter c) and article 115 paragraph 2 letter a) of the Timor-Leste Constitution.

Whereas Delegation of Authority Delegation is the delegation of authority to form statutory regulations carried out by higher statutory regulations to lower legislations, whether the delegation is declared more complete and legal harmony in its implementation. This is based on the authority of the National Parliament as stipulated in Article 95 paragraph 1 of the Timor-Leste Constitution.

So based on the Timor-Leste Constitution, it has regulated the legislative functions of the government to the National Parliament. this is due to the delegation of authority for legislative formation and legislative initiatives invited to Decreto-lei n. 1/2006, 21 *Fevereiro Sobre Aprova Código de Processo Civil*, namely:

1. Article 671 paragraph 2 (Arbitration decisions can be enforced based on the provisions of the judicial court, without prejudice to the law of Volunteer Arbitration);
2. Article 694 paragraph 2) (Contrary to the enforcement based on the arbitration award, the defendant may ask for reasons stipulated in the provisions of the Volunteer Arbitration Law).
3. Revocation of articles 841 and 679 paragraph 2).

This fundamental change and repeal is manifested in the Draft Law on Volunteer Arbitration Legal Provisions and alternative dispute resolution²⁴. The philosophy behind the submission of the draft Volunteer Arbitration Bill and the proposed amendments and revocation of the articles mentioned above are:

1. Whereas based on the prevailing laws and regulations, besides being able to be submitted to a public court, it is also possible to submit them through arbitration for alternative dispute resolution.
2. Whereas the current statutory regulations for dispute resolution through the Code of Civil Procedure Code (*Código Processo Civil*) are void of laws or statutory regulations with the current development of the business world and law in general.
3. Whereas based on these considerations and reasons, it is necessary to establish a law on Volunteer Arbitration and Alternative Dispute Resolution and proposals for amendments and revocation of the articles mentioned above, are no longer relevant and contrary to the enactment of the Law Volunteer Arbitration Provisions²⁵.

4. Government Competencies to Enact the Voluntary Arbitration Bill

So, the Government took the initiative to submit a bill on the provisions of the Volunteer Arbitration Law to the National Parliament, based on letter c)

paragraph 1 of Article 97 and article 115 paragraph 2 letter a) and the Delegation of Authority regarding the definition of civil procedural law based on article 96 paragraph 1 letter b) of the Timor-Leste Constitution with the aim of:

a) To create, maintain and strengthen a judicial administration system that is able to offer all citizens (all citizens who wish to use them) the services of jurisdictional law that ensure objective resolution (bring about decisions based on statute and law), impartiality, fair, useful and efficient in law cases is the responsibility that truly identifies the rule of law based on article 1 paragraph 1 of the Timor-Leste Constitution.

b) The existence of the State apparatus in the administration of the judiciary apart from being a fundamental basis for the formation (and legitimacy) of a State, is the minimum core of the principle of equality which is the resolution of conflicting disputes both through the judicial administration system and there are other mechanisms called "alternative means. "to resolve disputes".

c) Within the range of "alternative litigation mode", arbitration, in particular voluntary arbitration (which the parties use, freely, and inconsistent with legal requirements, as is the case with "necessary arbitration"), assumes special interest, because of the decisions that result. by the court (the court consists of impartial third parties appointed by the plaintiffs themselves).

d) Approval of the legal provisions of the Volunteer Arbitration is also

required to fill in the "statutory gap" affecting the Timor-Leste legal system in the arbitration material. It is true that the legal system of Timor-Leste is not completely empty of rules regarding the phenomenon of arbitration: outside the legal-constitutional provisions (and consequently the legitimacy) of the existence of an arbitral tribunal (article 123, paragraph 3 of the Constitution). Book of Invite The Civil Procedure Code includes several rules (articles 242, 671, 679 paragraph 2, 694 paragraph 2 and 841)²⁶ which require legal provisions for arbitration. However, it is precisely the existence of these rules, which relate to piecemeal and separate aspects of arbitration, which highlights the existence of a "statutory or regulatory vacuum" not only because it exposes areas of reality that are less than the norm, but also because of their applicability and effectiveness. Some of these depend on the existence of a global (and likely complete) regime on the phenomenon of arbitration. In other words: it is precisely the existence of norms (especially those included in the Civil Procedure Code) in arbitration that creates the need for a legal provision for the dispute.

e) The government's initiative to form this law, is precisely to fill the "statutory or regulatory vacuum" caused by the lack of provisions of arbitration law. It is also intended to promote the use of alternative means of resolving disputes, offering parties a normative framework that responds to major contractual freedoms, ensuring minimum imperative conditions of arbitration proceedings that respect the defendant, impartiality, independence and fair treatment of the disputing parties. Since one of the key features of volunteer arbitration is the ability to orbit (and enforce them by the courts) of decisions taken by third parties selected by the parties themselves, whose competence they rely on, the following processes also tend to make Timor-Leste's legal environment more investment-friendly. private, national and foreign.

5. International Agreements

International institutions formed based on international treaties or conventions, including:

1. The Court of Arbitration of the International Chamber of Commerce (ICC), which was established after World War I in 1919, is domiciled in Paris²⁷. This international arbitration body is tasked with resolving disputes in the trade sector in which the disputing parties have different nationalities.
2. Convention on the Recognition and Enforcement of Foreign Arbitral Award (convention on the recognition and implementation of foreign Arbitration Awards) is abbreviated as The 1958 New York Convention which was signed in New York on 10 June 1958 and entered into force from the date of 7 June 1959²⁸. This convention has been ratified or ratified by the National Parliament on the recommendation of the Government through resolution number 3 / V / 2²⁹ concerning *Adesão de Timor-Leste à Convenção de Nova Iorque de 1959 sobre o Reconhecimento e a Execução de Sentenças Arbitrais Estrangeiras*³⁰.

6. CONCLUSION

In this conclusion, the author can conclude that :

- the governing authority of the government with the initiative in shaping the Voluntary Arbitration Legal Regime.

- The application of the formulation of the Draft Law is based on the principle of interdependence between the National Parliament and the Government which is constitutionally related, namely the distribution of power and horizontal interdependence used for the formulation of the Draft Bill of Law on Voluntary Arbitration Legal Regime and resolutions *Adesão de Timor-Leste à Convenção de Nova Iorque de 1959 sobre o Reconhecimento e a Execução de Sentenças Arbitrais Estrangeiras* by the Government to the National Parliament based on the Timor-Leste Constitution.
- This is as stipulated in article 115 paragraph 2 paragraph a) of the Timor-Leste Constitution which states the Government has the authority and responsibility in relation to other bodies, namely to submit bills and resolutions to the National Parliament, at the initiative of laws owned by the Government.
- based on article 97 paragraph 1 paragraph c) of the Timor-Leste Constitution and legislative licensing (*autorização legislativa*) with the word of delegation of authority by the National Parliament to the government to make laws regarding definitions of Civil Procedural Law as regulated in article 96 paragraph 1 letter b) of the Timor-Leste Constitution.
- Thus, to fill in the "statutory or regulatory vacuum" caused by the lack of legal provisions for Volunteer Arbitration, the government also proposes amendments and repeal of the rules that are dependent on the articles referred to in the Shrimps or *Decreto-lei*

n. 1/2006, 21 Fevereiro Sobre Aprova Código de Processo Civil, namely

- Article 671 paragraph 2 (Arbitration decisions can be enforced based on the provisions of a judicial court, without prejudice to the law of Volunteer Arbitration);
- Article 694 paragraph 2) (contrary to enforcement based on an arbitration award, the defendant may request reasons stipulated in the provisions of the Voluntary Arbitration Legal Regime);
- Articles 841 and 679 paragraph 2) in the Law, because it is no longer in accordance with the development of the business world and law in general and is contrary to the norms in the Voluntary Arbitration Legal Regime.

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