

Memorandum of Advice for International Federation of Journalists (Asia Pacific) - reintroduction of Criminal Defamation law into Timor-Leste.

1. I have been asked by the International Federation of Journalists (Asia Pacific) to advise it and its affiliates, including its affiliates in Timor-Leste, about the significance for journalists and media freedom of the proposed re-introduction of criminal defamation law into Timor-Leste.
2. The proposal is disturbing because it flies in the face of the consensus in the democratic world which regards criminal defamation laws as toxic, liable to gross abuse by the wealthy and well connected, anti democratic, and anti-transparency. Criminal defamation law has historically been associated with severe encroachments upon press freedom and is typically seen as an instrument of authoritarian rule. Criminal Defamation is a relic of the colonial era.
3. On Friday, June 5, the Minister of Justice of Timor-Leste, Manuel Cárceres published a draft law proposing to re-introduce criminal defamation law into Timor-Leste. This has come as a surprise to journalists in Timor-Leste and in the region, since, alone among SE Asian nations Timor-Leste abolished its criminal defamation law when its new Press Law was adopted in 2014.
4. Announcing the proposal, Minister Cárceres was quoted in Indonesia Tempo stating that the new law 'will encourage people to respect leaders more'. The law proposes up to three years jail for an offender. In reality it protects politicians, government officials and religious figures.
5. To add insult to injury, the law will extend the 'right' to instigate criminal proceedings to corporations and government agencies. Even more disturbing is the proposed extension of criminal defamation to the deceased! No defences or protections for journalists are set out in the bill.
6. It is a grim and distressing reminder of precisely how retrograde this proposal is, that at the very time when this proposal was being introduced, the UN High Commissioner for Human Rights, Michele Bachelat, speaking about so called 'cyber libel' laws in the Phillipines, roundly condemned such

laws, stating that ‘under human rights standards imprisonment is never an appropriate penalty for defamation’.

7. The short paper issued with the bill argues that ‘since the adoption of the Penal Code in 2009, access to social media has become widespread in Timor-Leste and ‘offences against honour, good name and reputation are amplified, and that amplification affects more seriously the dignity of those targeted, as well as the State, which is also responsible for ensuring their ‘dignity’. There is nothing in the draft law which differentiates between media generally and social media.

8. In its brief reasons accompanying the bill, the Timor-Leste Justice Department advances the grotesque justification for the bill as conferring ‘dignity’ upon those against whom offences are committed which flow from the violation of - ill defined - rights to ‘honour, good name and reputation’. The reasoning apparently is that since, under section 36 of the Constitution, everyone has the right to honour, good name and reputation, a law criminalising ‘offences’ against these will confer ‘criminal dignity’ on those entitled to such rights. Needless to say, *criminal* dignity is a problematic concept - unknown in civilised, rules based legal systems.

9. Whereas restoration of draconian criminal libel is advanced under the pretext that it is all about protecting citizens' honour, good name and reputation, the real world beneficiaries of the law will inevitably be politicians, high public officials and the rich. Its victims will be transparency and accountability.

10. The proposed law has no counterpart in the laws of Australia and New Zealand, North America and the United Kingdom. The closest comparator is the law of Timor-Leste’s old colonial master, Portugal. If adopted, the law will restore colonial era Portuguese style laws when Portugal itself has long accepted that such laws are outdated and subject to the overarching rights to freedom of expression underwritten and secured by the European Convention on Human Rights with recourse to the European Court of Human Rights.

11. Portugal remains one of the few countries in Europe where criminal defamation still exists. However, prosecutions are uncommon, and the

European Court of Human Rights (ECtHR) has repeatedly ruled against Portuguese authorities for their handling of both civil and criminal defamation cases. It is also notable that in February 2018, the Portuguese parliament adopted changes to the criminal code that granted journalists a protected status, increasing the penalties for those who ‘threaten, defame, or constrain’ them. No such equivalent is offered in this proposal nor is there any overarching protection such as that offered by the European Court of Human Rights.

12. Colonial era criminal defamation law is also a feature of Indonesian law - but with some relevant important exceptions. In 2005, the criminal defamation conviction of the editor of Tempo magazine Bambang Harymurti, was quashed by the Supreme Court of Indonesia on the grounds that the matter should have been dealt with under the Indonesian Press Law and been submitted to the Press Council for adjudication and *not* formed the basis of a criminal prosecution. [Sup Ct decision 1608/K/PID/2005] [see: Simon Butt & Tim Lindsey *Indonesian Law*(Oxford 2018) 441].

13. The conclusion which must be reached is that, if this proposed law is adopted in Timor-Leste, the state of press freedom in Timor-Leste will be made *worse* than the position under the present equivalent laws in Indonesia and Portugal.

14. The present proposal is all the more curious since Timor-Leste already has a robust, effective and highly regarded Press Council which deals with complaints against the media and journalists by a mechanism which does not criminalise free speech and publication. Yet nowhere in the brief accompanying paper to the bill is the existence of the Press Council of Timor-Leste even mentioned. It is notable that the Press Council has expressed its serious concerns about the present proposal.

15. Recent experience in the region suggests that the real effect of reforms of this kind will invariably be misrepresented and in practice, miscarry. The law of unintended consequences will operate. In Indonesia, the Electronic Transaction Law, usually referred to as the ITE law, is a case in point. Despite the warnings from Journalists organisations, many human rights and press freedom NGOs, about the ITE bill, the Minister at the time insisted that it was merely a technical measure designed to deal with

electronic records - 'e-commerce'. This claim very rapidly proved to be specious and the predictions of critics were vindicated. The ITE law is even now being used to prosecute West Papuan dissidents. Similar claims are advanced about 'fake news' and 'now, 'cyber libel' as the trial of Rappler editor Maria Ressa amply demonstrates.

16. Far from representing 'an additional step in the improvement of the Timorese legal system' as the paper suggests, the proposed law represents a serious retrograde step which is out of keeping with modern notions of the rule of law, democracy and transparency.

17. Numerous international human rights bodies, including the U.N. Human Rights Committee and the special rapporteurs on freedom of expression of the U.N., the Organization for Security and Co-operation in Europe and the Organization of American States, have all urged states to repeal criminal defamation laws.

18. The International Press Institute pointed out that there is a clear international consensus against the penalty of imprisonment in defamation cases. This consensus includes not only the special rapporteurs listed above, but also international judicial bodies such as the European Court of Human Rights (ECHR). On several occasions, the ECHR has ruled that the imposition of a prison sentence for defamation violates Article 10 even when the national courts were justified in a finding of liability.

19. Like most comparable provisions in the legal systems of authoritarian states, the 'offence' provisions here are notable for their lack of precision. Quite what terms or expressions and in what context, communications (oral or otherwise) might constitute or contain 'offensive' judgements of a persons 'honour' is not defined. It is also notable that no defences are set out.

20. Defamation law generally (whether civil or criminal) usually requires the defamatory comment to have the effect that a person's reputation is besmirched by the offensive publication. There is also the defence of truth or substantial truth or, in the case expressions of opinion, fair comment which shields publishers and journalists - even though these defences often fall short of what is ideal.

21. There is no doubt that social media is a source of irritation for politicians and officials. However, legislation like that proposed is exactly the wrong response since it inevitably penalises the proper exercise of free speech and independent journalism whilst the very grave issues of hate speech, incitement to violence and the trolling and threatening of political enemies/opponents remain untouched. Complex legal issues have arisen with the advent of social media for which there are no ‘quick fixes’. [For a recent detailed discussion of the complexity of regulating social media see: Douek Evelyn *Australia’s ‘Abhorrent Violent Material ‘ Law* (2020) *Aust Law Journal* (forthcoming) Electronic copy available at: <https://ssrn.com/abstract=3443220>; Douek Evelyn *Facebook’s Oversight Board: North Carolina Journal of Law and Technology* Vol 21, Issue 1 October 2019] The authors of the proposed bill in Timor-Leste display no elementary awareness of these complex issues, let alone that they have been considered.

22. The Bill provides that where the defamatory comments ‘undermine the credibility, trust or prestige owed to legal persons or other similar entities’ a crime will have been committed. This is an important provision because it extends the crime to the benefit of corporations and arguably, government agencies [i.e. ‘similar entities’]. Once again, this kind of extension of the power to criminalise speech against corporations and government agencies is a direct threat against journalism, especially investigative journalism, and free political speech. It is at odds with the law in most democracies.

23. The right of a government agency or government body to sue for defamation has been thoroughly dealt with by Courts in the United Kingdom New Zealand and Australia Generally speaking, modern democracies do not permit corporations and government agencies to sue for reputational damage. [See: *Ballina Shire Council v Ringland* (1994) 3 NSWLR 680 Per Gleeson CJ & Kirby J) *Derbyshire County Council v Times Newspapers Ltd & Ors* [1992] UKHL 6; [1993] AC 534]

24. As for commercial corporations, Australian Law does not allow corporations - apart from extremely small businesses, which are for practical purposes closely identified with their owners, to sue for defamation. In New Zealand, companies and other corporate bodies can

sue for defamation, but only if they can show that the defamation has caused them (or is likely to cause them) actual financial loss - as distinct from so called 'reputational' loss. [See: e.g. *Low Volume Vehicle Technical Association Incorporated v Brett* [2017] NZHC 2846 (20 November 2017)] Where genuine, tangible commercial damage is done, more than adequate redress exists under other commercial laws. Criminal defamation law only serves to chill free expression and encourage a lack of transparency.

25. The dangers of these extensions should be obvious. Such laws equip powerful corporations and in some cases, state backed entities, to prosecute critics using the resources of the corporations and the state.

26. As noted above, the proposed law is also extended to acts which seriously offend the 'memory of a deceased person'. As with the previous sections, this provision would appear to be cut and paste from Portuguese law. Such provisions are a relic of an earlier age. It is hard to believe that anyone other than a relative of a powerfully connected family could invoke such a law.

27. The threat of such prosecutions will be calculated to chill historical research and genuine investigative journalism. Little wonder that the adoption of such a law in Australia has been roundly rejected for many years. Likewise in New Zealand, Canada and the United Kingdom, the dead cannot sue.

28. The 2016 case involving journalist Raimondos Oki serves as a cautionary guide to the very real dangers to Press Freedom represented by this proposed law. Although the case against Oki was dismissed, it was a text book example of the law being used as blunt and punitive instrument against journalism.

29. The provisions of s285 penal code under which Oki and his Editor were charged required proof of publication "with the intent of having criminal proceedings initiated against the person", yet no evidence of this intent was placed before the court. In court, the prosecutors produced little other than the text of Oki's article.

30. The prosecutors' approach carried the implication that any exercise of investigative journalism directed to exposing public malfeasance would risk investigation and charges under the penal code. The same will inevitably be the case under the proposed bill.

31. Oki's prosecution was directly contrary to the guarantee of freedom of the press embodied in articles 8 and 9 of the Press Law of Timor Leste which establishes the right for journalists *not* to be subjected to any interference that threatens their independence and objectivity, and, the right to freedom of expression and freedom from harassment.

32. At the time, the IFJ warned that Oki's acquittal would not be the end of the matter. It warned that while such a law as s 236 of the Criminal Code remained on the books - and laws like it - they represent a source of permanent temptation for politicians and ambitious prosecutors to seek "pay back" against investigative journalism.

33. It must be re-iterated that it is not just the existence of the law which represents a potential source of intrusion upon the press, but the chilling effect which the prospect of prosecution has on the exercise of press freedom.

34. While the Oki decision was a cause for celebration, it continues to provide a very real example of the threats to a free press and the state of the law affecting freedom of expression in Timor-Leste. A new criminal defamation law superimposed on the penal code creates a situation hostile to press freedom.

35. To reiterate, the Bill has - at least - the following major faults:

- It deals a blow to transparency in government by permitting politicians and powerful individuals to use the power of the state to prosecute journalists;
- It provides no defences of any kind let alone any public interest defences for published materials;
- It provides no protection for journalists and their sources;
- Its wording is confusing and imprecise;

- It allows corporations and government agencies utilising the power and resources of those entities, to instigate criminal defamation prosecutions against journalists (and others);
- It permits criminal charges to be instigated against journalists on behalf of deceased persons;
- It sets out no guidance for the exercise of prosecutorial discretion in the instigation of such prosecutions;
- It permits the jailing of journalists for doing their job.

36 Criminal defamation is anathema in democracies and to the rule of law. It is not surprising then, that Nobel Prize Winner and former Timor-Leste President Jose Ramos-Horta has condemned the proposal, commenting that he did not see that the proliferation of social media had affected the security, peace or development of the country and the dignity or prestige of the government. He has warned that its adoption will have an impact upon the international standing of Timor-Leste. The Bill represents a real and tangible threat to journalists and freedom of expression in Timor-Leste. It should be opposed and rejected.



Jim Nolan B.A. (Qld.) B.Leg St. (Macq) LLM (Syd)

Sydney

July 14, 2020.

Jim Nolan is an Australian Barrister and legal adviser pro bono to the International Federation of Journalists (Asia Pacific).

Liability limited by a scheme approved under the Professional Standards Legislation