

Criminal Defamation in Timor Leste



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1. - Introduction

1.1 - In its 2015 country report on East Timor, Freedom House made some telling observations about the state of Press Freedom in that country:

'In October 2014, Parliament unanimously passed a controversial media law. ... The final version ... included other elements that press advocates criticized as undermining media freedom, such as the creation of a government-sponsored Press Council with the power to fine journalists for "undesirable" reports, a requirement that all reporters be accredited by the state, and a prerequisite that journalists have minimum academic qualifications and professional experience—a high bar in a poor, developing country. The law also opened the possibility that restrictive provisions could be applied to bloggers, book authors, publishers, and social media users. The law came into effect in December, though the constitutionality of the foreign investment provision remained contested.'

[<https://freedomhouse.org/report/freedom-world/2015/east-timor>]

By early 2016 these concerns have been shown to be far from exaggerated.

1.2 - More disturbing still, the spectre of criminal defamation has arisen again in a south east asian country - this time in the region's newest country and newest democracy - East Timor. Journalist Oki Raimondos has now been informed that he will be charged with the bizarre and anachronistic crime of 'scandalous denunciation'.

1.3 - This state of affairs marks an especially unhappy milestone. Timor Leste is now shown up by its former occupier Indonesia in the struggle for press freedom.

Journalists in Indonesia have struggled fiercely since the fall of Suharto to resist and defeat criminal defamation prosecutions, and over the past two decades, cases against Indonesian journalists have steadily declined; so much so, that the last trial, in Makassar in 2010, resulted in the first acquittal in a criminal defamation trial. The acquittal marked a significant victory for the Indonesian journalists' campaign – all the more since the complainant at whose behest the charges were pressed was the outgoing Police Commander of South Sulawesi!

1.4 - It is a particularly bitter irony that criminal defamation, having been sent into retreat in Indonesia, has now surfaced so dramatically in democratic Timor-Leste.

Press Freedom - The Constitution of Timor Leste

1.5 - The Constitution of Timor Leste contains two high sounding guarantees for a free press.

1.6 - Section 40 deals with Freedom of Speech and Information. It states that: 'Every person has the right to freedom of speech and the right to inform and be informed impartially. The exercise of freedom of speech and information shall not be limited by any sort of censorship.' But the devil is always in the detail - the next clause provides the expected caveat: 'The exercise of rights and freedoms referred to in this Section shall be regulated by law based on the imperative of respect for the Constitution and the dignity of the human person'.

1.7 - The next article provides for press freedom. Section 41 is headed 'Freedom of the press and mass media', and states:

- 1. Freedom of the press and other mass media is guaranteed.*
- 2. Freedom of the press shall comprise, namely, the freedom of speech and creativity for journalists, the access to information sources, editorial freedom, protection of independence and professional confidentiality, and the right to create newspapers, publications and other means of broadcasting.*
- 3. The monopoly on the mass media shall be prohibited.*

4. *The State shall guarantee the freedom and independence of the public mass media from political and economic powers.*

5. *The State shall guarantee the existence of a public radio and television service that is impartial in order to, inter-alia, protect and disseminate the culture and the traditional values of the Democratic Republic of East Timor and guarantee opportunities for the expression of different lines of opinion.*

6. *Radio and television stations shall operate only under a licence, in accordance with the law.'*

1.8 - As a broad statement of constitutional intent these provisions are unexceptionable - even welcome. Like most such statements, they are aspirational, they do not create tangible, entrenched rights capable of vindication in the Courts. As discussed in the following sections, they are hollow assurances, significantly undermined by the restrictions contained in the Press Law.



Australian Barrister and IFJ legal observer, Jim Nolan with Timorese journalist Oki Raimundos

2. - The Penal Code, Criminal Defamation & Oki's case

2.1 - An article in The Timor Post on 10 November 2015 which dealt with the letting of government tenders for IT services, has now triggered little known about draconian criminal defamation laws against the journalist concerned.

2.2 - This disturbing development comes at a time when the government in Timor Leste is poised to formally appoint the members of its newly minted Press Council – the key body in a legal framework intended to deal with complaints against the press primarily by mediation. Yet, in this case, this new scheme of press regulation, (not without significant limitations as to which see below) which has been in the works for several years, was entirely side stepped in the rush to commence a criminal prosecution.

2.3 - This disregard for the new complaints mechanism is all the more puzzling since the newspaper concerned followed the precepts of the new press law in dealing with the complaint – including by publishing a prominent and timely (the next day) correction to the one, albeit important, part of the story which contained an error - namely the identity of the company concerned. Yet this was apparently not good enough.

2.4 - It is uncertain why, because no dissatisfaction has still been expressed with the promptness or adequacy of the correction. Indeed, nothing more was heard until the journalist, Raimundos Oki, received a 'summons' from the Prosecutor General's Office in Dili that the story raised a breach of s285 of the criminal code – a bizarre and dormant version of criminal defamation. It may be no co-incidence that the subject of this piece of investigative reporting was a former adviser to the Finance Minister, and now current Prime Minister, Dr Rui Maria de Araújo.

2.5 - The summons required Oki and his former editor, Lourenco Martins, to attend the office of the Prosecutor General on Monday 11 April. Appearing with their lawyers, each faced separate 30 minute interviews. Both men relied on their right to silence, and the prosecutor read a statement that left them none the wiser as to the substance of the complaint and how it could give rise to breach of s285.

2.6 - Each was given a 'letter' directing that neither could change his address nor travel overseas without giving the prosecutor 15 days' notice. Although these conditions are not on their own onerous, as a matter of principle they are repugnant because they place legal restrictions upon the free movement of the two men. Following the 'interviews' the prosecutor was left to decide whether to file an indictment or drop the charges.

2.7 - On April 22nd, 2016, a letter from the International Federation of Journalists and other press freedom groups (the Committee to Protect Journalists (CPJ), Freedom House, (IFJ) South East Asia Journalist Unions (SEAJU) was sent to the Prime Minister. It said:

" ... this defamation complaint against Oki and Lourenco threatens to significantly undermine press freedom in Timor Leste by engendering a culture of fear and intimidation among journalists who report on issues of national import. Such action also serves to weaken the view of media freedom in Timor Leste in the eyes of the international community. The revival of criminal defamation in this case is in contravention to global trends and the country's own positive steps to support a strong and independent media.

We strongly urge you to call on the prosecutor general to drop these damaging charges and to consider legal reforms that abolish Article 285 and other legal clauses that undermine your country's constitutional commitment to protecting and upholding press freedom."

See full letter [here](#).

2.8 - On 28 April, 2016, a response to the letter was sent by the Prime Minister Dr Rui Maria de Araujo. The critical passage in the letter is the following:

"As you seem to know well Timor-Leste's legal framework in general, and particularly Timor-Leste's penal code, you might have also noticed that the type of crime described in article 285 (1) of Timor-Leste's penal code (which you called "slandorous denunciation" but I would prefer to use its Portuguese name "Denuncia Caluniosa") is a public crime, and regardless of any offended person filing or not filing a lawsuit, the Prosecutor's Office has the duty to uphold justice, and make the decision to file or not to file a lawsuit in accordance to this article. Furthermore, the offence could also be committed if a person makes a calumnious denunciation directly to the investigative or prosecutorial authorities without making the statements publicly at all. It is a provision in the criminal law to prevent false accusations of criminal conduct being made. It can also be brought against police or prosecutors who breach the provision in the law. It exists to protect the integrity of the criminal investigation and prosecutorial process. It exists in a number of developed democracies, especially those of the civil law persuasion."

See full letter [here](#).

2.9 - The fact that the Prime Minister suggests that a charge under s285 is designed to 'prevent false accusations of criminal conduct being made' simply demonstrates the chilling potential of the Law. These 'crimes' which exist in democracies and are generally known as public mischief crimes, are extremely limited in their scope and are not used against journalists engaging in public interest journalism. They are typically confined to false and mischievous complaints to police. This could be further from the situation here. Interpreted as widely as the Prime Minister suggests, the law could be utilised to target any public interest journalism which the powerful find discomforting.

2.10 - Oki was not left wondering for too long about the outcome of his 'interview' with the Prosecutor General's office. He was informed by letter from the Prosecutor General's office on May 6, 2016 charges would be laid against him and his editor (proprietor/editor) for 'scandalous denunciation' of the Prime Minister, under section 285 of the Penal Code.

2.11 - Whilst the Press Law prescribes a set of criminal and civil 'offences' which are not defined (and await the promulgation of regulations), the Penal Code (2009 Law no 19) - not the Press Law - contains arguably the most serious sanction directed at the press - akin to the criminal defamation statutes elsewhere in the region - a penalty of imprisonment for up to 3 years.

2.12 - Article 285 of the Criminal Code sets out the crime of 'Defamatory false information' also referred to as 'slandorous denunciation'. The offence will be committed by a person who, 'by any means, before authorities or publicly, and aware of the falsity of the accusation, informs or casts suspicion on a certain person regarding commission of a crime, with the intent of having criminal proceedings initiated against said person, is punishable with up to 3 years imprisonment or a fine'. This is a curious and multi faceted 'crime' which needs close analysis.

2.13 - On its face, the prosecution must establish four conditions. Firstly, the publication of the 'accusation'. Secondly, at the time of publication, the journalist must be "aware of the falsity of the accusation," thirdly, the accusation must concern the "commission of a crime" and fourthly, the publication must be made "with the intent of having criminal proceedings initiated against the person."

2.14 - At first blush, it may be observed that the burden on a prosecutor in proving this crime is substantial. There must be actual (presumably admissible) evidence of intent - both in the case of knowledge of the falsehood of the accusation and in the intention of having criminal proceedings initiated.

2.15 - At the heart of this offence is the requirement to prove deliberate, premeditated malice to bring about a false and malicious prosecution of an innocent person. In a system which reflects adherence to the rule of law, any criminal statute must be interpreted strictly - to the benefit of the accused. It follows that each of the elements of the offence should need to be proved according to the criminal standard of proof.

2.16 - By conventional legal standards, there are two key stumbling blocks to any charge under s285. As observed, the journalist concerned must be "aware of the falsity of the accusation". There is no suggestion that any evidence exists as to the 'state of knowledge' on the part of either journalist Oki or his editor. In the absence of any prima facie, or sufficient, proof of a state of knowledge, the prosecution cannot get past first base. Only a 'confession' or clear proof tying the alleged perpetrator's state of knowledge to the story would be sufficient to raise a prima facie case. None exists and, in the interview, nothing was put to Oki to suggest that it did.

2.17 - The second major stumbling block is that the offending publication must be made "with the intent of having criminal proceedings initiated against the person". Quite how a journalist could publish a story with that precise intent is not at all clear. The journalist may be of the opinion that the content of the story (if true) indeed merited a criminal investigation and if the allegations were made out, the filing of charges would be expected. At best, the state of the Journalists 'intention' could, rationally, be raised no higher than an expectation or hope, that a criminal investigation would follow. However, the decision to commence criminal proceedings is entirely a matter for the Prosecutor-General's office.

2.18 - Every investigative journalism story carries the expectation that it will be treated seriously by those in power and acted upon with due inquiries made by the proper authorities. Whether those inquiries are made is a separate and distinct question.

2.19 - Since the journalist's actual knowledge is the essential ingredient of two elements of the offence, the failure to confront Oki with the 'evidence' of his alleged state of knowledge is troubling. On its face then, the investigation appears to have been no more than a fishing exercise directed to finding material to 'fit' the contorted features of the 'crime' created by s285. The question must be asked whether it is a proper exercise of the Prosecutor's function to investigate an alleged 'crime' where no prima facie evidence points to any offence under s285.

2.20 - On its face, this case suggests that any exercise of investigative journalism directed to exposing public malfeasance would risk investigation under s285. Such a development is antithetical to the clear expression of freedom of the press embodied in articles 8 and 9 of the Press Law which establish a right for journalists not to be subjected to any interference that threatens their independence and objectivity, and the right to freedom of expression and to be free from harassment. Investigations this kind can only have a 'chilling effect on journalists' freedom.

2.21 - There has been no credible suggestion that Oki reported the story other than with the intention of informing his readers on an important matter of public interest.

3. - The Press Law

3.1 - As observed above, the Parliament of EastTimor found it necessary to regulate the activities of the Press and Media in the 2014 'Press law'. This law was - perhaps not surprisingly - condemned by Journalist and press freedom groups as containing many provisions which have the potential to severely circumscribe press freedom.

3.2 - The Press law sets up a scheme of close regulation of the press and media and establishes a Press Council to oversight it. It is a well worn trope for authoritarian governments to lament - usually regretfully - in justification of press restrictions - that there are no rights without duties and the Press Law embodies these sentiments in troubling detail.

3.3 - Article 20 of the Press Law sets out the 'duties of journalists'. They must:

Contribute to a free and democratic society, fighting any restriction on the freedom of expression, freedom of the press or any other form of restriction on the citizens' right to information;

Contribute to the development of society by informing citizens in an educational, honest and responsible way, in order to promote the creation of an enlightened public opinion;

Defend the plurality of opinions, ensuring the expression of different currents of opinion and respecting the citizens' cultural, religious and ethnic diversity;

Exercise their profession with independence and impartiality, without the influence of other major interests beyond the right of public understanding;

Always observe the personal rights of citizens, including protecting their honour, dignity and privacy, except when such observance conflicts in an obvious and unequivocal way with the public interest;."

3.4 - Quite how a violation of the duties to 'contribute to a free and democratic society', to fight any restriction on freedom of expression, freedom of the press or any other form of restriction on the citizens' right to information' are ever likely to be amenable to legal enforcement may prove an interesting topic for speculation. But of course, the enforcement of these 'duties' is not the point of a statute containing specific criminal sanctions directed at the press. They merely provide the necessary 'camouflage' for the conceptually quite distinct duty to protect the 'honour, dignity and privacy' of citizens. As we know from bitter experience, honour, dignity and privacy attach disproportionately to the rich, powerful and well connected.

3.5 - Those familiar with the authoritarian assault on press freedom in many countries will recognise this kind of formulation as furnishing the inevitable pretext for litigation against journalists who endeavour to hold the powerful and connected to account. Offences to 'Honour, dignity and privacy' are qualities invariably prone to upset thin-skinned authoritarian political leaders as the recent persecution of Turkish journalists attests. 'Honour, dignity and privacy' are very rarely possessed by the powerless and indigent.

3.6 - The way this aspect of the law is crafted, an offence to honour, dignity and privacy, will only be excused when the public interest in the 'offensive' press report prevails in an 'obvious and unequivocal way'. A legal test which requires the 'public interest' to be demonstrated as 'obvious and unequivocal' would no doubt be welcomed by those in authority. 'Unequivocal means 'leaving no doubt'. This sets a legal burden for journalists engaged in public interest journalism which is completely antithetical to the idea of press freedom.

3.7 - Each press report which contains a slight to 'honour, dignity and privacy' will need to scale an insuperable bar to avoid prosecution. A report which is written in good faith and that raises an arguable and credible issue of public interest will not be defensible in the face of this formulation. No editor will take a chance on a story unless the proof of the matters alleged in the story are higher than the accepted criminal standard of proof (i.e. beyond reasonable doubt) - let alone a civil standard of proof!

3.8 - It must be underlined that the duties elaborated in Article 20 are not merely high minded entreaties. Violations of the duties may be treated as criminal offences and such 'Infractions are punishable by a fine of \$500 to \$1,500'. It must also be recalled that the other severe punishment includes de-registration of a journalist or a publication. In other words, career ending or business ending consequences may follow. Article 28 requires all media organisations and outlets to be registered by the Press Council. Any requirement for registration carries with it the possibility, indeed likelihood, of de-registration.

3.9 - Article 32 requires each media organisation to adopt an 'editorial statute' which clearly defines their 'orientation and objectives' and includes a commitment to ensure respect for the ethical principles and professional ethics, as well as the good faith of the readers'. Whether the media organisation can alter its statement of 'orientation and objectives', once set, is far from clear. More likely, the obligation, once adopted, serves no other purpose than to permit an officious and politically motivated regulator to level nit picking inquiries and accusations at a publication which has 'strayed' from its editorial statute'. The obligation has no other obvious purpose.

3.10- Article 34 provides for a right of reply & correction. Publication of corrections is 'mandatory and cannot be refused'. The text of any reply may only be refused if it 'exceeds the scope of the references that provoked it, goes beyond the limits of space or time of the content that gave rise to it, and/or contains 'offensive or uncivil expressions'. Any refusal to publish a proposed reply must be justified by the editor of the publication and made known to the complainant on the day following receipt of the text of the proposed reply. Refusal to comply with the right of reply 'without strong reasons' constitutes an offence punishable with a fine of \$2,500 to \$10,000 USD. This may oblige an editor to publish a 'reply or correction' which he or she knows to be false.

3.11 - Article 38 is entitled 'forms of liability' and states that 'for acts by the press that are detrimental to the interests and values protected by law, the perpetrators are civilly and criminally accountable'. Quite what acts or omissions could be detrimental remain to be guessed. Nor is it said that the public interest in the story prevails over the 'interests and values detrimentally affected. These are vague formulations which are antithetical to the rule of law and the protection of freedom of expression.

3.12 - Article 40 provides for 'contraventions'. Violations which do not entail criminal liability, and for which the Press Council has exhausted its mediation mechanisms, will be judged by the Press Council, which will apply the prescribed fines. Precisely which violations are criminal and which civil are unclear.

3.13 - Decisions of the Press Council may be appealed to a 'judicial court of first instance', but the grounds of appeal are not specified.

3.14 - Article 42 states that the Press Council shall be 'an independent administrative entity' which shall 'exercise its powers and tasks without being subject to any interference or direction from political power'. The full suite of powers and procedures to be used in complaints handling appears to await a statute to be established by 'decree-law'. (presumably by means of delegated legislation.)

3.15 - Article 43 provides that the 'essential duties' of the Press Council will be to ensure the 'professional and ethical conduct of journalists and media operators', as well as ensuring compliance with 'the conditions to access the profession and to perform journalistic activities'.

3.16 - Article 44 set out the functions ('prerogatives') of the Press Council which are:

"a. Promoting freedom of expression and of the press and the independence of the media from any influences of individuals, groups or political and economic interests;

b. Approve and oversee compliance with the Code of Ethics by

c. Exercise disciplinary authority over journalists, under specific regulations to be established by the Press Council to determine the violations, their corresponding sanctions and disciplinary proceedings;

d. Grant, renew, suspend and revoke the professional credentials of journalists;

e. Register and publish the registration of media organizations and outlets in the *Jornál da República*;

f. Maintain a database of active media companies, journalists' organizations and journalists;

g. Mediate disputes arising from the exercise of journalistic activity, in the relationship between citizens, organizations, government agencies and media organizations;

h. Provide advice when a Court requires the expert opinion of the Press Council to settle disputes arising from journalistic activities;

i. Promote dialogue between media operators, society and government agencies;

j. Support organizations of journalists in the development of the professional, technical and intellectual skills of journalists."

3.17 - Most of these functions are totally worthy objectives associated with advocacy of a free press and the mediation of complaints against the Press. That said, two of the nominated 'prerogatives' stand apart and raise a very real threats to press freedom.

3.18 - First, the Press Council is intended to 'exercise disciplinary authority over journalists. The law sets out no standards whereby this function is to be undertaken, leaving this to - yet to be determined - 'regulations', apparently to be promulgated by the Press Council or delegated legislation. The Council will, in that connection, conduct disciplinary proceedings, adjudicate on any alleged violations, and decide on appropriate sanctions which will (presumably) include the suspension and/or revocation of the professional credentials of journalists.

3.19 - In an important recent report on the state of media freedom in the middle east, the Centre for Law and Democracy says: It is 'a well-recognised principle of international human rights law, [that] schemes which prohibit people from practising journalism unless they are licensed violate the right to freedom of expression. Other conditions on who may practise journalism, such as a requirement to hold a university degree, to have attained a certain age or to belong to a particular professional association, are similarly illegitimate. There is ample authoritative support under international law for this position'. [Centre for Law and Democracy Background Paper - Toward a Media Regulatory Reform in Middle East and North Africa: The Regulation of the Profession of Journalists 6-7 March 2015, Tunis]

3.20 - These principles apply equally to East Timor and the system of press regulation established by the Press law are incompatible with them.

3.21 - Oki's case presents the newly established Press Council with its first significant challenge. The Council has powers to deal with complaints against the Press which powers must be regarded as potentially unduly restrictive of press freedom. However, the Press Council also has the (somewhat contradictory) power to promote freedom of expression and of the press. Clearly it has an advocacy role which gives it a 'bully pulpit' which will permit the Council to criticise prosecutions such as this one. It is to be hoped that it assumes this task.

3.22 - Notwithstanding concern about the powers of the Press Council, it must be said that the persons recently named to the Council are good appointments and will have press freedom as their paramount concern. That said, they must do their work in an institutional framework which is potentially, quite hostile to a free and robust press. If the new Press Council is to do its job, it will operate as bulwark against the legal setting in which it has been placed.



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