CENTRE FOR LAW AND DEMOCRACY

East Timor

Comments on the Media Law

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Introduction[1]

East Timor has been working to build and maintain democratic institutions since it regained effective independence from Indonesia in October 1999. Among other challenges, it has a small population of just over one million people and it is relatively isolated geographically. Within the broader democratic project, a significant amount of energy has been directed to establishing an appropriate legal framework for regulating the media and the issue of a media law has been the subject of debate for many years now.[2] The present Media Law was adopted by the parliament in May and now awaits Presidential signature.[3]

It has long been recognised that unprofessional behaviour on the part of journalists is a widespread problem in East Timor, and some would welcome the new Media Law for putting in place a system for addressing this. At the same time, there is some indication that the media community in East Timor had been trying to put in place its own system for addressing these problems, which the Media Law would effectively override.

The Media Law has some positive features from a freedom of expression perspective, such as explicit protection for freedom of speech and prohibitions on censorship. However, many of its solutions to the central issue of improving media professionalism are misguided. The rules requiring journalists to be licensed by the Press Council, to meet certain conditions and to undergo internships are in clear breach of the right to freedom of expression, and the many content restrictions found in different parts of the law almost all fail to meet international standards for such restrictions. We also recommend that the independence of the Press Council be further bolstered.

These and other concerns with the Media Law are elaborated on in these Comments. They aim to provide interested stakeholders with a better understanding of the

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[2] See Toby Mendel, *Assessment of Media Development in Timor-Lest Based on UNESCO's Media Development Indicators* (2011: Paris, UNESCO), Introduction.

[3] These Comments are based on an unofficial translation of the Media Law into English. Thanks to La'o Hamutuk for the translation, which is available at: http://www.laohamutuk.org/misc/MediaLaw/14MediaLaw.htm. CLD apologises for any errors in its analysis based on translation.

strengths and weaknesses of the Law from the perspective of international standards relating to freedom of expression.

1. Self- vs. Co-Regulation

It is recognised in established democracies that an effective complaints system should be in place, providing individuals with redress against unprofessional behaviour by the media. Ideally, this should take the form of a self-regulatory system, established by media outlets and representative organisations rather than by law. However, in some countries, including notably nearby Indonesia, co-regulatory systems are in place which involve oversight bodies which are established by law, but which are largely controlled by the media, in the sense of the media appointing members. In the case of Indonesia, the system is generally acknowledged to have been very successful. The Media Law, through the creation of the Press Council and the allocation to it of powers to develop and apply a Code of Ethics (see Article 44(b)), among other things, clearly establishes a co-regulatory system.

The idea of establishing a self-regulatory system for the print media in East Timor has been discussed for many years, but few concrete measures had been taken until fairly recently. However, following on from the report, *Assessment of Media Development in Timor-Lest Based on UNESCO's Media Development Indicators*,[4] there had been some efforts to move forward in terms of establishing a self-regulatory system. We have been unable to find out how advanced these efforts are and whether progress towards establishing the system continues. However, in light of the preference for self-regulatory systems, and the fact that they are generally more protected against political interference than statutory systems, any efforts to develop a self-regulatory system should be given a real chance to mature.

Recommendation:

- To the extent that real progress towards developing a self-regulatory system for the media is underway in East Timor, the authorities should not undermine that process by establishing a statutory co-regulatory system.

2. Definitions

[4] See Note 2.

Article 2(e) of the Media Law defines 'media (social communication)' and 'press' as any dissemination of information in the form of text, sound or images to the public, regardless of how that information is disseminated. Article 2(a) defines 'journalistic activity' (journalism) as including a wide range of functions relating to the dissemination of information to the public through the media, and a journalist as someone who is primarily engaged in journalism. There are also definitions of 'means of social communication' (the 'vehicle' which enables journalism) and 'media organ' (a collective, public or private person who is engaged in journalism), both of which are basically linked back to the definition of media via journalism.

The definitions are problematical mainly inasmuch as they are extremely broad and would capture not only what we understand traditionally as media but also a range of other information functions, including the new electronic forms of media, such as bloggers, but also any public website, whatever its function (so that any business which advertises over the Internet becomes a media) and even such things as posting notices on billboards or displaying advertisements. This is extremely problematical given the implications of being a media – such as, under Article 2, being required to promote democracy and censure bad practices in the provision of public services, under Article 28(1), being required to register (the provision refers to both media and organs), and under Articles 31 and 32, being required to have an editorial board and editorial statute. Even bloggers cannot be expected to comply with Articles 31 and 32, let along companies conducting advertising.

Recommendation:

- The definition of media should be limited to the regular mass dissemination of information to the public through traditional media forms, such as newspapers, magazines, radio and television.

3. Restrictions on Who May Practise Journalism

Articles 13-17 of the Media Law essentially establish a licensing system for journalists which, pursuant to Article 44(d), is overseen by the Press Council. No media can hire a journalist who does not have proper title to the profession, as issued by the Press Council (Article 13(5)).

The Media Law imposes a number of both substantive and procedural conditions on journalists. Pursuant to Article 12, a journalist must be a citizen of East Timor of majority age who enjoys full civil rights and has at least a secondary education. A number of categories of individuals are prohibited from practising journalism,

including civil servants, those in charge of sovereign bodies or local authorities or who exercise community leadership, public relations advisors, or anyone involved in advertising (Article 17).

All journalists must go through a period of internship, the length of which ranges from six to eighteen months, depending on the level and type of education of the individual (Article 14). Detailed and rigorous formal conditions are placed on internships, including that they be registered with the Press Council, that the host media provide a journalist with five years experience to guide the intern, that they cover five of a list of nine journalistic activities, that interns be paid for full-time work of at least the minimum wage, and that the media issue a certificate upon completion of the internship. Furthermore, the Press Council will administer an examination at the end of the internship, which must presumably be passed for the individual to gain the title of journalist (Articles 15-16).

In addition to these rules, further rules relating to journalists, apparently without any conditions, will be set out in a decree law to be adopted by the government (Article 13(2)) and, on an interim basis, by the Press Council (Article 13(3)).

It is well established under international law that requiring journalists to be licensed or even to register, or to impose formal conditions on who may be a journalist, is not legitimate. As the special international mandates for protecting freedom of expression stated in their 2003 Joint Declaration:

> Individual journalists should not be required to be licensed or to register.
>
> There should be no legal restrictions on who may practise journalism.[5]

The UN Human Rights Committee has elaborated on this idea, stating:

> Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3.[6]

Media groups in the country, such as the Timor-Leste Journalists' Union, have been outspoken about problems with the Media Law, including these rules, a position

[5] UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 2004 Joint Declaration. Available at: http://www.osce.org/fom/66176.
[6] Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No. 34, 102nd session, Geneva, 11-29 July 2011, paragraph 46. Available at: http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

which has been supported by the International Federation of Journalists (IFJ). Their concerns include the following:

> The TLJA [Timor Leste Journalists' Association] is disturbed by provisions in the draft legislation that define journalists and media as being certified by the Press Council; and are individuals employed by a recognised media outlet and who have served at least six months as an intern in a media organisation.[7]

The Inter-American Court of Human Rights issued a decision in 1985 which evaluated a law with very similar provisions to this one, namely imposing substantive conditions on who may practise journalism and requiring registration by a central body. In that case, the Court made it quite clear that such systems are not legitimate, stating:

> It follows from what has been said that a law licensing journalists, which does not allow those who are not members of the "colegio" to practice journalism and limits access to the "colegio" to university graduates who have specialized in certain fields, is not compatible with the Convention. Such a law would … be in violation not only the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference.[8]

The underlying rationale for this stems from the fact that the right to express oneself through the mass media belongs to everyone, not simply to a selected group who meet certain requirements. In this respect, and as explicitly recognised by the Court, journalism is different from other professions – such as being a doctor, a lawyer or an engineer – inasmuch as engaging in the subject matter of what those other professions do, unlike journalism, is not a human right. Licensing journalists is also illegitimate because it is susceptible of abuse and the power to distribute licences can become a political tool.

The Inter-American Court of Human Rights specifically rejected the argument that licensing schemes would help ensure that the task of informing the public is reserved for competent persons of high moral integrity, noting that other, less restrictive means were available for enhancing the professionalism of journalists. In practice, formal conditions on journalists have not been effective in promoting more professional journalism. In this regard, the requirement of an internship gives a false air of setting professional standards. Requiring aspiring journalists to complete

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[7] Jacqueline Park (Asia-Pacific Director of the International Federation of Journalists), Parliamentary Hearings (National Parliament) on draft version of East Timor Media Law, 3-7 February 2014, Available at: http://asiapacific.ifj.org/en/articles/east-timorese-journalists-express-concern-on-proposed-media-laws.

[8] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 13 November 1985, Inter-American Court of Human Rights, para. 81. Available at: http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf.

an internship is unlikely to result in improvements to the profession. There are many talented, professional journalists who have never received any formal media training and even more individuals that have received training but are still seriously unprofessional. Furthermore, as provided for in the Media Law, the process of internships imposes onerous obligations on host media outlets, which may therefore be unwilling to support internships, leading to a failure of the system.

Recommendation:

- The whole system of licensing journalists through the Press Council, including limitations on who may practise journalism and the requirement of internships for journalists, should be removed from the law.

4. Content Rules

The Media Law places a number of both positive content requirements and negative content restrictions on media. Articles 3 and 4 set out a number of functions and duties for the media. These include such vague and aspirational matters as promoting democracy and the public interest, supporting consumer protection and respecting human dignity. No specific penalties are associated with these provisions, but it is different for Article 20, breach of which may lead to a fine of between USD500 and 1000. Article 20 also includes vague and aspirational 'duties' on journalists such as contributing to a free and democratic society, combating restrictions on freedom of expression, contributing to the development of society, defending the plurality of opinions and exercising their profession independently.

The scope of legitimate limitations on freedom of expression is set out Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), ratified by East Timor in September 2003:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.[9]

[9] United Nations General Assembly resolution 2200A(XXI), International Covenant on Civil and Political Rights, 16 December 1966, Available at: http://www.ohchr.irg/EN/ProfessionalInterest/Pages/CCPR.aspx.

This means that both positive and negative rules regarding what may be published or broadcast are legitimate only where they are clear and specific in nature, and are necessary to protect legitimate public or private interests. The rules in Article 20 fail on both counts. They are clearly not sufficiently precise to justify imposing fines on media. Indeed, any media outlet could, at some point, be charged with failing to respect one or another of these values. They are also not necessary to protect legitimate interests. It seems highly anomalous to suggest that media be fined for failing to combat restrictions on freedom of expression or to contribute to the development of society. Rather, they are goals to which we would hope that professional media might contribute.

Even the more specific and appropriate rules in Articles 3, 4 and 20 are problematical and may be distinguished from the carefully tailored approach taken in other standard-setting documents relating to the media, such as the Declaration of Principles on the Conduct of Journalists adopted by the International Federation of Journalists (IFJ). For example, where Article 4 states that the media has a duty not to "make discriminatory references on race, religion, gender, sexual preference, disease, political beliefs and social status", the IFJ Declaration states: "The journalist shall be aware of the danger of discrimination being furthered by the media, and shall do the utmost to avoid facilitating such discrimination based on, among other things, race, sex, sexual orientation, language, religion, political or other opinions, and national or social origins." One is cast as a hard rule ('do not') while the other recognises that it is a question of making an appropriate effort ('do the utmost') as opposed to something that can always be achieved in the context of professional journalism.

Article 11 appears to place limits on press freedom, such as "the right to honor, good name, reputation, privacy, right to the presumption of innocence, and secrets of justice and state secrets". Although, as with Articles 3 and 4, there are no specific fines associated with Article 11, it presumably has some legal effect since it has been included in the Media Law, and Article 40(1) grants a general power to the Press Council to impose fines for breach of the law. These limitations are unduly vague and fail to strike an appropriate balance between freedom of expression and the countervailing interests listed. It is clear under international law that the rights to reputation and privacy, for example, must be balanced with the right to freedom of expression, depending on all of the circumstances. It is equally clear that precise rules must be adopted so as to limit the scope of secrecy, with a view to striking an appropriate balance between the interests which are protected by secrecy – national security, privacy, and so on – and the overall public interest in openness.

Article 21 provides for the development and enforcement of a Code of Ethics for media, which is to be enforced by the Press Council (see Article 44(b)). This is in line with practice in many countries and international standards, subject to the

comments in the opening section of these Comments about self-regulation. However, this could be improved upon in two ways. First, it might be useful to set out some of the issues that the Code should address in more detail. Indeed, some of the rules from Articles 3, 4, 11 and 20 could be used in this way (i.e. as areas where more detailed rules are needed in a Code, for example in relation to avoiding the promotion of discrimination). Second, it would be useful to make it clear that only limited penalties for breach of the Code – specifically a requirement to print or broadcast a statement acknowledging the breach – may be imposed. The role of such codes is to supplement the criminal and civil laws, which provide, respectively, for more harsh penalties and damages, not to replicate them.

Recommendations:

- Articles 3, 4 and 11 should either be removed from the law entirely or drafted in such a way as to make it clear that they do not impose specific obligations on journalists or the media. One option would be to include some of their provisions in a list of issues to be addressed in the Code of Ethics.
- Article 20 should be removed from the law.
- Consideration should be given to adding a list of issues to be addressed in the Code of Ethics to the law and of making it clear that the only penalty for breach of the Code is a requirement to publish or broadcast a statement.

5. Powers and Structure of the Press Council

Pursuant to Article 42 of the Media Law, the Press Council is to be an independent administrative authority. Under international law, it is quite clear that only an independent body could legitimately exercise the powers that have been allocated to the Press Council. As the special international mandates on freedom of expression stated in their 2003 Joint Declaration:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.

In general, the way the Press Council is constituted respects this standard, but the mechanisms for guaranteeing its independence could be further enhanced in two main ways. First, Article 42(2) provides for the statute of the Press Council to be adopted by decree-law. Better practice is to provide for the Press Council to adopt its own statute and for rules which need to be adopted externally (i.e. not by the

body itself) to be included in the primary legislation (i.e. adopted by the parliament).

Second, the rules relating to membership of the Council could be enhanced in the following ways:

- Setting out prohibitions so that individuals with strong political connections, for example elected officials or senior members of political parties, cannot be appointed.
- Setting out positive requirements, so that members must have a clear track record of demonstrated expertise in relevant fields and have earned significant social respect.
- Making it clear that members cannot be removed from their positions except pursuant to a fair process and for good cause.
- Making it clear that members, when participating in the work of the Council, should be impartial and fair and represent the public interest rather than the body which appointed them. As part of this, the law should prohibit members from taking active part in a matter when this involves a conflict of interest for them (e.g. when their own media outlet is being challenged for breach of the Code).

The Media Law also grants the Council what appears to be a very broad and undefined power, in Article 44(c), to impose disciplinary sanctions on journalists under regulations which it will adopt which will set out the substantive rules in this area, the procedures and the corresponding sanctions. While it is appropriate to provide for (very limited) sanctions on media outlets for breach of a code of conduct, as described above, imposing disciplinary measures on individual journalists for as yet undefined rules is not appropriate and is not something found in the self- or co-regulatory systems which are in place in democracies.

Recommendations:

- The law should enhance the independence of the Press Council by providing for it to adopt its own statute and through the rules relating to members noted above.
- Article 44(c) should be removed from the law.

6. Other Issues

Support to Media Outlets

Article 6 of the Media Law provides for support to be provided by the State for social communication activities according to "criteria and objectives to be included in the law". It is not clear how this is supposed to work, and whether the adoption of another law is envisaged before support is provided. However, while such support is welcome, it is essential that it be provided through an independent body, or possibly on fully objective criteria (such as periodicity and circulation of a publication), so as to avoid any possibility of political interference.

The Right to Information

Article 7, entitled "Right to Information", refers to the provision to citizens of objective and impartial information, with facts and opinions distinguished and with respect for diversity of opinion. As such, it would appear to refer to another media obligation, along the lines of those found in Articles 3, 4 and 20, as opposed to the right to information as commonly understood, which refers to a right to access information held by public bodies. Article 19(2) refers to the right to information ("right to access to official sources of information") more in this latter sense.

Media Structure

Articles 31 and 32 require all media to have an editorial board and an editorial statute. The purpose of these provisions seems clear, namely to ensure that the journalists working for a media outlet have some input into editorial decisions and to solidify or fix the editorial orientation of media outlets. At the same time, imposing fixed structural requirements on all media outlets is hard to justify as a restriction on freedom of expression and it is to be doubted that these rules will work in practice. Among other problems with these rules is that they may be very difficult for smaller media outlets to implement, that they impose rigidity on the editorial stance of a media outlet, whereas flexibility should be allowed, and that they may undermine investment in the media, to the detriment of diversity and the overall health of the sector.

Limitation Period

Article 39(2) gives claimants three years from the date on which the publication or broadcast occurred to bring cases for compensation against the media, in line with Article 432 of the Civil Code. The whole idea of establishing a special limitation period for media cases is so that this can be shorter than for other types of civil action, and a three-year limitation period is too long for cases involving freedom of expression.

There are two main reasons for this. First, the ability of those involved to present a proper defence is undermined by unduly long limitation periods. Second, drawn-out cases can exert a chilling effect on defendants' freedom of expression. As regards defamation, for example, better practice recommendations suggest a limitation

period of no more than one year from the date of publication, consistently with the rules in many countries.[10]

Right of Reply

Articles 34 to 37 set out the rules relating to the rights of reply and correction. Pursuant to Article 2(g), the right arises when a media publishes "offensive facts" about someone. The publication of a reply is mandatory (Article 34(5)) but there are exceptions (Article 34(6)). Generally, this system is in line with international standards. However, while the definition is quite narrow, better practice is to provide for this right only where the legal rights of claimants have been breached by the publication of false facts (whereas, as it stands currently, a right of reply could be demanded even for true facts). Second, better practice is to separate out a right of reply and a right of correction, and limit claims to the narrower right of correction where this would suffice to redress the wrong (i.e. where the original wrong was a simple factual error). Third, the sanctions for non-carriage of a right of reply are extremely heavy compared to fines for most other breaches of the law, up to USD10,000 (with the exception of the rules on advertising, where the fines are even more excessive).

Recommendations:

- Any State support for the media should be provided through an independent body or on the basis of fully objective criteria.
- Inasmuch as Article 7 refers to media obligations, it should be renamed and treated in the same way as Articles 3, 4 and 11.
- Articles 31 and 31 should be removed from the law.
- Article 39(2) should be amended to require that an action be brought within one year from the date of publication in order to be entitled to compensation for the damage caused by the media.
- The right of reply should apply only where false facts which harm a legal right of the claimant have been disseminated and where a correction will not suffice, and the penalty for refusing to carry a right of reply should be substantially reduced to be in line with the other penalties in the law.

[10] Article 19, *Defining Defamation: Principles of Freedom of Expression and Protection of Reputation; International Standards Series*, July 2000, Available at: http://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf.