



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA MONITORIZASAUN BA SISTEMA JUDISIÁRIU

Opinion:

Sixth Amendment to the Penal Code to approve Decree-Law No. 19/2009: Criminalising Defamation and Injury

Addressed to:

Ministry of Justice

CC:

The President of the Republic

National Parliament

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I. Introduction

JSMP appreciates the efforts and initiative of the Government, particularly the Ministry of Justice, to amend the Penal Code to criminalize defamation and injury and to also involve the public in this process.

Timor-Leste is a democratic nation based on the rule of law and the Constitution and laws that uphold human rights, particularly the right to freedom of expression, and also the right to honour and privacy.

The Constitution of the Democratic Republic of Timor-Leste (C-RDTL) in Article 40 provides for Freedom of speech and information, and Article 41 provides for Freedom of the press and mass media. In addition to the Timor-Leste Constitution, Article 19 of the International Covenant on Civil and Political Rights and also Article 19 of the Universal Declaration of Human Rights deal with the freedom of expression and to impart information and also freedom of the press and mass media as adopted by the State of Timor-Leste.

To guarantee the implementation of these fundamental rights, the State of Timor-Leste has established legislative measures such as the Law on Freedom of Assembly and Demonstration, the Media Law, Law on Freedom of Association and Organization, etc.

To guarantee the right to honour, the State has also established some legislative measures that deal with imposing penalties and sanctions such as the Penal Code, Code Civil and other relevant measures to guarantee the exercise of fundamental rights.

In 2000 the Report of the Office of the Special Rapporteur for Freedom of Expression reaffirmed and recommended for all States to repeal laws on defamation that they have adopted. Their report (2002) also highlighted that civil laws are a more appropriate mechanism in comparison with penal laws. In addition, the European Convention on Human Rights also decided to condemn the application of penalties for acts of defamation.

There is evidence that many nations around the world have eliminated the crime of defamation from their legal frameworks or criminal laws because they believe it has a major impact on freedom of expression, and interferes with social control and is not a proportional way to protect people's rights to honour and reputation. For example, Argentina has revised their criminal laws on defamation to not prohibit the public from questioning the work performance of those in public office.

Based on the existing situation and facts and with consideration also of political, social and judicial issues in Timor-Leste, through this opinion JSMP aims to share its thoughts on articles in the proposed amendments. In this opinion, JSMP has identified relevant articles in the Penal Code and Civil Code that have some relevance with the articles in the proposed amendments. Also, this opinion mentions provisions in the Constitution and International Law that JSMP believes are violated in the law on defamation. The aim is to guarantee that JSMP can contribute to legislative measures that can reflect the reality, national interests and State interests.

II. Definition of concept

After conducting research and comparison with references and theories on the definition of these concepts, JSMP would like to share a definition on *Defamation, Honour and Offences to Honour, Injury and Criticism* to help everyone differentiate and distinguish between these words and terms. A detailed explanation is below:

- **Defamation:**

- Defamation is a legal term that describes the relationship between a person and certain facts that are deemed to be offensive to the person's reputation or honour.
- Defamation is an act or an allegation that ruins the honour and reputation of a person, with the aim of making the public perceive that person negatively and to cause moral and psychological injury to the victim.
- Defamation, like insults, is not considered a criminal offence but an act that falls under civil law. The act is perpetrated through another person or another medium.

- **Injury:**

Is an act of expression that is offensive or affronts another person's dignity and harms that person's honour or good name. Example: A directly accuses B of being a thief or an idiot.

- **Slander:**

To ascribe to someone a false fact related to a crime.

- **Libellous Accusation:**

IS an act or behaviour that offends the honour or dignity of another person and is carried out by means of a denunciation before an authority or the public of a fact incorrectly depicted as a crime.

- **Honour:**

- Honour is the acknowledgement of the respect due to a person and of the dignity that comes with that person's character.
- Honour is a value that endures and is intimately associated with the life of a person or human being and with his/her relationship with other individuals in society and that may not be offended or injured.
- Honour is a quality that is distinct and recognisable and integral to all and everybody is entitled to have his/her honour respected, not only by other individuals but also by the State, as this derives from the State's duty to protect the fundamental rights and obligations to guard and shelter individuals from degrading (i.e. that debase their dignity) and inhuman behaviour. When the right to one's honour is protected and respected, the other fundamental rights are automatically secured.

- **Offence to honour:**

An offensive act or behaviour that reflects a lack of respect for a person's dignity, that causes humiliation and disregards his/her right to his/her good name with the effect that the said person loses the respect, confidence and esteem of others.

- **Criticism:**

An act or thought of an analytical nature that consists of an assessment of a situation with the aim of improving it with an opinion or thought intended to be constructive, or an act of analysis or commentary, of expressing one's opinion about a situation without withholding anything (in relation to a person or the outcome of some act).

III. Relevant legal framework

In this section JSMP would like to present its thoughts in relation to the legal framework in the civil and criminal law that deal with defamation, injury and slander.

The information below explains and analyses each of the articles in Decree-Law No. 19/2009 amending the Penal Code that criminalize defamation.

I. Article 187-A: Defamation and injury (Decree-Law No. 19/2009)

- 1. Any person who, publicly and in the absence of the victim, voices or by any other means of communication ascribes to another person a fact or makes a judgment that offends that person's honour and reputation, or conveys said allegation or judgement to third parties if the allegation or judgment were not generated by the agent himself/herself, shall be punished with a prison sentence of up to 1 year or fine.*
- 2. The same penalty shall apply to whoever, in the presence of the victim, utters words, acts or ascribes to the victim any other fact that offends his/her honour and reputation.*
- 3. The initiation of criminal proceedings depends on the filing of a complaint.*

According to JSMP's opinion and observations, there are some relevant provisions in the Civil Code (CC) that deal with some relevant issues relating to defamation and injury that are the same as Article 187-A. These articles are as follow:

- 1. Article 63 of the Civil Code on the commencement of personality: personality is acquired with complete birth and with life.**
- 2. Article 67 of the Civil Code on general protection of personality.**
 1. The law protects individuals against any illicit offence or threat of offence towards their physical or moral personality.
 2. The offended person may request that the necessary steps be taken in relation to civil liability to stop the and avoid the effects of the offence against personality.
- 3. Article 77 of the Civil Code on the right to preservation of the intimacy of private life**

1. Everyone should preserve the intimacy of the private life of the other persons.
2. The extent of this preservation is defined according to the nature of the case and the condition of the persons involved.

4. Article 417 of the Civil Code on general principles of civil responsibility for unlawful facts

1. Any person who, with intent or merely through fault, unlawfully breaches the rights of another or any legal provision intended to protect the interests of others shall be obliged to compensate the injured party for the damage resulting from the breach;
2. An obligation to pay compensation regardless of fault shall arise only in cases specified by law.

5. Article 418 of the CC on Offence to personal standing or good name

Any person who makes or disseminates a statement liable to harm the personal standing or good name of any natural or legal person shall be liable for the damage caused.

6. Article 432 on Prescriptive period:

1. The right to compensation expires after a three-year deadline, counted from the date on which the injured party came to know his or her right, although ignoring the liable person and the full extension of the damage, notwithstanding the ordinary prescriptive period if the respective deadline has elapsed counting from the damaging fact.
2. The right of recourse between the liable persons also expires after three years, counted as from compliance.
3. If the unlawful fact constitutes crime, for which the law establishes a prescriptive period subject to a longer deadline, then this shall be the applicable deadline.
4. The expiry of the right to compensation does not entail expiry of the claiming action nor of the restitution action for unjust enrichment, if either of them applies.

In addition to provisions in the Civil Code, JSMP has also identified some provisions in the Penal Code that also deal with the issue of defamation and injury, as follows:

1. **Article 183 of the Penal Code on Public disclosure of private information:** Any person who, by any means, even if lawful, becomes privy to facts regarding the private or sexual life of another person and, without consent of the latter, publicly circulates the same without just cause, is punishable with up to 1 year imprisonment or a fine. Prosecution depends on the filing of a complaint.
2. **Article 285 of the Penal Code on libellous accusation:** Any 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.

II. Article 187-B Aggravation (Decree-Law no. 19/2009)

Article 187-B Aggravation

- 1. The perpetrator is punished with a prison sentence of up to 2 years or a fine if the facts described in the previous article are carried out: a) Through means or under circumstances that help their dissemination, namely through the media or social media;*
- 2. If the two aforementioned circumstances occur cumulatively, the prison sentence will be of up to 3 years or fine.*

JSMP believes the some of the provisions in the Civil Code deal with the elements provided for in Article 187-B of the proposed amendment. These articles are as follows:

1. Article 76 of the Civil Code on the Right to one's image:

1. The portrait of a person may not be exhibited, reproduced or sold without his or her consent; after the death of the person portrayed, authorization is vested in the persons designated in paragraph 2 of article 68, in the order indicated therein.
2. The consent of the person portrayed is not required when justified by his or her notability, functional title or police or judicial requirements, as well as scientific, teaching or cultural purposes, or when the reproduction of the image is within the context of an image of a public place or of a fact of public interest or that has occurred publicly.
3. However, portraits may not be reproduced, exhibited or sold if that results in damage to the honour, reputation or mere decorum of the person portrayed.

2. **Article 418 of the Civil Code:** Offence to personal standing or good name: Any person who makes or disseminates a fact liable to harm the personal standing or good name of any natural or legal person shall be liable for the damage caused.

3. Article 417 of the Civil Code on General Principle:

1. Any person who, with intent or merely through fault, unlawfully breaches the rights of another or any legal provision intended to protect the interests of others shall be obliged to compensate the injured party for the damage resulting from the breach.
2. An obligation to pay compensation regardless of fault shall arise only in cases specified by law

4. Article 419 of the Civil Code on advice, recommendations or information

1. Mere advice, recommendations or information shall not render the person from whom the same emanate liable even if there is negligence on his or her part.
2. The obligation to pay compensation shall arise, however, where liability for damage has been accepted, where there was a legal duty to give the advice, recommendation or

information and the same was given negligently or with intent to cause harm, or where the conduct of the person giving the same constitutes a punishable act.

5. Article 428 of the Civil Code on Limitation of compensation in cases of mere fault:

Where liability is based on mere fault, compensation may be fixed equitably to an amount lower than that corresponding to the damage caused, provided that the degree of fault of the wrongdoer, the financial situation of the wrongdoer and of the injured party as well as the other circumstances of the case so justify.

6. Article 430 of the Civil Code on Non-material damage:

1. For the determination of compensation, regard must be had to non-material damage which because of its seriousness, deserves the protection of the law.
2. Where a victim dies, the right to compensation for non-material damage shall be available, jointly, to a spouse who is not legally separated and to the children or other descendants; failing the latter, to the parents or other ascendants; and, finally, to the brothers and sisters or nephews and nieces representing them.
3. The amount of compensation shall be fixed equitably by the court, having regard in any event to the circumstances mentioned in Article 428°; in the event of death, regard may be had not only, to non-material damage suffered by the victim but also to such damage suffered by the persons entitled to compensation by virtue of the foregoing paragraph.

7. Article 431 of the Civil Code on Joint Liability:

1. If damage has been caused by several persons, they shall be jointly liable for it.
2. The right of recourse among the liable persons exists as a function of the respective fault and the resulting consequences. The fault of liable persons is assumed equal.

8. **Article 497 of the Civil Code on General Principle:** Any person who is required to indemnify shall restore the situation that should exist if the event giving rise to the indemnity had not occurred.

In addition to legal provisions that deal with defamation and injury, JSMP has also identified and compiled some legal provisions about the freedom of expression, which in JSMP's opinion, the provisions of Article 187-A and 187-B in the proposed amendment could potentially violate, thus preventing freedom of expression. These are the provisions found in Article 19 of the ICCPR, Article 19 of the Universal Declaration of Human Rights, Articles 40 and 41 of the Timor-Leste Constitution. These articles are outlined below:

1. Article 19 of the International Covenant on Civil and Political Rights (ICCPR)

- a. Everyone shall have the right to hold opinions without interference.
- b. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds,

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

- c. 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.

2. Article 19 of the Universal Declaration on Human Rights

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

3. Article 40 of the Timor-Leste Constitution

1. Every person has the right to freedom of speech and the right to inform and be informed impartially.
2. The exercise of freedom of speech and information shall not be limited by any sort of censorship.
3. 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.

4. Article 41 of the Timor-Leste Constitution

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 license, in accordance with the law.

III. Article 187-C on Defiling the Credibility of Institutions or similar entities

1. *The commission of the acts referred to in article 187-A in terms*
2. *The provisions in article 187-B are correspondingly applicable.*
3. *The initiation of criminal proceedings depends on the filing of a complaint.*

Meanwhile in relation to the provisions of Article 187-C of the proposed amendment, JSMP has identified relevant articles in the Civil Code that deal with the issue of legal persons, as follows:

1. Article 156 Obligations and responsibilities of members of governing bodies of legal persons

1. The obligations and responsibilities of the members of the governing bodies of legal persons towards the latter are defined in the respective statutes or, in the absence thereof, the rules of the mandate shall be applied with the necessary adaptations.
2. The members of the governing bodies may not abstain from voting on the deliberations made at meetings where they are present, and they are responsible for the damage resulting therefrom, unless they have expressed their disagreement.

2. Article 157 Civil liability of legal persons

Legal persons are civilly liable for the acts or omissions of their representatives, agents or proxies in the same terms as principals account for the acts or omissions of their agents.

3. Article 418 Offence to personal standing or good name

Any person who makes or disseminates a fact liable to harm the personal standing or good name of any natural or legal person shall be liable for the damage caused.

IV. Article 187-D on Defiling the Memory of the Deceased (Decree-Law no. 9/2009)

1. *Any person who, in any form, gravely offends the memory of a deceased person is punished with a prison sentence of up to 6 months or fine.*
2. *The provisions in article 187-B are correspondingly applicable, with a prison sentence of 1 year or fine or of 2 years or fine being applied, respectively, in the circumstances provided for in paras. 1 and 2.*
3. *The initiation of criminal proceedings depends on the filing of a complaint, which can be legitimately file by the persons referred to in subpara. B) of para. 1 of article 214 of the Code of Criminal Procedure with the necessary adaptations.*

In relation to the provisions of Article 187-D, JSMP has identified relevant articles in the Civil Code that deal with this issue. These articles are as follows:

1. Article 68 Offence towards deceased persons:

1. Rights of personality are equally protected after the death of the holder.
2. In this case, the surviving spouse or any descendant, ascendant, relative, sibling, nephew or heir of the deceased has the legitimacy to request the measures established in paragraph 2 of the previous article.
3. If the unlawfulness of the offence results from the lack of consent, only those who should grant it, have the legitimacy, jointly and severally, to request the measures referred to in the previous paragraph.

2. Article 76 on the Right to one's Image:

1. The portrait of a person may not be exhibited, reproduced or sold without his or her consent; after the death of the person portrayed, authorization is vested in the persons designated in paragraph 2 of article 68, in the order indicated therein.
2. The consent of the person portrayed is not required when justified by his or her notability, functional title or police or judicial requirements, as well as scientific, teaching or cultural purposes, or when the reproduction of the image is within the context of an image of a public place or of a fact of public interest or that has occurred publicly.
3. However, portraits may not be reproduced, exhibited or sold if that results in damage to the honour, reputation or mere decorum of the person portrayed.

V. Article 187- on Proof of the truthfulness of the facts

Whenever the crimes provided for in this chapter consist in the allegation of facts, if the perpetrator proves the truthfulness thereof, or had no reason, in good faith, to doubt their truthfulness, his or her act shall not be punishable.

IV. Impacts or Consequences

In this section JSMP presents some facts relating to the impacts or consequences of defamation laws that have been criticized at the international level, particularly international laws. JSMP believes that this defamation law violates the provisions found in Article 19 of the ICCPR, Article 19 of the Universal Declaration of Human Rights, and Articles 40 and 41 of the Timor-Leste Constitution.

The impact of the defamation law is that on one hand it limits the freedom of expression and represents a distraction in relation to investigations into cases related to corruption. Also, it scares or discourages the public from reporting cases relating to corruption, even if they have knowledge thereof. This is because they feel afraid, that if the case goes to court and in the end the accused is not found guilty because of a technicality or some other complexity related to the case, the accused could have charges brought against the person who made the report.

Also, there is the probability that people will be afraid to make a complaint against those who hold public office or important people who commit a crime, particularly crimes such as gender-based violence, because when the court does not find the charges proven, based on this defamation law, the defendant can have the victim charged. In addition to discouraging people from making a report, this defamation law also has a psychological impact on those who express their thoughts and also those who denounce something.

This defamation law can also be used as a means to allow individuals to intimidate journalists and other relevant groups from making a complaint, but on the other hand there will be complaints happening on a daily basis because of criticisms, reports and publications. For

example, in Italy every day there are up to 19 cases of defamation, and this number continues to increase each year, even though 70% are closed at the preliminary investigation phase and 8% result in a trial that generally takes a long time to conclude the matter.¹

These examples show that the defamation law undermines fundamental rights relating to the freedom of expression that are enshrined in conventions and the Timor-Leste Constitution, prevents criticism, or policies for combatting corruption and for having sensitive cases processed by the courts.

V. History of Defamation Laws in other countries

An examination of history, particularly in those countries that have been independent for a long time and have adopted defamation laws, shows that in the end these laws have been revised and some defamation laws have been removed or repealed.

Great Britain repealed its defamation law in 2009 that had been adopted and used for more than 150 years.² Other nations in Europe have totally eliminated their defamation laws, namely Armenia, Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Ireland, Kyrgyzstan, Moldova, Montenegro, Norway, Romania, Tajikistan, the Former Republic of Yugoslavia, Macedonia and the Ukraine.³

In the Americas many nations have revised their laws on defamation and some of have been totally repealed. The United States of America has repealed its law on defamation and in 2009, the Inter-American Court of Human Rights ordered Argentina to revise its defamation law and stated that opinions are not subject to sanctions, especially opinions relating to the performance of those holding public office.⁴

In Africa the Constitutional Court of Zimbabwe in 2014 found that their laws on defamation were unconstitutional. The court declared that this has a massive and unproportional effect on the freedom of expression to protect personal reputation.⁵

In the Asian region, Indonesia has been strongly criticized for its law on defamation because it criminalizes essential acts or practices in a democratic society such as controlling the conduct, policies and work of the Government. Some practices that are criminalized include such things like reporting on the misbehavior of authorities, peaceful protests about the misbehavior of

¹ “Shut Up or I’ll Sue You!” Dossier by Ossigeno per l’Informazione, October Ossigeno per l’Informazione, Outubro 2016, p.8 https://www.ossigeno.info/wp-content/uploads/2016/10/DOSSIER_Shut-up-or-I%E2%80%99ll-sue-you.pdf

² A Briefing on the Abolition of Seditious Libel and Criminal Libel, by Index on Censorship and English PEN, 2019 https://www.englishpen.org/wp-content/uploads/2015/09/seditious_libel_july09.pdf

³ Defamation and Insult Laws in the OSCE Region: A Comparative Study, 2017 <https://www.osce.org/fom/303181?download=true>

⁴ Defamation Laws in Argentina <http://kellywarnerlaw.com/argentina-defamation-laws/>

⁵ Madanhire & Another v The Attorney General (2014)1 ZLR 719 (CC).

officials, public consumer complaints and business disputes and reporting on sensitive political topics. Also, the defamation law distracts from investigations into cases of corruption.⁶

The reality is that many nations are aware that defamation laws limit public rights and freedoms to criticize, publish and report on the performance of the Government. This criticism is very important in a democratic society to contribute to national development and control and also to guarantee good and transparent governance and also to guarantee the livelihood of the entire community.

VI. Conclusions and Recommendations

In the State of the Democratic Republic of Timor-Leste there are legislative measures in place to guarantee public participation public in the exercise of fundamental rights.

To enforce the exercise of these aforementioned fundamental rights, the State has also established legislative measures such as the Penal Code, Civil Code and other specific laws.

JSMP has observed and carefully considered the provisions in the criminal and civil law and has noted that a number of provisions deal with the right to honour, good name and privacy. Therefore, JSMP believes it is **“UNNECESSARY**, for the Government, and in particular the Ministry of Justice, to amend the Penal Code to criminalize defamation, because we reiterate that these matters are already dealt with in the Civil Code and the Penal Code as detailed above.

Before concluding our opinion paper, we would like to make the following recommendations to the Government, particularly to the Ministry of Justice to:

1. Embrace the Civil Code as the legal basis for protecting the fundamental rights of all persons in relation to their honour.
2. Not criminalize defamation because it will undermine public participation in social control of national development.
3. The criminalization of defamation discourages public participation in reporting cases of corruption and cases characterized as gender-based violence.
4. The criminalization of defamation can also limit the freedom of expression and information.
5. Regularly and thoroughly raise awareness about the relevant provisions in the Penal Code and Civil Code that deal with issues relating to the right to honour, good name and privacy, to help all people understand that these right are already provided for in the aforementioned laws.

⁶ *Turning Critics into Criminals*, Human Rights Watch Report, 2010
<https://www.hrw.org/report/2010/05/03/turning-critics-criminals/human-rights-consequences-criminal-defamation-law>

Dili, 16 June 2020

A handwritten signature in black ink, appearing to read "Ana Paula Marçal". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ana Paula Marçal
Executive Director of JSMP