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OMBUDSMAN FOR HUMAN RIGHTS AND JUSTICE

OPINION

Criminalizing Defamation: Perspectives on Human and Fundamental Rights

Part A - Legal Basis

The Ombudsman for Human Rights and Justice, enshrined in Article 27 of the Constitution of the Democratic Republic of Timor - Leste (CRDTL), is an independent body whose function is to assess and seek to satisfy citizens' complaints against public authorities. It is incumbent upon the Ombudsman for Human Rights and Justice (PDHJ), within the scope of article 24(b), of Article 28(I) and Article 35 to submit, on its own initiative, to the Government, the National Parliament or any other competent body, on a consultative basis, opinions, recommendations, proposals and reports on any matter relating to the promotion and protection of human rights and good governance aimed at improving respect for human rights and good governance on the part of entities within their area of jurisdiction.

Part B - Purpose

In order to be able to assist the Government and the National Parliament in the current discussion initiated by the Ministry of Justice on the possibility of criminalizing defamation, insults, offense to the prestige of natural and legal persons and offense to the memory of deceased person, in order to reinforce the protection of the dignity of the human person^[1], the PDHJ drafted this opinion whose object is related to the analysis of the referred subject, from the perspective of Human and Fundamental Rights and the positive obligation of the State, within the scope of the duties, rights, freedoms and guarantees of citizens.

Since, in the absence of a hierarchy between the various constitutional norms, the resolution of conflicts between fundamental rights, such as the right to honor and the right to freedom of expression, in which restrictions will be applied^[2] in one or both rights, such limitations or restrictions must be made respecting the application of the principle of proportionality^[3]. In other words, it should be examined whether the introduction of new legislation in criminal law, criminalizing defamation, injury and other insults to the prestige and the memory will enhance and ensure the current rights or will jeopardize the balance between these two fundamental rights, resulting in the application of disproportionate penalties, proving to be incompatible with international standards with regard to the right to freedom of expression and information.

Part C - Current Legal Framework

In 2009 the Penal Code[4], based on Law No. 13/2008[5], was approved by the IV Constitutional Government, without including the crimes of defamation and insults, but providing for some other articles in order to criminalize slanderous denunciation[6], racial or religious discrimination[7], instigation of crimes[8], and violation of privacy[9] to ensure the protection of the right to honor and privacy[10], thus imposing certain limits on freedom of expression[11], necessary to ensure, in a democratic state of law, all the fundamental rights of the citizen in an appropriate and proportional way.

In 2011, with the approval of Law N 10/2011, of September 14, which approved the Civil Code, Timor-Leste expanded the protection of the right to honor and privacy, establishing in the civil venue the illegality of acts that would violate that right[12], and through the Code of Civil Procedure, it provides adequate mechanisms to deal with defamation and injuries[13]. These diplomas determine basic rules and relevant procedures, proportionately and effectively, promoting legal instruments to demand, when applicable, the rapid cessation of the act of violation[14], through precautionary measures[15], and the possible compensation of the offended for the damages resulting from the violation. In the event that the offender does not comply with the court order[16], this becomes crime of qualified disobedience[17], which can result in a sentence of 1 to 4 years in prison.

In 2014, the Media Law, Law No. 5/2014, of 19 November, established in its Chapter VI rules of accountability for the liable acts of interests and values protected by law, committed through the press. Said law establishes that the perpetrators of such harmful acts can respond, civilly and criminally (crime of qualified disobedience), for the damages they have caused in the cases of publication of text, sound or image in a media organization, with the right to compensation of the victim, for damages caused by the press. Chapter V also clearly provides for the right to reply and rectify a person who feels negatively impacted by news published in the media. When the media does not respond positively to the request without providing reasons for the refusal to exercise the right of reply, it constitutes an administrative offense punishable by a fine of between \$2,500 and \$10,000 USD. Judicial intervention is also considered to guarantee the right to reply and rectification, with the process decided within eight working days[18], from the entry of the application at the judicial secretariat. Under Article 37 of that law, is qualified disobedience, punished under the Penal Code, noncompliance with a judicial order for the publication or broadcast of the reply by the editor-in-chief.

Article 40 of the CRDTL states that *"everyone has the right to freedom of expression and the right to inform and be informed impartially"* and that *"the exercise of freedom of expression and information cannot be limited by any type of censorship"*. And even that *"the exercise of the rights and freedoms referred to in this article shall be regulated by law based on the imperative of respect for the Constitution and the dignity of the human person"* (art. 40.2).

It should be noted that when the Constitution provides for the regulation by law of a fundamental guarantee, this does not necessarily mean regulation by criminal law. Such an interpretation is a basic aspect of constitutional hermeneutics. Thus, there is no doubt that currently the right to freedom of expression is already regulated by a series of laws: Penal Code (crimes of slanderous denunciation[19], racial or religious discrimination[20], the instigation of crimes[21], and violation of privacy[22]), by the Civil Code and Civil Procedure (especially the general protection of the personality[23], the offense against people who have died[24], right to the image[25], right to reserve on the privacy of privacy[26], and the offense of credit or good name[27], provided for in the Civil Code) and also by the Media Law (providing for the right to rectify and respond and consequences of a legal violation and criminal nature when the law or judicial decision is not complied with).

Thus, we are not facing a lack of regulation of Article 40, nor are we in a situation where we are violating the constitutional requirement to regulate by law.

Part D- Human and Fundamental Rights Position on Criminalizing Defamation and Injuries

There is consensus from a human rights perspective that the criminalization of defamation and injuries violates the right to freedom of expression.

The United Nations freedom of expression protection bodies, as well as those of regional human rights systems, have repeatedly declared that the criminalization of defamation and injuries is a violation of the right to freedom of expression and opinion. This is based on the premise that criminalizing defamation and injury represents an excessive measure to protect the right to honor and privacy. As already stated on numerous occasions by the UN Committee on Human Rights that the criminalization of defamation and violation of the right to freedom of expression and opinion[28], and therefore requesting State Parties to decriminalize defamation[29]. This assertion has already been declared to Portugal, Macau[30], Mozambique[31] and also Thailand[32], and Indonesia[33].

Likewise, the Mechanisms for the Promotion of Freedom of Expression since the various systems of human rights protection 2002 already reiterate that "the criminalization of defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws must be abolished and replaced, if necessary, by appropriate defamation civil laws "[34].

Based on predictions, a significant number of states have decriminalized defamation in recent decades, notably Sri Lanka, the United Kingdom[35], Bosnia Herzegovina, Moldova, Norway and others[36].

It is important to note that the CRDTL in its Article 23 states that the fundamental rights enshrined in the CRDTL must be interpreted in line with the Universal Declaration of Human Rights (UDHR). In addition, Article 9 of the CRDTL consecrates, in its number 1, that *"the Timorese legal order adopts the principles of general or common international law"*. In number 2, of the referred article determines that *"the norms contained in conventions, treaties and agreements international laws are in force in the domestic legal system upon approval, ratification or accession by the respective competent Bodies and after being published in the official journal"* and the final paragraph 3 states that *"All the rules of laws contrary to the provisions of the received international conventions, treaties and agreements are invalid in the Timorese internal legal order."* Timor-Leste, through the National Parliament Resolution No. 3/2003, of July 22, ratified the International Covenant on Civil and Political Rights[37].

Freedom of expression and information, provided for in Article 19 of the Universal Declaration of Human Rights[38] and Article 19 of the International Covenant on Civil and Political Rights[39] is a basic principle of democratic rule of law. The UN Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR), in its General Comment no. 34 of September 12, 2011[40], reaffirms that freedom of expression and information are essential conditions for any free and democratic society, necessary for the realization of the principles of transparency and accountability, and that they are also fundamental instruments for the promotion and protection of the other provided guarantees.

Freedom of expression and information establishes the basis for the realization of other fundamental rights such as freedom of the press and the media[41], freedom of assembly and expression[42], freedom of association[43], freedom of conscience, religion and worship[44], the right to political participation[45], the right to vote[46], education and culture[47], among others.

The determination of civil and other non-criminal mechanisms is considered sufficient to deter acts of defamation and to properly compensate victims, and the application of criminal defamation laws is seen as inappropriate since the prison sentence is considered to be disproportionate to the damage caused, which may result in self-censorship by citizens and the media[48], negatively impacting the right to freedom of expression and information, resulting in incompatibility with it.

Within the scope of paragraph 3 of Article 19 of the ICCPR, which determines that the exercise of the freedoms of expression, provided for in paragraph 2 of Article 19 "carries with it special duties and

responsibilities", and may, therefore, "be subject to certain restrictions", the UN Human Rights Committee[49] and international courts have established a test based on three criteria:

- 1) that the restriction must be expressly fixed by law;
- 2) for the purpose of safeguarding a legitimate interest, including protecting the reputation of others; and
- 3) be necessary to ensure this interest.

Of the same nature is Article 24 of the CRDTL, which, in the opinion of the Court of Appeal, requires analysis based on proportionality, reasonableness and the need for the restriction to safeguard another interest.

Sanctions that are disproportionate to the damage caused by a private action, will be considered to violate the guarantee of the right to freedom of expression, that is, they may be declared unconstitutional. Thus, the criminalization of defamation and injury, further increasing the range of criminalization of acts based on the right to freedom of expression, will be excessive and in violation of constitutional guarantees.

The idea is to reform the systems of States that still criminalize defamation, rules that are seen as feudal and obsolete, as mentioned by the European Court of Human Rights[50]. Although countries with more mature democracies have criminal defamation standards, such as Portugal, they are regularly condemned as violators of human rights, either by the human rights bodies of the United Nations[51] or by its own European Court of Human Rights[52].

Timor-Leste leads the democracy index in Southeast Asia and is the 7th country in Asia and Oceania in the democracy index released by The Economist Intelligence Unit (EIU)[53], with civil liberties such as freedom of expression and information[54], one of the categories evaluated.

Part E- Draft Decree-Law: Criminalizing Defamation, Injuries and Offenses to Prestige and Memory

The Ministry of Justice recently submitted for consultation by civil society a draft decree-law aimed at criminalizing defamation, injuries and offenses against prestige and memory.

PDHJ understands that it is not necessary to reproduce the proposal in question here, but only to emphasize that the proposal includes the criminalization of the expression of facts and opinions [judgment] that cause offense to the living people, memory of people who have died and to collective or similar persons. The proposed punishments are between 6 months and three years in prison or a fine.

It should be noted that, because any criminalization of defamation and injury would be a violation of human rights, regardless of its content and scope, the PDHJ does not consider it pertinent to make comments or recommendations to the proposed rules.

Part F- Final Considerations

CRDTL establishes that the fundamental rights enshrined therein do not exclude any others contained in the law and must be interpreted in accordance with the Universal Declaration of Human Rights[55].

The CRTDL stipulates that the Timorese legal order adopts the principles of general or common international law, and the norms contained in conventions, treaties, and international agreements are in force in the domestic legal order through approval, ratification or accession[56].

Timor-Leste ratified the ICCPR which, in its article 19, states that any restriction on freedom of expression and information must be mandatory. This criterion is also integrated in article 24 of the

CRDTL through the general regime of restrictive laws, which prohibits excessive and disproportionate restrictions.

There is consensus that the criminalization of defamation and a violation of the right to freedom of expression and opinion. It is clear that this represents a disproportionate limitation of the right to freedom of expression and information in the face of the right to honor and privacy, and is therefore irreconcilable.

Therefore, the introduction of new legislation in the criminal sphere, criminalizing defamation, insulting, among other offenses to prestige and memory, will not reinforce or guarantee current rights, but will end up calling into question the balance between these two fundamental rights, resulting in the application of excessive or disproportionate measures.

The crimes of slanderous denunciation, instigation of crimes, discrimination and hate and of violation of privacy already represent a criminalization of the abuse of freedom of expression and opinion. Still, civil mechanisms for repairing damages to the honor of others and mechanisms under the social communication law are shown as mechanisms already foreseen to account for and repair violations of the right to honor and privacy. The PDHJ notes that defamation criminalization is unjustifiable as a necessary step when it is generally known that the other formal mechanisms for the repair of honor or consideration to those who have been offended are already available and provide the necessary response in such a situation. PDHJ notes that traditional customary practice in Timor-Leste is payment with animals or items when an offense to the honor of another person caused during dispute resolution processes through *adat*.

Since the present draft decree-law fails to satisfy the requirements of article 19 of the ICCPR and there are already civil and administrative mechanisms in Timor-Leste to adequately respond to the defense of honor, prestige and private life, together with the defense of memory of deceased persons, approval of the draft decree-law will be in violation of the requirements of article 24 of the CRDTL, being unnecessary and disproportionate, in violation of the constitution itself and international human rights treaties.

Dili, 18 June 2020,

/s/

Jesuína Maria Ferreira Gomes, MPA

Provedora

Notes:

[1] Article 40.3 of CRDTL Freedom of Expression and Information and Article 36 of the CRDTL right to honor and to privacy.

[2] Within the scope of article 24 (Restrictive Laws) of the CRDTL.

[3] See General Comment No. 27, paragraphs 14-15, which reaffirms that restrictive measures must respect the principle of proportionality: they must be appropriate to perform their protective function; be the least intrusive instrument possible, of the instruments available to achieve the desired protection and be proportional to the interest to be protected ..., and should be included not only in the law that regulates the restriction, but also by the administrative and judicial authorities in the application of the rule.

<https://www.refworld.org/docid/45139c394.html>

[4] Decree-Law No. 19/2009 of 8 April, which approves the Penal Code.

[5] Law No. 13/2008 of 13 October, Law on Legislative Authorization in Criminal Matters.

[6] Article 285 of the Penal Code approved by Decree-Law 19/2009 of 8 April.

[7] Article 135 of the Penal Code approved by Decree-Law 19/2009 of 8 April.

[8] Article 189 of the Penal Code approved by Decree-Law 19/2009 of 8 April.

[9] Article 183 of the Penal Code approved by Decree-Law 19/2009 of 8 April.

[10] Article 36 of the CRDTL Right to honor and privacy.

[11] Article 40 of the CRDTL Freedom of Expression and Information.

[12] Article 67 (General protection of personality), Article 68 (offense to persons who have died), Article 76 (right to image), Article 72 (right to reserve on the privacy of privacy), Article 418 (offense to credit or good name), among others of the Civil Code, approved by Law no. 10/2011 of 14 September.

[13] Section II (Personality rights) of Chapter 1 of Subtitle I of Title II of Book I; Subsection I (Civil Liability) of Section V of Chapter II of Title I of Book II, among others, of Law No. 10/2011 of 14 September, which approves the Civil Code.

[14] **Article 306. Urgent precautionary procedure**

- 1) *Precautionary procedures are always urgent, preceding any other non-urgent judicial service.*
- 2) *The proceedings initiated before the competent court must be decided, in the first instance, within a maximum period of two months or, if the defendant has not been summoned, fifteen days.*

[15] The precautionary procedures are provided for in Chapter V II of Title I of the Civil Procedure Code, approved by Decree-Law N 1/2006 of February 21, has the scope of:

Article 305 Scope of precautionary measures not specified

- 1) *Whenever someone shows a well-founded fear that someone else will cause a serious injury that is difficult to repair their right, they can request the conservative or anticipatory action that is concretely adequate to ensure the effectiveness of the threatened right.*
- 2) *The applicant's interest can be based on a right, an existing or an emerging right of decision, to render a constitutive action, already proposed or to be proposed.*
- 3) *The provisions referred to in no. 1 do not apply when it is intended to safeguard the risk of injury specially prevented by any of the measures typified in the next section.*
- 4) *It is not permissible, depending on the same cause, to repeat measures that have been deemed unjustified or have expired.*

[16] Article 315 (penal guarantee of the providence) "*Incurs the penalty of the crime of qualified disobedience every one who violates the decreed precautionary measure, without prejudice to the appropriate measures to its coercive execution*", of the Civil Procedure Code, approved by the Decree-Law no. 1/2006 of February 21.

[17] Article 244. of the Penal Code approved by Decree-Law 19/2009 of 8 April.

[18] *Article 36 (Judicial processing), of the Social Communication Law, Law no. 5/2014, of November 19:*

- 1) *The judge, upon receipt of the request, orders, in forty-eight hours, the summons of the publication's editor in chief to respond and support the reasons for not publishing the response.*
- 2) *The response time is forty-eight hours.*
- 3) *The process is decided within eight working days, counting from the filing of the application at the judicial secretariat.*
- 4) *In the decision, the judge condemns the defendant to obligatorily publish the response and also its dissemination in a broadcasting station of greater hearing and in another periodical of greater circulation, importing all expenses to the defendant.*
- 5) *The publication and disclosure referred to in the previous number are made within three days, counting from the final decision of the judicial decision.*

[19] Article 285 of the Penal Code approved by Decree -Law 19/2009 of 8 April.

[20] Article 135 of the Penal Code approved by Decree-Law 19/2009 of 8 April.

[21] Article 189 of the Penal Code approved by Decree-Law 19/2009 of 8 April.

[22] Article 183 of the Penal Code approved by Decree-Law 19/2009 of 8 April.

[23] Article 67 of the Civil Code, approved by Law N. 10/2011 of 14 September.

[24] Article 68 of the Civil Code, approved by Law N. 10/2011 of 14 September.

[25] Article 76 of the Civil Code, approved by Law N. 10/2011 of 14 September.

[26] Article 77 of the Civil Code, approved by Law N. 10/2011 of 14 September.

[27] Article 418 of the Civil Code, approved by Law N. 10/2011 of 14 September.

[28] United Nations Human Rights Committee, General Comment No. 34, July 2011, para. 12. Available at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

[29] Concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2), Poland (CCPR/C/POL/CO/7)

[30] CCPR/C/CHN-MAC/CO/1

[31] CCPR/C/MOZ/CO/1

[32] CCPR/C/THA/CO/2

[33] In the first cycle of periodic review of Indonesia, the only one completed so far, the UN Human Rights Committee, in its final remarks, criticized the use of the defamation offense, provided for in the penal code and in law no. 11/2008 on information and electronic transactions, as a tool to stifle legitimate criticism of the government, and suggested that the country promote the revision of these laws to ensure that they are in compliance with art. 19 of the ICCPR. Human Rights Committee, CCPR/C/IDN/CO/1 (21/08/2013), para. 27. available at: <https://undocs.org/es/CCPR/C/IDN/CO/1>

[34] International Mechanisms for Promoting Freedom of Expression JOINT DECLARATION by the 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, 2002 (accessible at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&IID=1>). Similarly, and more recently, the UN Special Rapporteur for "any attempt to criminalize freedom of expression as a means of limiting or censoring freedom must be combated. Therefore it encourages all efforts to decriminalize acts considered defamation acts and to ensure that the civil liability process is the only form of reparation for reputation damage complaints "(Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue, A/HRC/14/23, 20 April 2010, para. 23). human rights, see Resolution 1577 of the Parliamentary Assembly of the Council of Europe, "Towards the decriminalization of defamation", 2007, available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en> . Also in the regional scope of human rights protection, see the European Council document, "EU Guidelines on Human Rights on Freedom of Expression Online and Offline", 2014, available at https://easrotgeu/sites/eas/files/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline.pdf

[35] UK: Defamation Decriminalized. *Index on censorship.org, Article19*, November 2019. <https://humanrightshouseorg/articles/uk-defamation-decriminalized/>

[36] Still, Armenia, Cyprus, Estonia, Georgia, Ireland, Kyrgyzstan, Montenegro, Romania, Tajikistan, Former Yugoslav Republic of Macedonia, Ukraine, United States of America (at the federal level, but also at the state level).

[37] See General Comment No. 31 of the Convention on the obligations of States Parties to give effect, under national law, to the rights provided for in the Convention, in a manner consistent with the recommendations of the UN Human Rights Committee.

[38] Article 19 UDHR: *"Everyone has the right to freedom of opinion and expression; this right includes the freedom, without interference, to have opinions and to seek, receive and transmit information and ideas by any means and regardless of borders."*

[39] Article 19 ICCPR:

1. *Everyone shall have the right to hold opinions without interference.*
 2. *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.*
 3. *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, or of public health or morals.*
2. Everyone has the right to freedom of expression; this right understands the freedom to seek, receive and expand information and ideas of all kinds, regardless of borders, in oral or written, printed or artistic form, or by any other method of choice.
3. The exercise of the freedoms provided for in paragraph 2 of this article includes special duties and responsibilities. Consequently, certain restrictions may be subject, which must, however, be expressly fixed by law and which are necessary :
- a) Respect for the rights or reputation of others;
 - b) Safeguarding national security, public order, public health and morality.

[40] General comments No. 34, UN Human Rights Committee, 102nd session, published 12 September 2011, www2.ohchr.org/English/bodies/hrc/docs/GC34.pdf

[41] Article 41. CRDTL, Freedom of the press and the media.

[42] Article 42 CRDTL, Freedom of assembly and demonstration.

[43] Article 43 CRDTL, Freedom of association.

[44] Article 45 CRDTL, Freedom of conscience, religion and worship.

[45] Article 46 CRDTL, Right to political participation.

[46] Article 47 CRDTL, Right to vote.

[47] Article 59 CRDTL, Education and Culture.

[48] See General Comment no. 34, para.13, which states that a free press is essential for any society, to guarantee freedom of opinion, expression and information, under the terms of the Convention.

[49] See General Comment no. 34, para. 21.

[50] https://rr.sa_po.pt/2012/06/17/pais/portugal-esta-longe-da-europa-ao-criminalizar-a-injuria-e-a-defamacion/news/86470/; and <https://www.coe.int/en/web/freedom-expression/defamation>

[51] The UN Human Rights Council adopted Resolution A/HRC/RES/12/16 on 16/10/2009, which criticizes the abuse of laws that criminalize defamation, in violation of art. 19 of the ICCPR. Available at: <http://undocs.org/en/A/HRC/RES/12/16>. In addition, the UN Special Rapporteur for the Promotion and Protection of the Rights to Freedom of Opinion and Expression has repeatedly denounced the criminalization of defamation, in violation of the guarantee of freedom of expression and opinion: cf. in E/CN.4/2005/64 (17/12/2004), paras. 51, 59, 69, available at: <https://undocs.org/en/E/CN.4/2005/64>; A/HRC/4/27 (02/01/2007), para. 12, 44-57 available at: <https://undocs.org/en/A/HRC/4/27>; A/HRC/14/23 (04/20/2010), paras. 82-84, available at: <https://undocs.org/en/A/HRC/14/23>; A/HRC/20/17 (04/06/2012), paras. 53, 79, 84 and 87, available at: <https://undocs.org/A/HRC/20/17> and A/71/373 (06/09/2016), paras. 33, 34 and 57d, available at: <https://undocs.org/en/A/71/373>

[52] Between January 2005 and January 2015, Portugal was found guilty in 18 cases of violation of freedom of expression (Article 10 of the European Convention on Human Rights). In 12 cases, the crime of defamation was at issue. For more information see <http://legajdb.freemedia.at/wp-content/uploads/2015/06/PortugalCriminalDefIPIPOR.pdf>

[53] <https://observador.pt/207/02/03/timor-leste-lidera-indice-da-democracia-no-sudeste-asiatico/>. See also: <http://timor-leste.gov.tl/?p=17298&lang=en>

[54] See General Comment no. 25, on article 25 of the Convention, para. 25, which elaborates on the importance of freedom of expression for public life and the effective exercise of the right to vote.

<https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2025.pdf>

[55] Article 23 of the CRDTL.

[56] Article 9 of the CDRTL.