

Press Freedom and Defamation in relation to the Applicable Law

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Press freedom is a crucial issue in Timor Leste at the moment because it raises important questions about what type of restrictions on the press can be accepted. There is a complex debate about principles of press freedom and equality before the law as well as principles of democracy and the rule of law, namely should total press freedom be allowed or should the applicable law place restrictions on the press. The importance of this issue is evidenced by the many cases that have emerged and have been forwarded to the formal justice sector basically relating to members of the press who have been accused of committing defamation.

Based on information in the possession of JSMP, several individuals have initiated criminal proceedings against the press as an institution and against several journalists as individuals in relation to the reporting of information perceived to be defamatory. In the very least these circumstances have shocked the press in TL, because the press as an institution has been found guilty by the courts and has been ordered to restore the reputation of aggrieved parties and pay compensation for reporting considered to be defamatory (Case of *Bambang vs. STL*). Several other cases are still being processed and investigated (a case made against Timor Post, and a case involving the Minister of Justice vs. Tempo Semanal and its journalist). These developments pose a significant question: can a journalist be charged for performing his job? Or should the press be given full assurance that it is free from liability (both criminal and civil) when a member of this profession is performing his job? Or should any legal process (criminal or civil) initiated against a journalist be considered as an attempt to limit press freedom? Or has the press in Timor Leste failed to adhere to standards of professional reporting and is it irresponsible disrespectful of values governing the reporting of information? These questions are of great interest because they encompass both press freedom and defamation.

Freedom of speech as well as the distribution of information through the media is clearly protected under Articles 40 and 41 of the RDTL Constitution, Article 19 of the International Covenant on Political and Civil Rights and Article 19 of the International Declaration of Human Rights which deal with freedom of expression and the freedom of information, as well as freedom for the press and the mass media.

However we must acknowledge that members of the press are also ordinary citizens who have to adhere to the applicable law. In this regard, the principle of equality before the law dictates that all citizens have the same rights and shall be subject to the same duties. This includes journalists who as members of the press are granted equal status under Article 16 of the RDTL Constitution. Therefore, members of the press are not excluded or granted immunity as legal subjects and have to adhere to the applicable law in Timor Leste. Nevertheless this doesn't mean that press freedom is restrained by the law.

A concern arises when press reporting is used as a means to defame or slander a person or institution without any consideration if the article is newsworthy or not, and such reporting is deliberate and negligent as thus fulfils the elements of a criminal act. Therefore, what needs to be highlighted here is that the law must be applied to any party who intentionally defames or slanders another through the press. There is a tendency emerging in Timor Leste

for various parties to try and have members of the press held liable through criminal and civil proceedings.

The freedom of the press to express an opinion or thought is an absolute right provided for in the Constitution and relevant international conventions ratified by Timor Leste. However, this should not be construed as an absolute freedom without any restriction. Other legal measures are necessary to prevent the press from being misused to defame, insult, slander or abuse others. These measures are not aimed at restricting the press but rather to ensure that the press is more professional and responsible and respects the applicable law and the human rights of all individuals as set out in the Constitution and international conventions ratified by Timor leste.

In 2000 the UNTAET administrator exercised his executive authority and issued Executive Order No. 2/2000 which basically revokes Articles 310-321 of the Indonesian Penal Code on defamation. This means that defamation no longer constitutes a criminal act and cases of defamation or slander can only be processed through civil proceedings. After the aforementioned executive order came into effect the Office of the Public Prosecutor lodged an appeal with the Court of Appeal in a case of defamation and in response the Court of Appeal issued decision No 46/04 dated 15 September 2004 (*Ivo Valente, STL*, January 2009) stating that the executive order did not have the legal authority to revoke or supersede the articles on defamation set out in the Indonesian Penal Code, based on the hierarchy of laws and the principle of *Lex Superior derogate Lex Inferior*. Pursuant to the aforementioned decision issued by the Court of Appeal defamation/slander is still a criminal act in the current legal system of Timor Leste. However, the aggrieved party can choose to pursue civil proceedings (because defamation is a crime on complaint unless the aggrieved person is a public servant). In this context, with reference to the hierarchy of laws and the principle of *Lex Superior derogate Lex Inferior*, defamation is still a crime that can be charged until such time that other legislation is enacted.

Articles 310 to 321 of the Indonesian Penal Code deal with defamation, slander and abuse resulting from press reporting. These articles clearly prescribe the criteria for the criminal act of defamation. These articles prescribe maximum penalties ranging from four months to four years imprisonment. These severe penalties will be handed down if the elements of a respective article on defamation are fulfilled. An additional provision in the articles relating to the criminal act of defamation provides the person suspected of defamation to prove the truth of his accusations, and if such accusations are not proven then he will be found guilty of the criminal act of slander. If the criminal act of slander is conveyed via the print media then it will fulfill the existing elements for this charge. Therefore, in principle the Indonesian Penal Code provides adequate protection for press freedom as it provides an opportunity to the person suspected of defamation or slander to prove the validity of his accusations, or when defamation or slander is committed through the print media then the journalist reporting this information can be given an opportunity by the judge to prove the truth of his report.

If the journalist accused of defamation or slander can prove that his report was accurate then he can not be found guilty of defamation or slander. On the other hand, if the decision of the judge carrying full force of the law states that the accusations made against the aggrieved party have not been proven then the aggrieved party is thereby exonerated from these accusations and the decision itself is unadulterated proof that the accusations are not true.

Based on the aforementioned analysis we can deduce that press freedom, in the sense of expressing a thought or a piece of news, continues to be protected, however this does not mean that members of the press are not liable to criminal charges according to the applicable law. When the press is used as an instrument to commit defamation or slander then the perpetrator can certainly be held criminally liable in accordance with the applicable law. Therefore the press as a medium for information is not held criminally liable, rather the individual perpetrator that utilizes or takes advantage of the press for unlawful purposes is the one who is held criminally liable. Therefore the individual is put on trial, not the press. To establish the criminal act of defamation or slander committed through the press it must be shown that the perpetrator intentionally carried out the criminal act and was found guilty. Therefore the criminal proceedings are not focused on the press report itself but rather on the act of committing defamation or slander.

In addition to the provisions contained in the Indonesian Penal Code, Article 12 of the International Declaration of Human Rights also states that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks”. The same protection is provided in Article 36 of the RDTL Constitution, namely that “every individual has the right to honor, good name and reputation, protection of his or her public image and privacy of his or her personal and family life”.

JSMP believes that the freedom of the press is an absolute right protected and guaranteed by law as set out in Articles 40 and 41 of the RDTL Constitution, Article 19 of the International Convention of Civil and Political Rights and Article 19 of the International Declaration of Human Rights which prescribes the freedom of expression and information as well as freedom of the press and mass media. Nevertheless, members of the press also have to respect the honor and good name of a person as prescribed in the Constitution, Article 19 of the International Declaration of Human Rights and Article 19.2 and 19.3 of the International Convention of Civil and Political Rights as well as other subsidiary law. Therefore legislators have achieved the outcomes they anticipated when they drafted these laws, namely to ensure harmony and order in society, as well as peace and stability, whereby the law equally applies rights and duties to all members of society, and distributes authority and provides for legal remedies whilst maintaining legal certainty.

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