

**Submission to the RDTL Ministry of Justice
From La'o Hamutuk
regarding the Proposed Amendment to the Penal Code to Criminalize
Defamation
15 June 2020**

Timor-Leste is a democratic nation under rule of law as enshrined in the Constitution, which guarantees freedom of expression and information to our people, as part of the development of the country. Further, Timor-Leste has ratified conventions including the International Convention on Civil and Political Rights. Article 19.2 of that Convention states that "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."

In June 2020, the Ministry of Justice began discussing a proposed amendment to the Penal Code that would criminalize defamation, causing offense, and insults, even if the target is a company or a deceased person.

La'o Hamutuk has worked for 20 years to promote democracy and defend human rights in Timor-Leste, and we are very concerned about this proposed addition to the Penal Code. We consider the proposed amendment to be very dangerous, as it will extinguish people's right to share opinions, to criticize, and to express dissatisfaction. The proposed amendment has already sparked wide discussion and discontent within Timor-Leste.

For the reasons mentioned above, we ask that the Ministry of Justice to reject the proposed amendment in its entirety; it conflicts with fundamental rights of freedom of expression and opinion, and will particularly injure our most vulnerable people. We also ask civil society organizations, media organizations, social movement groups and everyone in Timor-Leste to consider the consequences of this proposal on present and future generations, and to communicate their thoughts to our leaders. A law can determine the destiny of a society, and we need to keep this in mind as we consider it carefully.

As a civil society organization whose work is founded on the principles of democracy and human rights, La'o Hamutuk opposes this proposed law. Therefore, we urge the Ministry of Justice to stop the process of enacting this law, for the following reasons:

Amending the Penal Code to criminalize defamation contravenes the Constitution of Timor-Leste and weakens democracy.

1. The proposed amendment violates the Constitution of Timor-Leste, including Article 6 on the objectives of the State, Article 40 on freedom of expression and information, and Article 41 on freedom of the press and other forms of communication.

2. The proposed law will undermine the freedom of civil society and the broader population to provide input, recommendations and criticisms to state bodies and other entities.

3. The proposed law will obstruct everyone from expressing their opinion, writing freely, making comments or asking questions which criticize leaders or other people, whether at public events and in publications.

This proposed amendment would block everyone who writes on social media. Social media is not a threat to democracy, but has shown itself to be a positive instrument to promote public dialogue and wide participation in democratic processes. It is a beneficial tool for democracy and for freedom of expression, as it creates a space where almost anyone - not only journalists and decision-makers - can share information and ideas. We should not consider social media to be a threat to democratically elected leaders. La'o Hamutuk believes that nobody should be imprisoned for using social media.

The amendment violates international human rights conventions.

The proposed amendment violates Article 19 of the Universal Declaration of Human Rights (as referenced in Article 23 of the Timor-Leste Constitution), which guarantees everyone the right to freedom of expression and freedom to obtain information.

The proposed law has been modeled on Portuguese law, and it therefore lacks local context and fails to reflect the reality and specific history of Timor-Leste. The Portuguese anti-defamation law itself has been found to violate Article 10 of the European Convention on Human Rights, and Portugal was sanctioned 18 times by the European Human Rights Tribunal between 2005 and 2015 for violations related to this law.

Criminalizing defamation revives the trauma of Indonesian occupation by re-implementing repression.

Timor-Leste is committed to encourage democracy and respect human rights worldwide, and we must not stain our integrity or devalue of the popular resistance which was based on these principles.

The proposed amendment will cause fear and recall our people's traumatic experience of the Indonesian occupation. For 24 years, the oppressive Indonesian military regime jailed and murdered those who criticized or opposed Suharto's rule. The proposed defamation law could reactivate the trauma experienced during the occupation. Inter-generational trauma can be passed on to future generations, if we don't deal with it right away. If we oppose repressive occupations, we ourselves must not reinstate the oppressive policies of Indonesia. This is a major reason that La'o Hamutuk opposes this proposed amendment now and in the future.

Consideration of new laws require transparency and democracy.

Previous amendments to the Penal Code were enacted by Parliamentary Law, through a process that ensured the changes were transparent to the public (see laws 6/2009, 5/2003, 3/2017, and 5/2017).

In 2008, Parliament passed a time-limited Law to authorize the Council of Ministers to enact the initial Penal Code by Decree-Law. (This was also the case with the Criminal Procedure Code and the Civil Procedure Code.) Parliamentary legislative authorization is requested by the Government when proposed legislation contains many articles or complex technical elements, but the current proposal to amend the Penal Code contain only six paragraphs, relating to only one issue.

La'o Hamutuk is worried that the Government's intentions to put this important amendment through without an transparent Parliamentary process open to the media and civil society. Although the Constitution does allow for approval through a Decree-Law (after receiving Parliamentary authorization), our position is that this issue requires greater visibility through an open, public and participatory process.

In addition, La'o Hamutuk wonders why this amendment was introduced during a State of Emergency, without a public hearing or adequate time to receive public feedback. The State of Emergency makes it difficult for people to gather together and discuss ideas. The newly restructured Government wants to hastily pass the law through the Council of Ministers, which is closed to the public, rather than through the more transparent and deliberative National Parliament.

What could happen if this law is enacted?

1. This draft law threatens everyone, particularly vulnerable people without political connections or financial resources. The law has the potential to silence women who have experienced violence or sexual assault, and prevent them from writing or talking about their experiences without hard evidence. A recent example is the case of pedophilia in Oecusse, in which the perpetrator, former priest Richard Daschbach, has finally been brought to court. A criminal defamation law would intimidate victims, especially women and children, from pursuing allegations in court.

2. The proposed law discourages public discussion of crimes. Article 187-B of the proposed law mandates a prison sentence of up to one year, which is doubled or tripled when the target of defamation is a public servant or public figure, or when the defamation occurs through the press or social media. La'o Hamutuk considers this a danger; it erodes freedom of opinion and expression. For example, should people who express an opinion, make suggestions, or ask questions, saying that ex-Finance Minister Emilia Pires was corrupt, be threatened with prison? Should people discussing the pedophilia allegations against Richard Daschbach on social media or in articles be incarcerated? What about someone who writes that Suharto was responsible for the deaths of 200,000 Timorese during the occupation?

Timor-Leste does not yet have effective legal protections for whistle-blowers who report

unlawful activities to journalists, prosecutors, NGOs, or the public. If someone exposes institutional corruption, for example, they need protection not only if they are anonymous. If their identity is known, whistle-blowers and witnesses should not be subject to prosecution under this proposed law, and should also be protected from subsequent discrimination or retribution.

La'o Hamutuk acknowledges the need to protect some internal state information. However, this should not prevent people from reporting crimes committed within institutions to the public when it is necessary. People should not be afraid to speak the truth.

3. Aside from threatening the media and individuals, the proposed law could prevent civil society organizations like La'o Hamutuk, who engage in peaceful and substantive discussions about public issues with the community and political leaders. In our own work, we occasionally criticize companies and institutions. If we say that Woodside stole \$5 billion from Timor-Leste, should we go to prison? If we state that the Australian Government violated Timor-Leste's right to a maritime boundary for 20 years, could we be brought to court? If we suggest that policies promoted by politicians to spend hundreds of millions on roads and airports rather than on health and education endanger the lives of ordinary people, could the Government file a case against us? If we oppose military leadership using armed force to limit election campaigning, will the state put us in prison?

It will be difficult to question this proposed law's constitutionality.

The preamble to the draft decree-law states that advice from the Coordination Council for Justice was heard. The Coordination Council for Justice includes the Minister of Justice himself, the President of the Court of Appeals and the Prosecutor-General.

Note that according to the organic law of the Ministry of Justice, the Council's only role is to provide "strategic consultation and advice in the area of justice and law."

La'o Hamutuk wonders how the President of the Court of Appeal can participate in developing the legislation, when the Court of Appeal will also be the body which decides on the constitutionality of the law.

Although in the future the President can declare that there is an impediment to the oversight process, we believe that judges may find it hard to contradict the President. The President of the Court of Appeals is the President of the Superior Council of the Judiciary, and is also responsible for aspects of the management of courts.

The Prosecutor-General also has the power to ask for abstract review of constitutionality. Considering the Prosecutor-General's participation in the development of this proposal, and his agreement with it, he will be unable to exercise this mandate under the law.

Leaders and public figures should be ready to accept criticism.

When a person decides to seek public office, receiving a salary from public money and making

decisions that affects other people's lives, they should also accept the corresponding responsibilities. At some point, someone may disagree with their actions, talking or writing about them. If one is not prepared to receive criticism, he or she should not seek public office. Timor-Leste is not a monarchy or military dictatorship; Constitution Article 2.1 states that "sovereignty rests in the people." As stated in the Preamble to our Constitution:

"Fully conscious of the need to build a democratic and institutional culture appropriate for a State based on the rule of law where respect for the Constitution, for the laws and for democratically elected institutions constitute its unquestionable foundation;

Solemnly reaffirm their determination to fight all forms of tyranny, oppression, social, cultural or religious domination and segregation, to defend national independence, to respect and guarantee human rights and the fundamental rights of the citizen, to ensure the principle of the separation of powers in the organization of the State, and to establish the essential rules of multiparty democracy, with a view to building a just and prosperous nation and developing a society of solidarity and fraternity."

There are already ways to deal with defamation.

Processes are already on the books to resolve cases of defamation through lawsuits (Civil Code articles 77-78). In addition, making a false accusation to the authorities is already a crime; Article 285 of the Penal Code considers it "Slandorous denunciation (*Denúncia Caluniosa*)".

The Media Law also includes mechanisms to cancel or correct articles that slander a person; it provides for the right to defend one's reputation.

Conclusion

We suggest that the Ministry of Justice and other parties responsible for this proposed law find other ways to protect people's dignity. Anyone who wants to be a leader or public figure with privileges should accept the responsibilities that come along with that role. They have a responsibility to accept criticism, and it is unacceptable to incarcerate people for expressing it. Timor-Leste is built on a foundation of democracy, human rights, and speaking truth; we must not reinstate the policies of the regime that we ourselves fought against. We trust that the Ministry of Justice includes people who embrace our values. We maintain that this proposed law must be rejected in its entirety.

We thank you for your attention. We ask the Ministry of Justice to consider the issues discussed in this submission. If the process for drafting this law goes ahead, we are ready to participate in discussions or public hearings with the Government or National Parliament.

<http://www.laohamutuk.org/Justice/defamation/2020/20DefamLaw.htm>