



COMMENT

on

**“Important Points for Social Communication Law” Produced by the
Legislation Committee for Social Communication (KOLKOS), Timor Leste**

October 2008

ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · <http://www.article19.org>

This Comment summarises ARTICLE 19’s main observations on the document “Important Points for Social Communication Law” (Points) produced by the Legislation Committee for Social Communication (KOLKOS) of Timor Leste and dated 11 August 2008. We understand that these Points were developed in consultation with journalists in Timor Leste and that they represent the proposals of KOLKOS, an official body. The recommendations and comments in this Comment are based on international standards governing media regulation and the essential underpinnings of democratic governance. The Comment is intended as input into the process of developing a ‘social communication’ or media law, with the goal of ensuring that it conforms as far as possible with international standards in this area.

We note at the outset that the Points are generally very positive in nature and that they largely conform to international standards. At the same time, we have a number of comments on the Points. In some cases, they are not sufficiently clear, at least in the English translation that was made available to us, while some of the proposals are not necessarily practical, and others may not be in line with international standards.

Key Recommendations:

- Consideration should be given to whether it is necessary or appropriate to require ‘journalists’ to be accredited by the Press Council and to allow such accreditation to be withdrawn. If such accreditation is necessary to practise as a journalist, then this requirement should be removed.
- It should be clarified that Point No. 13 under Journalists does not imply that civil sanctions may be imposed whenever journalists make mistakes or errors.

- The definition of media in Point No. 1 under Media (Social Communication) should be limited to periodical and edited content.
- The issue of registration of media should be reconsidered. For broadcasters, consideration should be given to replacing this with a licensing requirement. If registration is retained for the print media, a framework of rules, including that there is no discretion to refuse registration, should be provided for in law.
- Various Points under Media (Social Communication) suggesting that the media and journalists should comply with the code of ethics should be removed, leaving such issues to be address later on, under The Mechanism to Resolve Press Cases.
- Point No. 6 under Press Freedom, providing that journalists need to show their identity to get access to information, should be removed.
- Far more detail is required, either in the Points or in the actual law, regarding the manner of appointment of members of the Press Council.
- Consideration should be given to removing Point No. 9 under Press Council, dealing with the power of the Council to refer cases of a refusal by media to respect its decisions to the courts, as this is addressed in the following section.
- It should be clarified that the only sanction that the Press Council may impose on the media is to require them to carry a statement recognising that they have breached the code of ethics (apology).
- The Points should clarify what sanctions the Press Council may impose on those who have abused journalists' right to freedom of expression, and more detail should be provided for in relation to the rules governing the processing of such complaints.
- The question of whether a full licensing regime for broadcasters is being proposed should be clarified and, if it is, consideration should be given to adding considerably more detail on how this system would work under Radio and Television.
- Consideration should be given to adding more detail on the nature and structure of the 'organ' designated to regulate radio and television.
- Point No. 7 under Radio and Television, providing for no limitation of radio frequencies, should be removed. Consideration should be given to replacing it with a reference to the need for a central, public interest approach to allocating the frequency spectrum among different users, including broadcasters.

Journalists

This section of the Points includes a number of positive statements about the proposed status of journalists in Timor Leste, including that anyone can be a journalist (Point No. 3) and that journalists should not be criminally sanctioned for their professional activities (Point No. 12). However, other statements appear to be in conflict with this. For example, Point No. 6 provides that journalists must obtain accreditation from the Press Council, Point No. 7 provides that journalists must have at least six months of experience working in the media and Point No. 15 provides that journalists may be banned from the profession if they do not adhere to the code of ethics.

It is well-established under international law that anyone may work as a journalist, in the sense of being able to contribute material to the media for publication or broadcasting. In this sense, journalism is not like other professions, such as being a lawyer or doctor, where entry into practice may be prohibited on various grounds. The rationale for this is that, unlike other professions, the practise of journalism is itself a protected human right. To restrict access to it would deny those affected their right to freedom of expression. As three of the special mandates on freedom of expression – 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 – stated in a Joint Declaration on 18 December 2003: “Individual journalists should not be required to be licensed or to register.”

It is not clear from the Points what the implications of being a journalist are. It would appear that this is not the same thing as being able to work for the media, since otherwise, it would be impossible for anyone new to enter the profession (it would be impossible to gain the six months experience required by Point No. 7 if one were prohibited in the first place from working for the media).

If the idea is that only journalists may publish material in the media, then Points Nos. 6, 7 and 15 are inconsistent with international standards. As noted, the right to work as a journalist should not be restricted. Otherwise, it is not very clear what the point of accrediting journalists, and potentially removing such accreditation from them, is, particularly given that Point No. 8 provides separately for identity cards (presumably press cards) to be provided to journalists (either by the Press Council or by media outlets). There is at least a risk that the process of accreditation might be abused.

Point No. 13, regarding civilian sentences, is also not very clear. It is appropriate for civil defamation laws and some other forms of civil redress, for example for breach of privacy, to be in place. These rules should be set out in civil laws (either the civil code or separate laws) and should strike an appropriate balance between freedom of expression and the protected interest (reputation, privacy, etc.) If Point No. 13 merely refers to this, then it is uncontroversial. However, it gives the impression that all journalistic mistakes and errors may attract civil sanction, and this is not compatible with international standards. While journalists should always strive to be accurate in their work, mistakes are inevitable and it is only where such mistakes cause specific harms prohibited by law that they should attract civil sanction.

Media (Social Communication)

Once again, this section of the Points contains a number of positive features, including that anyone may establish a media (Point No. 2), that no licence from the government is required to establish a media outlet (Point No. 8) and that media is an important pillar of democracy (Point No. 6).

The scope of media is defined in Point No. 1 potentially very broadly to include websites and blogs, albeit only where they have a legal structure, journalists and organisational rules. The Council of Europe’s Recommendation Rec(2004)16 of the Committee of

Ministers to member states on the right of reply in the new media environment of 15 December 2004, defines the media as “any means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line”. This is thus limited to bodies which provide information on a periodic basis, and which edit such information. The aim is to capture so-called ‘traditional’ media which also publish or broadcast online, while leaving other forms of Internet dissemination outside of its scope. Blogs, for example, are generally not captured by this definition, since they are not normally edited.

Point No. 8 provides that media do not need a licence from the government, while Point No. 3 provides for media to be registered by the Press Council (this is repeated in No. 9, which should be removed as it is duplicative), the rules for which shall be set by the Press Council (Point No. 4). In most countries, there is a licensing process for broadcasters, to ensure order in the airwaves and also to promote the use of this public resource in the public interest. These provisions would appear to rule out licensing even for broadcasters, contrary to international practice (although the Points also provide for the regulation of broadcasting, see below).

Registration for the print media can be subject to abuse and, for this reason, many commentators recommend that no obligation to register be imposed. At the same time, a system of technical registration is not necessarily contrary to international guarantees of freedom of expression, as long as there is no discretion to refuse registration once the requisite information has been provided. Instead of leaving this entirely up to the Press Council, would be preferable to provide a framework of rules regarding registration in the primary legislation.

The status of a number of Points in this section is not clear. These include Points No. 5 and 10 (which are duplicative of each other), providing that media should operate in accordance with the code of ethics and Point No. 11, to the effect that media should ensure that their staff act in a professional manner. There is nothing wrong with these as statements of principle, but they are not appropriate as legal obligations, particularly when the implications of breach of these obligations is not clear. Another section of the Points deals with complaints against the media, which is the appropriate manner in which to address breach of professional codes.

Press Freedom

This section sets out a number of positive aspects of press freedom and is to be welcomed. The provisions on journalists accessing information are useful in the absence of a right to information (or access to information) law. At the same time, it is now widely recognised that public bodies hold information not for themselves but on behalf of the public and that everyone has a right to access this information. To give effect to this right, States should adopt general right to information laws, as has been done by some 80 countries around the world, including recently by Indonesia. Timor Leste should also adopt such legislation.

The provisions in this section should not be seen either as a replacement for, or as undermining, a general right to information law that applies to everyone. Point No. 6, providing that journalists need to show their identity to get access to information, suggests that this is a special right for journalists and hence goes against this principle.

Press Council

The Points are unclear as to whether the Press Council is to be established as a statutory or self-regulatory body. It is assumed, for purposes of this Comment, that it is to be a statutory body, although ARTICLE 19 recommends as a better practice the establishment of a self-regulatory body. If it is to be a statutory body, it is essential that the Council be established in a manner that protects it against political interference (i.e. that it be independent of government). Point No. 3 provides for up to nine members of the Press Council, representing journalists, other professions and NGOs. It does not, however, indicate how these members are to be appointed, a crucial matter as regards the independence of the Council. Far more detail is required, either in the Points or in the actual law, on this issue.

Point No. 9 provides for the Council to forward cases of a failure of journalists to abide by its decisions to the courts. This is repeated in the next section and it would be preferable to address it only there.

The Mechanism to Resolve Press Cases

This section, like those before it, also includes a number of positive provisions, including that the Press Council should attempt to resolve complaints against journalists through mediation (Point No. 3) and that complaints regarding the media should go first to the Council before being pursued in the courts (Point No. 2). Point No. 5 provides for the Council to impose sanctions on journalists or media outlets, including by requiring them to apologise. It is not clear whether or not the Council may impose other sanctions. In other countries, the powers of bodies regulating the print media are restricted to ordering offending outlets to print a statement acknowledging breach of the code (analogous to an apology). This limitation on the sanctioning power of the Council is particularly important given the power of the Council to refer to the courts instances where journalists or media outlets refuse to implement its decisions (Point No. 6).

Point No. 7 authorises the Council to refer to the courts cases where those who have abused the freedom of expression rights of the media refuse to abide by any sanction imposed by the Council. However, the section does not address such complaints in anything like the same detail as it does complaints against the media. In particular, it does not specify what sorts of sanctions the Council might impose on those abusing journalists' right to freedom of expression.

Radio and Television

Point No. 1 refers to State radio, but it would be preferable to refer to public radio, since international law calls for any publicly funded broadcasters to be independent of the State. It remains unclear from this section and the rest of the Points whether a fully-fledged licensing system is envisaged for broadcasters. Such a system is consistent with

the practice in other countries and is necessary to promote use of the airwaves in the public interest. Although the various Points in this section are useful, they fail to provide the detail that is necessary to establish such a licensing system.

The reference in Point No. 3 to an ‘organ’ to regulate radio and television is excessively vague. This may be due to a lack of clarity as to what the role of this body should be, in particular as regards licensing, as noted above. As with other bodies with regulatory powers over the media, such as the Press Council, it is important that the broadcast regulator be protected against political interference. This requires detailed provisions regarding the appointment of members, funding and related matters.

Point No. 7 provides that there shall be “no limitation of frequency for radio”. It is not clear what this means. However, there are natural limits on the frequencies available for dissemination of radio signals, as well as competition for scarce frequencies from other users, such as mobile phones and security services. What is required is a central planning approach, based on the International Telecommunications Union (ITU) master plan, for allocating the frequency spectrum available in Timor Leste, taking into account the overall public interest, including that there be sufficient frequencies available for broadcasting.

About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. These publications are available on the ARTICLE 19 website:

<http://www.article19.org/publications/law/standard-setting.html>.

On the basis of these publications and ARTICLE 19’s overall legal expertise, the Law Programme operates the Media Law Analysis Unit which publishes a number of legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive law reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/publications/law/legal-analyses.html>.

If you would like to discuss this Memorandum further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at law@article19.org.