Comment

on the

Draft National Policy on Mass Communication for Timor Leste

ARTICLE 19
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This Note provides an analysis of the draft National Policy on Mass Communication for Timor Leste (draft Policy),[1] which consists of the draft Policy itself, as well as a draft Government resolution adopting the Policy. The proposed Policy is the result of a long process of discussion and development of rules for the media in Timor Leste. In March 2009, ARTICLE 19 analysed five draft laws prepared on behalf of the UNDP for consideration by the authorities in Timor Leste.[2] Our Analysis was critical of the drafts on a number of grounds many of which, unfortunately, also appear to run through the draft Policy.

This Note assesses the draft Policy against international standards on freedom of expression as relevant to the issue of media regulation. The draft Policy has a number of positive features. The draft Resolution, for example, states that the aim of the Policy is to establish, "a

[1] This analysis is based on an unofficial translation of the draft Policy provided to ARTICLE 19 by IREX. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

[2] Our analysis is available at: http://www.article19.org/pdfs/analysis/timor-leste-draft-laws-regulating-journalists-the-media-and-the-right-to-inf.pdf. The laws analysed were: "Statute of the Media Council" (draft Media Council Law), "Freedom of Information and the Conduct of Media Activity" (draft Media Law), "Statute for the Professional Activity of Journalists" (draft Journalists Law), ""Community Radio Stations" (draft Community Radio Law) and "Right of Access to Administrative Documents or Documents Which May be Considered of Interest to the State of Timor-Leste" (draft Right to Information Law).

free, independent and impartial environment, in order to obtain quality, professionalism, responsibility and accuracy." We note that this is an exemplary statement, particularly inasmuch as it promotes the view that a free, independent and impartial environment, rather than legal regulation, is what is necessary to promote quality and professionalism. The draft Policy also makes a strong commitment to support media development, to promote the availability of media throughout the country, including through support for community media, and to enhance the professionalism of journalists through training.

ARTICLE 19 generally welcomes moves to put media regulation in Timor Leste on a more firm legal footing. We very much welcome the stated commitment in the draft Policy to key freedom of expression values such as a free, independent and pluralistic mass media. We also believe that the government is undertaking this effort in good faith, in an attempt to promote a diverse and development-oriented media sector, which the country needs to progress.

At the same time, we note that the draft Policy contains language which suggests certain approaches to media regulation which are inconsistent with international standards. Key problematical areas include:

- Unduly vague statements which appear to reflect unfortunate approaches in the media laws analysed by ARTICLE 19 in March 2009.
- The suggestion that regulatory and subsidy programmes would be overseen directly by government, rather than by an independent body.
- Undue reliance on the idea of public subsidies, to the neglect of wider efforts to create an environment in which the media can be sustainable.
- The imposition of unreasonable obligations on the media, linked to more promotional subsidy initiatives.
- Accreditation (i.e. licensing) of journalists.
- Reference to a number of rights of journalists which are at least potentially problematical given that the draft Policy does not elaborate on them.
- Excessive restrictions on the content of what may be published or broadcast through the media.
- A failure to propose measures to enhance the independence of the public media.

Timor Leste acceded to the *International Covenant on Civil and Political Rights*[3] on 18 September 2003. As such, it has committed itself to the legally binding obligation "to take the necessary steps … to adopt such laws or other measures as may be necessary to give effect to" the right to freedom of expression.[4] Freedom of expression includes the right to "impart information and ideas of all kinds … through any … media"[5] and, although this right is not absolute, any restrictions on it must be strictly "necessary" for the achievement of one of the legitimate aims listed in Article 19 of the ICCPR. Under international law, this establishes a high legitimacy threshold to be overcome before any restriction may be deemed to be justified.

1. General Comments

[3] UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.
[4] Article 2(2).
[5] Article 19(2).

1.1 Vague Commitments

The draft Policy includes a number of extremely vague commitments and recommendations. These include the idea that the right to information includes the right to inform and "to be informed" (clause 1), the idea of support for the media through "appropriate incentives" (clause 1.2), the idea of independence and freedom from editorial interference (clauses 2 and 2.1.ii), the need for pluralism in the media (clause 2.1.ii), the need to protect "sensitive audiences" (clause 2.1.iii), the need for a right of reply (clause 2.1.v), the right of journalists to "protect any works" (clause 4.3.i), the protection of journalistic independence through a "conscience clause" (clause 4.3.iii), and the right of journalists to participate in editorial issues (clause 4.3.v).

Unlike legal rules governing freedom of expression, which international law requires to be clear and narrow, there is nothing inherently wrong with a policy including rather vague statements, on the understanding that their precision will be clarified later, for example through law, although at the same time the more precise a policy can be the better.

However, we note that in many cases, these vague statements relate to matters that we criticised as being contrary to international law in the set of media laws we analysed in March 2009. We are, therefore, somewhat concerned that the vagueness in the draft Policy reflects an ongoing desire to put in place systems for media regulation that may not be legitimate.

Recommendation:

- The draft Policy should be reviewed to ensure that it is as concrete as possible. A special effort should be made to avoid vague statements in relation to issues that were controversial in the draft media laws which ARTICLE 19 analysed earlier this year.

1.2 Independent Regulation

It is very well established in international law that bodies with regulatory and related powers over the media should be independent of government. The most obvious reason for this is that if these bodies are subject to government influence, their decisions will necessarily be politically motivated, to the detriment of freedom of expression. For analogous reasons (i.e. to avoid bias), it is important to protect these bodies from commercial interference.

The draft Policy repeatedly refers to the government in relation to regulatory and other powers, although it does also propose the creation of a Mass Communication National Council (MCNC), which is "not a Government body" and which has "administrative, financial and patrimonial autonomy" (clause 2.1). Among other things, the draft Policy refers to the role of the government in relation to supporting the acquisition of transportation and telecommunication services (clause 1.2), distributing media products (clause 1.3), financing training (clause 2.2), concluding a memorandum of understanding on training in Tetun and Portuguese (clause 3.1), subsidising a Timor-Leste News Agency (clause 3.1.i), contributing to audiovisual production in Portuguese (clause 3.1.ii), mediating purchase agreements for Portuguese materials (clause 3.1.iii), subsidising independent production (clause 3.2), sponsoring the development of a Journalism Training Institute (clause 4.1), subsidising traineeships for journalists (clause 4.2), supervising RTTL (the public broadcaster) (clause 5) and granting annual allowances to community radios (clause 6).

If these references really mean the government, as such, then they need to be reconsidered as most of these roles should not be undertaken by government but, instead, should be overseen by an independent body. Various forms of support for the media, including those listed above, are welcome but they cannot be run by government or the implications in terms of freedom of expression will potentially be very serious. As the three special international 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 of 18 December 2003:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.

Recommendation:

- The Policy should make it clear that all regulatory powers over the media, including the allocation of subsidies for various media support activities, will be overseen by an independent body. The proposed Mass Communication National Council would seem a natural place to locate these oversight roles.

1.3 Support Measures

The draft Policy outlines a large number of support measures for the media, including many of the activities of the government as outlined above. These include providing support for different aspects of media operations (recruiting professionals, acquiring transportation, obtaining telecommunications services, obtaining Portuguese and independent productions, ensuring the sustainability of community media), entering into agreements of various sorts (for distribution of media products, with Portuguese-speaking mass media bodies), and promoting various training initiatives.

While support of this sort is always welcome, as long as it is overseen by an independent body, at the same time care must be taken to ensure that the media do not become excessively dependent on public subsidies, which may pose a threat to their independence. In addition to these direct support measures, far more attention needs to be given in the policy to creating an overall environment in which the media can flourish, including without public subvention.

It is essential that, in addition to being overseen by an independent body, the allocation of these benefits is governed by clear and objective rules that are carefully designed so as to achieve the underlying objective of the subsidy. As the four special international mandates[6] on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information – stated in a Joint Declaration of 12 December 2007:

> Consideration should be given to providing support, based on equitable, objective criteria applied in a non-discriminatory fashion, for the production of content which makes an important contribution to diversity.

[6] A fourth mandate, from the African Commission on Human and Peoples' Rights, was added in 2004.

Finally, it may be noted that the draft Policy often couples support measures with more contentious regulatory approaches. For example, the promotion of the Portuguese language attracts quite a lot of attention in the draft Policy, and it is sought to be achieved, on the one hand, by the support measures noted above and, on the other hand, by formally binding obligations, such as the following, found in clause 3.1: "[M]ass communication bodies must protect the official languages of Timor-Leste – Tetun and Portuguese". Similarly, all media are required to "protect the recent history" of the people of Timor-Leste, as well as benefitting from support to do so (clause 3.2). All journalists are required to begin their career with a paid traineeship, for which the government will provide "financial supplements".

This sort of coupling is not legitimate. These objectives should be achieved exclusively through promotional measures rather than through imposing these sorts of obligations on the media. Furthermore, experience in other countries clearly demonstrates that obligations of this sort are, in addition to being open to abuse, likely to undermine the overall development of the media as a sector, thereby inhibiting rather than supporting the real objectives. For example, forcing media, other than public media, to promote an official language or to remember history is not legitimate and is unlikely to lead to these results. However, these objectives may be promoted through the provision of training or subsidies for certain types of media output.

Recommendations:

- The policy should devote more attention to creating an environment in which an independent media can flourish, including financially, instead of concentrating so heavily on public subsidies.
- The allocation of any subsidies should be made subject to clear and objective criteria which are closely linked to the goals of the subsidy.
- Subsidy systems should not, in general, be linked to mandatory obligations, for example to produce certain kinds of content or meet minimum training standards

2. Specific Comments

2.1 Regulation of Journalists

The draft Policy refers to the idea of accreditation of journalists, as well as minimum standards of training for journalists, at a number of places. Clause 2.1.iv refers to the role of the Mass Communication National Council in issuing "professional accreditation after traineeship" to journalists. This is supported by clause 4, which requires journalists to start their careers with a paid traineeship, after which they may be granted professional accreditation. During the traineeship, the media outlet must ensure that the journalist develops "technical and linguistic skills and, most of all, the awareness of the legal and ethical rights and duties of this profession".

It is very well established under international law that systems of licensing for journalists are not legitimate. Although the draft Policy uses the term 'accreditation', the system it establishes is a licensing one. It is true that the system envisaged is less insidious than some, particularly inasmuch as it is overseen by an independent body and as the preconditions it imposes for entering the profession – undertaking a traineeship – may not be very onerous. At the same time, the system may be open to abuse and it is not necessary. It is open to abuse,

among other things, because the draft Policy does not set a length on traineeships and the skills that it requires to be developed during this period are described in very vague terms. It is unnecessary because, on the one hand, a system like this does little to promote professionalism and, on the other hand, it may exclude individuals who are perfectly capable of assuming the role of a journalist.

At the same time, if a proper system of subsidies is put in place to support the training of journalists as interns, it is almost certain that media outlets will take advantage of this. This is, therefore, a good example of where it is neither necessary nor legitimate to couple mandatory rules with subsidy systems. To provide a further incentive, formal recognition of having undertaken a traineeship, for example in the form of a formal certificate or even recognition on a press card, could be promoted.

Several provisions in the draft Policy refer to rather general rights and obligations of journalists, some of which do not appear to be consistent with international law, and many of which were the subject of criticism in ARTICLE 19's March 2009 analysis of media laws in Timor Leste.

Clause 2.2 refers to the idea that a free, independent and pluralistic media means that media should respect journalists' opinions on editorial matters, and this is repeated in clause 4.3.v. Depending on how this is interpreted, it is probably not realistic. Media outlets, like any other business, and indeed public bodies, need to have a clear and consistent policy approach, including as to editorial matters. In practice, the extent of participation of working journalists in the editorial line of media varies considerably from outlet to outlet and to some extent from country to country. It is not legitimate for the government to try to impose, as the draft media laws analysed in March 2009 did, specific modalities for such involvement. This is an internal matter for media outlets to sort out with their journalists.

Clauses 4.3.i-iv refer to various rights of journalists, including to protect their works, to attend public events, to the protection of a conscience clause and to protect professional secrets. These are, for the most part, important rights (although a conscience clause is more controversial). At the same time, all of these issues were dealt with in a problematical fashion in the draft media laws analysed in March 2009.

Recommendations:

- The licensing system for journalists, whereby the MCNC will 'accredit' only journalists who have undergone a traineeship, should be removed from the policy. Instead, traineeships should be promoted exclusively through positive measures.
- The government should not attempt to impose a particular form of participation in editorial matters on media outlets; instead, this should be left to media outlets to agree with their journalists.
- The draft Policy should elaborate in more detail on the various rights referred to in clauses 4.3.i-iv and, in particular, in a way that addresses the concerns noted in ARTICLE 19's March 2009 analysis of five draft Timorese media laws.

2.2 Content Regulation

The draft Policy refers at several points to the idea of regulation of media content. Clause 2.1.iii refers to the need to protect sensitive audiences. Clause 2.1.v refers very generally to a wide range of issues, including to the rights of reply and correction, to broadcasting

propaganda against reputation or intimacy, and to the "right of cross examination". The rights of reply and correction are elaborated on in clause 4.4, which calls for the former to be engaged whenever a statement is disseminated in the media which "affects reputation" and for the latter to apply whenever incorrect statements are disseminated.

Clause 3.1 refers to a number of obligations relating to language, including the obligations of media outlets to "protect" the official languages, to be able to disseminate original news in Tetun and Portuguese within three years, and of journalists to be trained in Tetun and Portuguese. This is supplemented by clause 3.2 which places an obligation on media outlets to publicise the "ethnical-cultural groups of Timor-Leste" and "to protect the recent history" of the people. Clause 4.4 refers to the duty of journalists to report in an impartial and accurate manner.

Clause 2.1 also refers specifically to the role of the MCNC in safeguarding journalists' rights through a right of complaint or appeal. Clause 4.3 calls on the MCNC to develop a Code of Professional Conduct "as a self-regulation mechanism" for journalists.

Several of these obligations are unduly vague or simply illegitimate. The meaning of a 'right of cross examination' is not clear but it would appear to have no place in a media policy. It is not the responsibility of the media to protect official languages, ethnic groups or history. If the government wishes to promote these objectives, it should do it through positive incentive structures and training, rather than through imposing obligations. Other obligations noted above should be dealt with through a code of conduct for the media (see below), including protection of sensitive audiences (especially children) and reputation, and invasion of privacy. Print media should not be placed under specific requirements as to language; indeed, media in different languages should be encouraged.

The right of reply is defined too broadly. The term 'affect' does not even suggest that there has been a negative impact on reputation but, regardless, if the media report accurately on facts which happen to lower the reputation of an individual, this should not give rise to a right of reply. The right should arise only in the context of illegitimate media reporting. Furthermore, it should be restricted to cases where the less restrictive right of correction does not serve to repair the damage done.

The idea of a code of conduct overseen by an independent body such as the MCNC is not necessarily a bad one, as long as the MCNC is in fact independent. However, the rules should apply to media outlets, not journalists. Journalists' codes of ethics are professional commitments which should not be imposed by law. Furthermore, it is only after dissemination through the media, normally after an editorial process, that media work may cause harm. It is thus appropriate that the code, and any sanctions for its breach, should apply to the outlet, not the journalist who happened to first produce a piece (i.e. the outlet should take collective responsibility for its output).

Furthermore, it should be clear that the role of such a code is not to punish the media, but to set clear professional standards. This should be reflected in the sanctions for breach of such a code, which should normally lead, at least in the first instance, simply to a warning or possibly a requirement to carry a statement acknowledging the breach.

Recommendations:

- The content restrictions proposed in the draft Policy should be removed and either

dealt with through a code of conduct or left out altogether.
- The right of reply should apply only where a media outlet has breached a legal right of the claimant and where a right of correction would be insufficient to repair the damage.
- The code of conduct proposed in the draft Policy should apply to media outlets, not to individual journalists.
- The policy should make it clear that sanctions for breach of the code will be 'light' in nature, consistently with the aim of such a code to promote professional standards rather than to punish.

2.3 Public Broadcasting

Clause 5 of the draft Policy addresses public broadcasting. It refers to the idea of supervision of Timor-Lester Radio and Television (RTTL) by the government, although this is not supposed to undermine its editorial freedom. It also refers to the role of the government in ensuring that RTTL fulfils its duties as set out in Decree-Law No. 42/2008, and it being under the control of internal bodies (the Supervisory Board and the Opinion Council), as well as external bodies, specifically the Minister of Finance and the Secretary of State of the Council of Ministers. For its part, Decree-Law No. 42/2008 provides for RTTL to operate under the tutelage of the member of government responsible for the media and for its annual plan and budget to be subject to the approval of the members of government responsible for media and finance.

As with regulatory bodies for the media, it is a well-established principle of international law that public media should be independent of government. These rules signally fail to protect that independence in accordance with international standards. Although the government retains a policy role in the area of the media, it should not engage in any direct supervision over public media, including in relation to its budget. Instead, this role should be assumed in part by its oversight body (presumably the Supervisory Board) and in part by a multi-party body, namely parliament or a parliamentary subcommittee.

Recommendations:
- The draft Policy should promote rather than undermine the independence of RTTL, including by ensuring that oversight is vested in the Supervisory Board and parliament, rather than the government.
- Consideration should be given to revising Decree-Law No. 42/2008 so as to better protect the independence of RTTL.

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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's operates the Media Law Analysis Unit which publishes around 50 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 legal 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.

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