

ANALYSIS OF DRAFT LEGISLATION ON NEW INSTITUTION

Pat Walsh, 2 July 2010

1. Introduction

The following analysis and recommendations have been prepared in response to an invitation by Committee A of the Timor-Leste Parliament for comment on its draft legislation *Establishing the Public Memory Institute* and related *Framework of a National Reparations Program*, dated 15 June 2010.

It is important to emphasise that this comment is based on an unofficial English translation of the original Portuguese and may not always be accurate.

2. General comment

Generally speaking, the draft is a positive and welcome response to some important recommendations made by CAVR and CTF and should be supported.

The law is particularly welcome because, as stated in the key paragraphs 3 and 4 of the preamble, it acknowledges the relationship between history (memory) and human rights and legislates concrete ways (based on CAVR and CTF's recommendations) in which this linkage can be acted on to good effect – especially for the sake of Timor's many victims and the broader nation-building imperatives of rule of law, accountability and non-violence. It recognises that though Timor-Leste has made a radical new beginning, it cannot and should not be divorced from its past because, used creatively, its history can be made to work positively for the present and future.

The law also has some weaknesses. In places it is unhelpfully prescriptive and detailed, repetitive, unclear and inconsistent. It also lacks balance. For example, the second law on reparations is most important and welcome but it dominates the law at the expense of other activities and is not sufficiently integrated with them.

Committee A is committed to having the law adopted by the full Parliament by 15 July 2010. Though this extremely short time-frame conflicts with the Parliament's desire to consult widely and take account of feedback, everything possible should be done to comply with this deadline provided there is nothing in the final law which compromises the rights and needs of victims or blocks the new institution from fulfilling its activities creatively and fully.

Given the above dilemma, this commentator has decided to limit recommendations for changes and to assume that it is legitimate for the new institution to take initiatives not included in the law as long as these are not forbidden by the law, are integral to its mandate, are cleared with the responsible Minister and reported to the Parliament.

3. Specific comments and recommendations

3.1 Name (Art. 1)

Recommendation - Institute of Memory and Human Rights. This title captures better the key principle articulated in the preamble. Timor-Leste is not remembering just for the sake of knowing facts or for negative reasons but for the positive good of advancing contemporary and future human rights.

3.2 Headquarters (Art. 3.2)

Recommendation - Ex-Comarca de Balide. Why leave this vague and imply there are other options when Art 37.3 states that the Institute will preserve the Comarca as a public historical site and Art 42 identifies the Comarca as an asset of the Institute?

3.3 Mission (Art. 4)

Recommendation – add a new article entitled Vision (4.1) which precedes Mission (4.2) and articulates a vision to complete work undertaken by CAVR and CTF over the last 10 years and contribute further to healing, reconciliation, national unity, human rights etc as the foundations of the new nation. This should be spelled out in the body of the law as its central inspiration and driving force, not just left to the introductory preamble.

3.4 Functions (Art. 5 (h) and passim)

Recommendation – to be consistent with the law on reparations, Art 5 (h) should read ‘advise and assist’ because, as defined in the second law, the role is clearly more than advisory.

Ideally, the section should be re-written in more general terms. As is, it is more a list of activities than functions and is a curious mix of the specific and general, mostly focussed on documentation, education and training though these are dealt with again in Chapter 3.

3.5 Board (Art 7 on)

Recommendation – do not translate Conselho Directivo (CD) as the Board because this term has a different function in English. As proposed the Conselho Directivo is more than a conventional Board because it is responsible for the executive management of the institute and is composed of full-time, paid officials who will run the institute day to day. At the same time Art 17 suggests they will function like a conventional board when it specifies they are obliged to meet 4 times a month.

Recommendation – clarify whether members of the CD are elected or appointed. Arts 9.2 and 13.2 make it clear they are Ministerial appointees but Art. 11 refers to them being elected.

Recommendation – that the law provides for public nomination of the CD members prior to their appointment by the Government.

Recommendation – that at least 1 member of the CD be a woman.

3.6 Documentation and research

References to these activities are scattered throughout the text and are to be found, for example, in Art 5.1, 7 (b), 20, 25, 26 (1), 31.3 etc. They are generally comprehensive and, as mentioned in point 2 above, do not contain any provisions that might preclude the Institute from taking additional initiatives relevant to its work in this area. Ideally, the following is recommended:

- Add an introductory paragraph which spells out the link between this area of work and the Institutes’ broader mission of facilitating healing, understanding, non-violence, human rights etc.
- Group the references under one heading.
- Specify the importance of climate control, digitalisation, back up and independent secure storage of the archives. Experience, human handling and threats from climatic, pest (white ant) and political factors demonstrate the need for such measures. Preservation of the archives is mentioned in Art 21 (a) and a vague reference to ‘technically adequate conditions’, but nothing further.

No mention is made of CTF archives and only vague reference is made to the Institute’s potential role in the on-going building of Timor’s historical patrimony through the acquisition or copying of records held overseas or in Timor-Leste which are the subject of numerous CAVR recommendations.

The law is restricted to paper archives only and makes no mention of other important documentation services such as the library, audio-visual, website and bookshop facilities built up by CAVR and P-CAVR over the last 10 years.

Art 25 makes no mention of where the archives will be stored or that they are part of the national patrimony or of the long over-due need for archival legislation.

Mention is curiously given to the Institute giving archival training (Art 30) to others but no mention is made of Institute staff receiving training or other forms of professional development which, experience shows, should be priorities.

3.7 Education and training (Art 27-30)

Though scattered, references to these programs are generally comprehensive and the requirement (Art 27.3) that outreach must include rural communities is particularly welcome even though this will require the development of appropriate skills and resources. It is recommended that the scattered references be organised under one heading (as e.g. with reparations).

The law obliges the Institute to design a civic education program (Art 28.1) and a human rights program and to give training in human rights (Art 30) even though it is well known that programs and activities have been delivered in these areas for some years. Rather than duplicate, it is recommended that the law be rephrased to oblige the Institute to review existing programs in these areas and, if found inadequate, to work with the relevant organizations so that programs are empirically based and grounded in Timor's experience and history.

The law (27.2) obliges the Institute to use Tetum and Portuguese in its community outreach. It should be noted that requiring the use of Portuguese will make special demands on the Institute and almost certainly need to be backed up with intensive language in-services for staff.

The law makes no mention of the excellent resources developed by CAVR, P-CAVR, ICTJ and others leaving the impression that the Institute is pioneering initiatives rather than value adding to 10 years of work already undertaken. These resources include the Dalan ba Dame video (widely used in Timor-Leste communities), the new Popular or Comic Book version of Chega (currently being printed), the much-admired Chega exhibition, public hearing publications and other information resources currently available such as, e.g. library, free internet...

3.8 Missing persons

Art 40.4 states that information about missing persons may not be used in other areas of the Institute's work. This exclusion militates against the broad inter-dependence and organic relationship that should characterise the Institute's work. For example, Reparations Art 4 a) (iii) states that families of the disappeared should be eligible for reparations.

3.9 Reparations

The requirement (Reparations law Art 11. 2) that the Institute report to the Government within 6 months of its establishment on the Institute's research, assistance to victims and review of government programs, is onerous and impractical. It is recommended that this deadline is substantially extended or left to the advice of the Conselho Directivo.

3.10 Memorialisation

The main reference to memorialisation is found in the Reparations law at Art 9 1 (a) i-vi. Another reference is made in the organic law (Art 37.4) which obliges the Institute to make an inventory of monuments built in memory of conflicts 1974-1999.

It is recommended that an additional clause be inserted that explains that (a) memorialisation can be understood in wider terms than ceremonies and monuments and also embraces literature, music, theatre, film, signage and other ways of creatively remembering and (b) that the Institute should undertake a systematic and intensive consultation with the community, especially victims, to solicit their ideas and involvement but also to model wider options such as those above and examples from other countries.

3.11 Reporting

As translated in English, Art 49 (organic law) is not clear about the Institute's important reporting obligations to the Parliament. 49.1 requires 6 monthly reports and 49.2 requires an additional annual report. Submitting 3 reports per year will be onerous for both the Institute and the Parliament.

The scope of the reporting is also not clear. As the law is currently framed Art 4 speaks generally about monitoring (and presumably reporting on) CAVR and CTF recommendations, Art 5. 1 (a) refers to monitoring ‘pursuant to the law’; Art 50 (c) states the report should include assessment of the implementation of recommendations. Is the Institute, as proposed by the Working Group, required to report on the implementation of all the CAVR and CTF recommendations (whether or not they are part of the Institute’s terms of reference) or only on its work?

3. Unfinished business: what the draft law does not do

The draft laws under consideration are complete as they stand and it is not suggested that their scope be extended.

However, it is important to recognise that they do not (and are not intended to) address a number of important related issues. These are as follows:

1. Responsibility and schedule for establishing the Institute

As currently framed, the law seems to imply that the Government (and MSS in particular) is responsible for establishing the Institute, primarily through the appointment of the Conselho Directivo. The Government’s formal views on this proposal are not known, but it is fair to assume that should the Minister of Social Solidarity agree to the role, she will need additional assistance not currently available in her Ministry.

For this reason, it is recommended that a small, full-time Task Force is established to assist whichever state authority is charged with overview of the Institute and that this Task Force be paid out of the budget already earmarked by the Parliament for the new Institute.

It is further recommended that this Task Force commence work immediately after the President approves the legislation, that it be given 6 months to assist with the establishment of the Conselho Directivo, staffing and office establishment, that it be based at the premises of the P-CAVR and that it liaises closely with the Office of the President of the Republic and with the Executive Director and senior staff of the P-CAVR as they wind-up the programs and affairs of P-CAVR.

2. Debating the CAVR and CTF reports

Though much welcomed, the draft law focuses exclusively on the recommendations of the CAVR and CTF reports. It does this in isolation from the content and evidence on which the recommendations are based and to which they are a response. The law is therefore not a substitute for Parliamentary debate on the contents and other aspects of the CAVR and CTF reports and their other recommendations including on justice.

3. Justice recommendations

The draft law should also not be regarded as a response to CAVR recommendations on the difficult issue of justice or as a strategy to pre-empt action on these matters. It establishes a mechanism to implement important recommendations for which no national mechanism currently exists. Responding to justice issues is institutionally a matter for the justice sector.