

# Internet Freedoms Under Threat in Timor-Leste

Asia Centre, founded in 2015, is a not-for-profit social enterprise that seeks to create human rights impact in the region. Asia Centre, on 21 May 2021, was recommended for a Special Consultative Status at the UN by the Committee on Non-Governmental Organizations of the UN Economic and Social Council (ECOSOC). Asia Centre develops evidence-based knowledge toolkits, organises stakeholder capacity building activities and undertakes media and social media advocacy. It is well known for its seminal analysis in “The Universal Periodic Review of Southeast Asia: Civil Society Perspectives” (2018: Palgrave Macmillan, USA) and “National Human Rights Institutions in Southeast Asia: Selected Case Studies (2020: Palgrave Macmillan, USA). In March 2021, Asia Centre contributed to and co-sponsored a joint submission, “Human Rights Defenders and Fundamental Freedoms in Thailand” on fundamental freedoms in Thailand to its third UPR cycle in 2021. This UPR submission ‘Internet Freedoms Under Threat in Timor-Leste’ is informed by Asia Centre’s report, Timor-Leste: Internet Freedoms Under Threat, published on 14 July 2021.

## 1. Executive Summary

1. Timor-Leste protects fundamental freedoms pursuant to its commitments under the *International Covenant on Civil and Political Rights* (ICCPR) that are enshrined in its Constitution, its support of relevant recommendations under the UPR process and its obligations under customary international human rights law. It is committed to achieving the Sustainable Development Goals (SDGs), in particular Goal 16.10 to “protect fundamental freedoms”.

2. Concern has arisen over two draft laws: a draft law released in 2020 that seeks to reinstate criminal defamation in Timor-Leste’s Penal Code, and a draft Cybercrime Law tabled in January 2021 that would threaten freedom of expression online by criminalising free speech and access to information (Part 3.1 and 3.2).

3. Concerns also abound over a proposed Data Privacy and Protection Law that was announced in 2021. If it is not drafted properly in consultation with all stakeholders, it may threaten citizens’ right to privacy and possibly limit freedom of expression online, if data is shared among government agencies and used for surveillance purposes in spite of assigning proper oversight mechanisms (Part 3.3).

4. An analysis of these draft laws has informed the recommendations offered herein that are aimed at protecting and promoting internet freedoms in Timor-Leste (Part 4).

## 2. Methodology

5. This submission analyses internet freedoms in Timor-Leste during the period of its third UPR cycle, from 2016 until this submission's date of 14 July 2021. This submission is drawn from Asia Centre's report, *Timor-Leste: Internet Freedoms Under Threat*, published in July 2021. The analysis results from evidence-based research, inclusive of consultations with key stakeholders in Timor Leste and the region; information gathered in Asia Centre's town hall, "*Timor-Leste: Internet Freedoms Under Threat*" on 4 June 2021; and during an online report launch on 14 July 2021. This submission assesses Timor-Leste's new draft legislation and announced legislation—the draft Criminal Defamation Law, the draft Cybercrime Bill and announced Data Privacy and Protection Law—against its constitutional and international human rights obligations.

## 3. Freedom of Opinion and Expression

6. Timor-Leste has ratified the ICCPR which recognises and protects freedom of expression under Article 19.<sup>1</sup> Article 41 of Timor-Leste's Constitution guarantees this fundamental freedom.<sup>2</sup>

7. In its second UPR, from 2012 till the date of consideration on 3 November 2016, Timor-Leste supported 5 recommendations to guarantee freedom of expression, in paragraphs 89.123 (United States of America), 89.124 (Costa Rica), 89.125 (France), 89.126 (Japan) and 89.127 (Namibia).<sup>3</sup>

8. Timor-Leste has enjoyed high levels of freedom of expression thus far, according to Reporters without Borders, Freedom House and the Global Public Policy Institute, with few reported restrictions on academic, press and media freedoms.<sup>4</sup> Internet penetration has increased steadily, and as of 2021, 599,700 Timorese (45.1%) possess means to access the internet.<sup>5</sup>

9. With increasing internet penetration and social media usage, individuals in Timor-Leste have been able to make use of online platforms as a civic space for political discussion and advocacy, furthering the democratic potential of the state.

10. In response to the increasing online criticisms directed at the government, in 2020, the government of Timor-Leste has drafted a law to amend Article 187 of the Penal Code, in order to reinstate criminal defamation,<sup>6</sup> followed by the draft Cybercrime Law in 2021.<sup>7</sup> In 2021 the government also announced it was drafting a Data Privacy and Protection Law, in line with the future implementation of a Unique ID system.<sup>8</sup>

### 3.1 Draft Criminal Defamation Law

11. In 2020, a draft law was put forward by the Minister of Justice, Manuel Cárceres de Costato, to amend Article 187 of the Penal Code to reinstate criminal defamation. The implementation of this draft law would result in the curtailing of freedom of expression, as critical opinions against the state or its officials can be criminalised.<sup>9</sup>

12. The draft Criminal Defamation Law is aimed at preventing online criticism of public officials in Timor-Leste. This was explicitly stated in the preamble of the draft law: *“through the media and social networks, the offenses against honour, good name and reputation are amplified, thus causing repercussions that affect more seriously the dignity of those targeted, and also the dignity of the State, who should also be responsible for protecting its own dignity”*. Under Article 187-B (aggravated penalties), if the plaintiff is an office holder, or if the statement is made through traditional or social media, the wrongdoer faces up to three years imprisonment or a fine.<sup>10</sup>

13. The reintroduction of criminal defamation would severely impact freedom of expression, both offline and online, in Timor-Leste by criminalising critical free speech against public officials and political incumbents. Journalists, civil society organisations and human rights defenders would engage in self-censorship as a result of harsh penalties they may face for airing their views against the State.<sup>11</sup> This outcome is evidenced in other regional jurisdictions.

14. The draft law may also be invoked to criminalise the actions of whistleblowers who call out human rights violations by the state, or victims of crimes who speak up against perpetrators.

15. The criminal defamation law may be misused in situations that do not require criminalisation or harsh penalties. This is based on Timor-Leste’s history of using Article 285 of the Penal Code to disproportionately penalise journalists,<sup>12</sup> even though other measures short of the law are present to effectively handle such issues, such as the mediation function of the Press Council as stipulated under the Media Law<sup>13</sup> and Article 76 of the Civil Code (Right to an image).<sup>14</sup>

16. The reinstatement of criminal defamation, based on existing public officials' rhetoric to tackle "offenses against honour, good name and reputation" runs counter to the Human Rights Committee's (HRC) General Comment 34, whereby "*the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties*".<sup>15</sup> Paragraph 47 of General Comment 34 explicitly states that defamation laws cannot stifle freedom of expression.<sup>16</sup>

17. Switzerland, in the second cycle of Timor-Leste's UPR, recommended that Timor-Leste revise its Penal Code and legislative framework to better align it with its international obligations (89.32), Timor-Leste supported this recommendation.<sup>17</sup> However, the attempt to reinstate criminal defamation does not align with international obligations or the support for the UPR recommendation.

### 3.2 Draft Cybercrime Law

18. In January 2021, Timor-Leste's public prosecutor José Ximenes submitted the draft Cybercrime Law to the Council of Ministers for consideration. The law focuses on cybercrimes and the collection of evidence pertaining to such crimes. However, the lack of specificity in provisions can lead to its misuse to curtail freedom of expression and access to information online.

19. Articles 6 and 7, which criminalises unauthorised access of a computer system and interception of computer data respectively, do not take into account the intent behind the interception of data.<sup>18</sup> These articles do not stipulate the need for clarifying the 'intention' behind these acts before criminalising them, which would render innocent and accidental access a violation. As such, whistleblowers who access and intercept data to expose human rights violations are not adequately protected. These articles serve to limit and criminalise public access to information by penalising efforts to expose rights violations to the general public.

20. The criminalisation of public access to information violates Article 19, Paragraph 2, of the ICCPR, which stipulates 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*".<sup>19</sup> The HRC General Comment No. 34 noted that this provision also embraces the rights of access to information purposefully withheld by public authorities.<sup>20</sup>

21. Article 11 imposes criminal liability on an individuals' organisation or business if they intercept data.<sup>21</sup> Media organisations or human rights organisations that a whistleblower belongs to can thus be closed down by the government. This limits the entities' freedom of expression, especially in instances where these entities and projects provide legitimate critical opinions against the State or provide aid in exposing rights violations.

22. Articles 15 to 21 do not provide the necessary thresholds with regards to the severity of a crime that warrant the authorisation of an investigation.<sup>22</sup> Authority to investigate personal data may be easily obtained, regardless of the necessity of the investigation, leading to abuses of these Articles to investigate the sharing of dissent online. The ease in obtaining warrants to conduct investigations threatens the right to privacy and can breed self-censorship as individuals would be unwilling to practice their right of free speech in fear of investigations.

23. Articles 15 to 21 do not specify the type of personal data to be collected for investigations, nor does it provide for the destruction of data once investigations are over.<sup>23</sup> The collection of data unrelated to the investigation breaches rights to privacy, and could stifle freedom of expression if citizens engage in self-censorship as their personal communications are surveilled and monitored. The lack of provisions on the destruction of data after an investigation is over may lead to the misuse of data for continued surveillance.

24. Article 11, in tandem with the vague provisions as to what circumstances necessitate an investigation under Articles 15 to 21, could potentially undermine the critical role of civil society groups and activists in Timor-Leste, as authorities may be able to easily investigate and surveil their work when they arbitrarily deem it necessary.

25. Article 5 provides that those who interfere with information data or computer systems “*will be punished with imprisonment up to 5 years or with penalty of fine of up to 600 days*”. The similar absence of safeguards and adequate judicial review for communication surveillance and interception raises concerns related to the right to freedom of expression online, and the right to privacy.

### 3.3 Announced Draft Data Privacy and Protection Law

26. The Timorese government is drafting a Data Privacy and Protection Law separate from the Cybercrime law, as of July 2021. This is in tandem with the government’s proposal to implement a unique ID system, which would obtain citizens’ personal and biographical information, to enable access to a wide array of public and private sector services.<sup>24</sup>

27. In drafting the law, the state must ensure that the law upholds international standards with regard to the right to privacy, enshrined in Article 17 of the ICCPR, whereby “*1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks*”.<sup>25</sup>

28. Timor-Leste must ensure that its Data Privacy and Protection Law is crafted with great care in relation to data collection, storage, and usage. Legislators should avoid vaguely worded clauses that may result in the potential misuse of the law to collect irrelevant data. Provisions should guarantee that data collected is not used for reasons unrelated to the purpose of its collection, such as surveillance or monitoring, that would stifle freedom of expression and breed self-censorship.

29. In order to ensure personal data is not abused by the State for political purposes or shared between ministries, oversight mechanisms should be properly empowered, resourced and their independence guaranteed. Standing invitations should be extended to the relevant UN Special Rapporteurs (SR) such as the SR on the rights to privacy, and civil society organisations should be involved in the proposed committee overseeing the handling of data privacy.

30. The Unique ID system, while a good effort to promote and improve e-government services in Timor-Leste, may nevertheless affect citizens' right to privacy. 'Voluntary' consent may be negated as individuals would be obligated to cede their data to the government. Due to low digital literacy among the population, many people do not understand the technicalities and implications linked with personal data collection and their rights to privacy and data protection.

## 4. Recommendations

### 4.1 Draft Criminal Defamation Law

31. Withdraw the draft Criminal Defamation Law that criminalises defamation.

### 4.2 Draft Cybercrime Law

32. Amend Article 5 to provide strong protection against communication surveillance and data interception, as well as safeguards for whistleblowers.

33. Amend Articles 15 to 21 to specify the threshold for a warrant to be issued for investigation, the type of data collected and the use and disposal of data after the investigation.

34. Amend Articles 6, 7 and 11 to include an 'intent' clause so that protections are provided to human rights defenders, whistleblowers, media organisations, and civil society organisations, as well as their projects, if they intercept data to expose human rights violations.

35. Ratify the Budapest Convention on Cybercrime and abide by its international standards of cybercrime legislation.

36. Ensure more consultations are held with relevant stakeholders, such as civil society organisations and telecommunications companies, before the draft law is discussed and reviewed again in parliament.

37. Ensure the law is available in Tetum, Portuguese and English so that the general public is able to understand its provisions.

### **4.3 Announced Draft Data Privacy and Protection Law**

38. Transform the proposed committee overseeing the correct handling of the draft Data Privacy and Protection Law into a wholly independent body consisting of individuals from a wide range of civil society stakeholders.

39. Use precise wording that ensures the collection, storage and usage of data is aligned with international standards on the right to privacy and data protection.

40. Provisions should outline that data collected must strictly align with the purpose of the collection, and data should not be collected arbitrarily, shared without permission and used for monitoring and surveillance where it is unnecessary and unwarranted.

41. Ensure more consultations are held with relevant stakeholders, such as civil society organisations, to inform the drafting of the law and its adherence to the promotion of freedom of expression and privacy protection.

42. Ensure the law is available in Tetum, Portuguese and English so that the general public is able to understand its provisions.

## **5. Conclusion**

43. The draft Criminal Defamation Law and the draft Cybercrime Law do not align with Timor-Leste's Constitution and its commitments to the ICCPR, UPR recommendations and SDGs framework. Despite commitments to align its legislation with international human rights standards, the implementation of these two draft laws would severely impact the currently high levels of academic, press and media freedoms. The announced draft Data Privacy and Protection Law also stands to negate human rights if the issues related to data collection, storage and usage are not effectively over-sighted.

44. Timor-Leste must ensure that these draft and announced laws are amended or adhere to the aforementioned recommendations before their implementation, in order to uphold high standards of internet freedoms, particularly freedom of expression and the right to privacy online.

45. The government of Timor-Leste should consult UN human rights bodies, international human rights organisations, as well as local civil society organisations when drafting new laws, to mitigate the negative effects on freedom of expression and rights to privacy.

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