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LEGISLATIVE AUTHORISATION IN CRIMINAL MATTERS

The constitutional mechanism for legislative authorisation is to be found in article 96, no. 1, sub-paragraph a) of the Constitution of the Democratic Republic of Timor-Leste.

The option for this mechanism, which is foreseen in the Constitution, brings greater speed to the legislative process, with the Parliament defining the major lines of its legislative policy which should govern the definitive diploma, the Government being responsible for the harmonisation of the legal aspects, intervention resulting from the directives from the National Parliament. The powers assigned to the different constitutional bodies have undergone a separation, concerning the exercise of legislative power.

The content and scope of the object of this Law on Legislative Authorisation ensures respect for the citizens' fundamental rights, liberties and guarantees in the field of Criminal Law. Moreover, the proposed solutions have taken into consideration the general principles of criminal law adopted in international legal instruments ratified by Timor-Leste, as well as respect for the country's socio-cultural context.

It should also be pointed out that the present Law on Legislative Authorisation proves to be consistent with the legislative drafting process relating to the draft Criminal Procedure Code and other complementary legislation approved and currently in force.

The approval of the Penal Code will lead to the cessation of the subsidiary application of the Indonesian Penal Code in Timor-Leste. Its approval further entails repealing or harmonising legal instruments subsequent to 20 May 2002 containing provisions

concerning the definition of crimes, penalties or security measures.

Pursuant to paragraph 95.1 and 96 of the Constitution of the Republic, the National Parliament enacts the following to have the force of law:

Article 1 **Object**

1. The Government is granted authorisation to approve a Penal Code and repeal relevant legislation in force, namely, with regard to the definition of crimes, penalties, security measures, and their respective prerequisites.

2. The authorisation has the following meaning and scope:

- a) set up a legal criminal system with a view to protecting property essential for the social life of Timor-Leste and the reintegration of delinquents into it;
- b) lay down the principle of legality and of the prohibition of analogy in respect of the application of criminal law, though a law subsequent to the commission of a crime may be applied where that law proves more favourable in concrete terms;
- c) stipulate that laws, whether exceptional or temporary, are applicable to acts practised while such laws are in force even if such acts are prosecuted after those laws are no longer in force;
- d) establish norms that will define the scene where, and the time when, a crime was committed;
- e) set out the principle of territoriality in connection with the application of the criminal law of Timor-Leste, singling out the restrictions on that principle and the cases where it may be applied to situations that have occurred outside of the territory of Timor-Leste;
- f) regulate the general prerequisites about crime, equating omission with action, except where the intent of the law is different, if the type of crime entails a certain result and the perpetrator was required to avoid it;
- g) make objective imputation dependant on the existence of a nexus of causality between the conduct and the typical result;
- h) Objective imputation shall be dependant on malicious intent or negligence, the types of malicious intent being defined as direct, necessary or incidental, and the forms of negligence as conscious or subconscious;
- i) Provide that criminal liability for any of the crimes contemplated in the Penal Code may not be transferred and these can only be committed by individuals, while admitting cases of liability for acts committed in the name of third persons, and that specific legislation may render corporate bodies criminally liable also;
- j) establish that minors aged less than 16 years are immune from criminal culpability and set out the requirements for immunity from criminal culpability on grounds of mental disorder;
- k) admit the possibility of aggravating a sentence where the liability of the perpetrator might, at least on the grounds of negligence, produce a result not covered by the type;
- l) provide that an error regarding circumstances excludes malicious intent and an error regarding illegality is relevant to remove guilt;
- m) with respect to forms of crime, establish the principle of non-punishability of preparatory acts, and the rule for punishing attempts at committing crimes carrying a penalty of more than 3 years' imprisonment;
- n) define the concept of attempt, the extent of its penalty, cases of impossible attempt, the relevance of voluntary desistance and of subsequent repentance in situations involving one or more perpetrators;

- o) establish forms of authorship, instigation or complicity, and define the liability of the co-perpetrators in the guilt and offence;
- p) provide for and define the prerequisites regarding situations of accumulation of crimes, of accumulation of penalties, of accumulation of a crime with another offence, and of accumulation of provisions;
- q) establish rules for punishing accumulated crimes, even if these have become acquainted with at a later stage, admitting the possibility of the accumulation reaching up to 30 years' imprisonment and 600 days' fine;
- r) define continued crime and the rules for punishing it with a penalty applicable to the most serious misdemeanour;
- s) set out the causes for exclusion of illegality and guilt, making those causes systematically autonomous from one another and defining the respective prerequisites for the application thereof;
- t) insert a title relating to the circumstances that, though not forming a part of the type of crime, have relevance in determining the criminal liability of the perpetrator;
- u) enumerate the general aggravating circumstances and extenuating circumstances;
- v) provide for a general provision concerning extraordinary attenuation in addition to special cases provided for in the law and set out the respective consequences in determining the scope of the penalty, through a pattern of degrees of attenuation;
- w) consider recidivism and criminal habituality as general modifying aggravating circumstances, setting out their respective prerequisites and consequences within the scope of the penalty;
- x) set up a system of penalties and of security measures, with the difference between these being based on whether culpability may or may not be imputed to the perpetrator of the act; in the first case, the specific penalty may never exceed the extent of the guilt and, in the latter case, the security measure has to be grounded in the danger posed by the perpetrator;
- y) enunciate the principles behind the determination of a penalty or security measure, as well as their effect, and crediting pre-trial detention;
- z) with respect to the execution of penalties and liberty-depriving measures, provide for release on parole and a regime for producing proof, always with the consent of the person concerned, and with all other requirements to be determined in complementary legislation met, and the possibility of laying down the conditions for the execution of prison sentences, the rights and duties of inmates, and the existence of open regimes;
 - aa) set up a system of criminal penalties for those culpable based on the principal penalties: imprisonment, fine, community labour, and admonition;
 - bb) the execution of the penalty of imprisonment the term of which ranges from 30 days to 30 years may be suspended where the penalty is not in excess of three years and the requirements for preventing future criminal offences do not require the penalty to be served; suspension may or may not be contingent upon the fulfilment of certain duties and/or subject to follow-up by the reintegration service during the suspension period;
 - cc) regulate the possibility of amending the suspension regime originally applied and the revocation thereof if during the suspension period the convict commits a criminal offence for which he or she is sentenced to imprisonment or where he or she wilfully fails to fulfil the duties required of him or her;
- dd) establish a regime for substitution of prison sentences the term of which are not in excess of 12 months for a fine or community labour, depending on the circumstances, and the court shall give a substantiated reason for not substituting the penalty where, though able to do so, it fails to take such a measure;
- ee) do not match an alternative imprisonment sentence with the substitutive fine and, in the case of unjustified failure to pay the fine, enforce the previously imposed prison sentence;
- ff) stipulate that the penalty of fine be determined in terms of time, ranging from 10 to 360 days, in principle, and determine that an amount to be fixed between 50 cents and 200 dollars, depending on the economic and financial situation of the convict, corresponds to each day of fine;
- gg) where a penalty of fine is directly imposed, stipulate the duty to make it match with alternative imprisonment for the corresponding period of time reduced by two-thirds (2/3), as well as the possibility of paying the fine in instalments, its reduction or exemption where a great difficulty subsequently arises or where the penalty cannot be served;
- hh) provide for the possibility of a penalty of community labour which can be either substitutive to imprisonment as that of fine in cases involving small or less serious crimes and establish some of the conditions required for imposing and executing that penalty in coordination with the reintegration service, as well as cases of exemption or reduction of the penalty, and the regulation of all other conditions for imposing and executing such a penalty is to be dealt with by a complementary law;
- ii) provide for the penalty of admonition for cases that may not be punished by an abstract prison sentence exceeding three (3) years, provided that, cumulatively, the damage is repaired, the perpetrator is a primary delinquent, and admonition is enough to meet the need for crime prevention and the recovery of the delinquent;
- jj) set up an accessory penalties system, causing certain crimes to correspond with the prohibition of either exercising some rights or practicing some professions, namely temporary suspension from public office, prohibition of holding office, prohibition of driving, cancellation of a licence to carry a weapon and expulsion of foreigners; such accessory penalties shall not be automatic and shall depend on the prior imposition of a principal penalty and the duration thereof shall vary according to the extent of guilt;
- kk) In respect of a person who has been declared immune from criminal culpability on the grounds of a mental disorder, provide for the possibility of imposing a security measure, of limited duration, namely internment, if internment is advisable in the face of the danger posed by that person; and such a

- security measure must be lifted where the circumstance that legitimised it ceases to exist; in the case of foreigners, a security measure may be replaced with expulsion;
- ll) provide also for measures for prohibiting professional practice, for cancelling a driving licence or for prohibiting a person immune from criminal culpability on grounds of a mental disorder from driving;
- mm) create an autonomous chapter relating to the issue of determining a specific penalty, of both imprisonment and prison, enunciating the general principles and the operations required for its choice and quantification;
- nn) in relation to the prerequisites and calculation, stipulate that compensation for losses and damage resulting from a crime is regulated by the civil procedure law but shall, except as otherwise stated by the aggrieved person, be discretionarily arbitrated by the court on the basis of the criminal procedure and the credit resulting therefrom is given preference over any other;
- oo) establish the conditions under which forfeiture of objects used for committing a crime and/or benefits resulting from such a crime may be ordered by the court;
- pp) for the purposes of exercising the right to complain, define crimes as public or semi-public, identify the holders of the right to complain, the deadline for exercising that right and the conditions for waiving or dropping a complaint;
- qq) with respect to the lapse of criminal liability, set the time limits for criminal proceedings taking into consideration the different scopes of the types of crime, how to count time and the causes for suspending time limits;
- rr) set the time limits on penalties, security measures and accessory penalties, as well as the situations in which time limits may be suspended;
- ss) regulate all such other causes for lapse of liability as the death of the perpetrator, amnesty, generic pardon or clemency;
- tt) provide that criminal proceedings in connection with, and penalties resulting from, war crimes, crimes against peace, humanity or freedom shall not be subject to any statute of limitations;
- uu) organise the specific part of the second book of the penal code by subsuming the types of crime under the property being protected, creating titles and chapters as homogeneous as possible;
- vv) In Title I, subsume illicit acts concerning crimes of genocide and against humanity, war crimes, including any prohibitive conduct involving any ways and means referred to in international law, war crimes against property and assets protected by insignia or distinctive emblems or other rights; also in this Title, the so-called crimes against peace and freedom, namely, prohibiting incitement to war, any conduct of racial or religious discrimination, trafficking in and enslavement of persons; and provide for a type of crime covering cases of terrorism;
- ww) still in Title I of the Special Part, the future Penal Code of Timor-Leste shall take into account the international obligations assumed by the country in signing and ratifying the Statute of the International Criminal Court;
- xx) Title II of the Special Part of the Code shall protect eminently personal property with emphasis on life, physical integrity, honour, personal liberty, sexual liberty, honour, and the protection of private life;
- yy) structure the protection of the property called life through the combination of different scopes of penalty according to the type of guilt of the perpetrator (malicious intent or negligence) and the circumstances determining a greater or lesser degree of culpability, namely on the basis of the motives, the capacity of the victim, and the ways and means used for materialising the criminal intent;
- zz) provide for the protection of intra-uterine life, referring the problematic issue of voluntary interruption of pregnancy to solutions to be contemplated under complementary legislation; provide that a childbearing woman is exonerated from culpability in connection with infanticide during childbirth only if committed under the disturbing influence of childbirth or as a way of covering up her dishonour or shame; criminalise incitement to suicide and abandonment or intentional exposure of another person to situations that might endanger the life of that person;
- aaa) define a set of incriminating provisions prohibiting behaviours that might encroach upon the physical integrity of another person, rating the scope of the abstract penalty on the basis of the degree of illegality and of guilt of the perpetrator shown by the gravity of the injury, the type of guilt and whether or not the injury might produce a certain result exceeding the criminal intent conceived or still justifies the imputation, at least on the grounds of negligence, known as the results-based doctrine;
- bbb) deal separately with the incrimination of offences committed using poisonous substances, reciprocal bodily harm or taking part in a quarrel with two or more people;
- ccc) lastly, still within the framework of bodily harms, determine two types of crime specifically providing for the punishment of maltreatment inflicted upon a minor or disabled and upon a spouse or someone cohabiting with the perpetrator in a situation similar to that of a spouse;
- ddd) in the chapter on the protection of personal liberty, criminalise practices, within the framework of both customary and comparative law, which comprise the types of crime of threat, coercion, kidnapping, abduction and other acts impinging upon personal liberty and, in a specific manner, establish a type of offence in connection with the sale of people and failure to denounce situations

that are likely to amount to the crimes in question;

eee) provide for a chapter on sexual crime pointing out liberty as a determining factor for criminalising such practices, protecting young people from acts over which they cannot yet be prepared to freely and consciously decide for themselves, incriminate practices revealing sexual exploitation and the most common forms of sexual abuse whether through fraud or by taking advantage of the victim's age;

fff) specifically incriminate sexual prostitution practices, child pornography and any acts of a sexual nature with minors aged less than twelve years;

ggg) introduce the criminalisation of the breach of secrecy, unlawful entry into one's domicile and other places, and tampering with mail or telecommunications;

hhh) subsume into a single chapter a set of crimes such as those against public order and peace, state security, social life, public authority, including crimes against electoral activities;

iii) with respect to practices that might disrupt public order and peace, prevent the emergence of criminal associations, public attitudes toward incitement to crime, participation in public riots, behaviours that might prevent citizens from exercising their political rights, disobedience to a lawful order to disperse, criminalise practices amounting to influence peddling, and punish the abuse of public signs and uniforms;

jjj) in the field of domestic state security, set out incriminating provisions regarding behaviours that might pose a danger to thereto in a more acute way, namely determine the type of crime of high treason, of collaboration with armed forces hostile to Timor-Leste, sabotage against national defence, campaign against peace efforts in Timor-Leste, attempt on the life of the head of state or other actions against constitutional organs or practices the purpose of which is to change the state based on the rule of law, promote diplomatic disloyalty, breach state secrets or desecrate national symbols of Timor-Leste;

kkk) criminalise fraudulent behaviours in electoral activities regardless of the perpetrator and the phase of the electoral process, cases of obstruction of someone's right to run as a candidate or the unlawful exercise of such right, situations of electoral canvassing in violation of the its legal framework and actions disrupting the smooth running of an electoral act;

lll) life in modern societies is lived in permanent contact with practices that potentially generate dangers that are not far from materialising and are likely to encroach upon the property the integrity of which needs to be protected, such as the driving of motor vehicles, the use and carriage of weapons, and certain activities relevant to personal and public health; some types of crime shall be determined in this respect;

mmm) likewise, behaviours that might encroach upon religious values embedded in Timorese society shall also be criminalised,

failure to fulfil the obligation to provide food to a minor under one's custody or other obligations related thereto, cases of social solidarity arising from a public disaster or catastrophe or required to carry out certain professional activities;

nnn) Punish practices that are unsustainably harmful to the environment, namely fauna, flora, natural habitats or subsoil resources of Timor-Leste;

ooo) criminally penalise practices running counter to the exercise of public authority, namely through acts of disobedience, obstruction, destruction, resistance to or usurpation of public offices;

ppp) with respect to the execution of penalties and liberty-depriving measures, criminalise behaviours amounting to the removal of detainees, escape, a warden helping a detainee to escape, and riots by inmates;

qqq) as a form of protection of property assets, devote two chapters categorising crimes against assets into one chapter and crimes against property in general into another;

rrr) build a normative system protecting assets on the basis of the most common types of crime in the various criminal laws like theft, robbery, abuse of trust and damage, categorising these types into simple and aggravated, once the value of the circumstances combined with the misappropriated asset, the means and ways in which the act has been committed, violence, threat, coercion, or any other circumstances that are likely to significantly aggravate the guilt or the offence, have been weighted;

sss) still in regard to assets, separate the provisions characterising joy ride, cases of violence after theft or robbery, usurpation of immovable property and change of the position of landmarks, keeping the incrimination of involuntary damage and defining the types of prohibited burning of bush and of fire as types of crime specifically causing significant damage to the environment or posing danger to people and/or property, judging from the consequences that are normally associated therewith;

ttt) protect property in general not only with the most common incriminations in this respect like swindling, extortion, receiving of stolen goods and bankruptcy or insolvency while taking particular account of the needs arising from new trade technologies and the responsibilities to be required of a person who, managing someone else's assets or property, fails to conduct himself or herself in an appropriate manner in that management task; we are referring to the crime of online swindling, and abusive and harmful management;

uuu) In modern, democratic societies, justice and the administration thereof are assets that justify criminal protection, and falsity in procedural acts, forms of obstruction of the administration of justice, failure to administer justice as a refusal of justice, and breach of in-camera proceedings, shall be penalised;

vvv) incorporate incriminations relating to acts of bribery, malfeasance by a magistrate or official, by a lawyer or public defender, including other acts of personal favouritism in the field of justice, without forgetting the classical incriminations relating to slanderous denunciation, simulated crime and failure to report a crime;

www) apart from the references made in the two previous paragraphs, practices amounting to situations of corruption, embezzlement, abuse of power, abusive deployment of public force, and economic participation in business by a person holding a public position or office, shall be criminalised;

xxx) through appropriate incriminating provisions, separately prevent practices of forgery of documents or technical notations, counterfeiting of currency, stamps and franks, weights and measurements, seals, office stamps and signets, diversifying their respective penalties in accordance with the nature, the probatory or fiduciary value thereof and how and where the forged or counterfeited items were to be used, and provide for the possibility of seizing or forfeiting the objects destined to be used for committing such crimes;

yyy) with respect to issues relating to the economy, authorisation is granted to incriminate acts that constitute tax fraud, smuggling or avoidance of customs duties concerning customs or border issues, in addition to maintaining the criminal penalty for failure to attend to a requisition of goods made by the government and behaviours that are likely to disrupt, negatively impact or impede the performance of some public acts such as a competitive bidding or judicial auction sale;

Article 3

Construction with the Criminal Procedure Code

The Penal Code referred to in this law on legislative authorisation shall be drafted concurrently with the Criminal Procedure Code to ensure legal security and coherence of the respective Legal System.

Article 4

Duration and extension

The duration of the legislative authorisation granted by this law shall be 180 days commencing on the date of its entry into force.

Article 5

Entry into force

The present law shall come into force on the day following the date of its publication.

Approved on 23 September 2008.

The Speaker of the National Parliament

Maria da Paixão de Jesus da Costa

Promulgated on 7 October 2008.

To be published.

The President of the Republic

Dr. José Ramos Horta