CENTRE FOR LAW AND DEMOCRACY

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Analysis of the 2001 Law on Freedom of Information and Communication

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Introduction

This Analysis[1] evaluates the extent to which the Republic of Congo's 2001 Law on Freedom of Information and Communication[2] (Communications Law) aligns with international human rights standards, with a focus on the right to freedom of expression. The Communications Law covers several areas, including establishing a regulatory framework for different media sectors; providing for journalistic ethical standards and rights; providing for the regulation of professions related to communications, advertising, archives and Internet service functions; and establishing a series of offences for crimes committed through the print media or other means of communication. In view of the breadth of the subject matter covered by the Communications Law, this Analysis does not purport to offer an exhaustive analysis of all of its provisions but rather focuses on certain areas which raise the most direct concerns for freedom of expression.

1. Human Rights Framework

A key international treaty protecting freedom of expression is the *International Covenant on Civil and Political Rights* (ICCPR).[3] The Republic of the Congo acceded to this treaty in 1983,[4] meaning that it is legally bound by its provisions. Article 19 of the ICCPR provides:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. 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.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

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[2] Loi N° 8 – 2001 du 12 novembre 2001 sur la liberté de l'information et de la communication, https://www.scribd.com/document/512799752/Loi-n-8-2001-du-12-novembre-2001-sur-la-liberte-de-l-information-et-de-la-communication#.

[3] UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976. Available in English here: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights and in French here: https://www.ohchr.org/fr/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

[4] See https://indicators.ohchr.org/.

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

The guarantee of freedom of expression found in Article 19 of the ICCPR is broad in its scope and protects even offensive or unpopular speech. Where speech may cause actual harm to others, States may restrict that speech but only in accordance with a strict three-part test, set out in Article 19(3) of the ICCPR. This test ensures that any restriction on freedom of expression is constrained, responds to real harms and does not deprive the right of meaning. The three-part test requires any restriction on freedom of expression to be:

1) Provided by law: The restriction should be established in a law in language which should not be overly vague but, instead, formulated with sufficient precision to enable an ordinary person to guide their conduct.
2) In pursuit of a legitimate interest: The only acceptable reasons for restricting freedom of expression are to protect the rights and reputations of others, national security, or public order, health or morals.
3) Necessary to protect that interest: The restriction should be necessary to protect the legitimate interest. Necessity requires restrictions to be narrowly tailored so that they restrict expression as little as possible and to be proportionate in the sense that the impact on freedom of expression does not outweigh the benefits in terms of protecting the legitimate interest. [5]

The right to freedom of expression is also found in the *African Charter on Human and Peoples' Rights*,[6] to which the Republic of Congo is also a State party.[7] Unlike the ICCPR, the text of that treaty is less clear about the scope of restrictions on freedom of expression, providing that there is a right to freedom to express and disseminate opinions "within the law".[8] However, the African Commission on Human and Peoples' Rights has interpreted the guarantee of freedom of expression under that instrument as requiring that restrictions to freedom of expression "serve a legitimate interest and be necessary in a democratic society".[9] Moreover, broader international law rules must be taken into account in interpreting the

[5] UN Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, 12 September 2011, paras. 22, 25 and 33-35, https://undocs.org/CCPR/G/CG/34.
[6] Adopted 26 June 1981, in force 21 October 1986, available in English at: https://au.int/en/treaties/african-charter-human-and-peoples-rights and in French at: https://www.african-court.org/fr/images/Basic%20Documents/Charte%20africaine%20des%20droits%20de%20lhomme%20et%20des%20peuples.pdf.
[7] For a table of ratification status see, https://achpr.au.int/en/charter/african-charter-human-and-peoples-rights.
[8] See Article 9(2).
[9] See *Elgak and others v. Sudan*, March 2014, Communication 379/09 para. 114, https://www.escr-net.org/sites/default/files/caselaw/achpr15eos_decision_379_09_eng_0.pdf

African Charter, including Congo's obligations under the ICCPR,[10] which further limits what are considered legitimate interests under the African Charter.

2. Mandate of the Regulatory Body

Article 212 of the Constitution of the Republic of the Congo provides for the establishment of the Superior Council for Freedom of Communication (Superior Council) with the general mandate of "seeing to the good exercise of the freedom of information and of communication",[11] and Article 213 of the Constitution provides for the elaboration of the Council's functions through an Organic Law. Certain details of the Council's mandate and functions were elaborated in Title II of the Communications Law. However, subsequent legislation, namely the Organic Law No. 4 of 18 January 2003 (2003 Organic Law),[12] which was amended by the Organic Law No. 27 of 29 June 2022 (2022 Organic Law),[13] superseded provisions found in Title II of the Communications Law.[14]

The most recent mandate ("*missions*") of the Superior Council is found in Article 6 of the 2022 Organic Law. Several items on the list are progressive even if quite general in nature, such as guaranteeing citizens access to free communication.[15] However, the mandate also includes certain problematic items. Specifically, Article 6(9) of the Organic Law tasks the Council with ensuring the non-diffusion of information which does not support the consolidation of peace and national unity. This is a far too vague a criterion for limiting the dissemination of information and is susceptible of abusive interpretation. Another problematic task, in Article 6(1), is to prevent the "manipulation" of political opinion through the media. Although addressing issues of mis- and dis-information are important concerns which are worthy of carefully considered and defined policy responses, a general mandate to combat "manipulation" is vague and risks being interpreted in a manner which undermines freedom of expression.

[10] See African Charter on Human and People's Rights, Article 61 and Vienna Convention on the Laws of Treaties, UNTS vol. 1155, p. 331, 23 May 1969, Article 31(3)(c), available in English at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf and French at: https://legal.un.org/ilc/texts/instruments/french/conventions/1_1_1969.pdf.
[11] See https://www.constituteproject.org/constitution/Congo_2015?lang=en (in English) or https://www.sgg.cg/fr/constitution/constitution.html (in French).
[12] Available at: https://www.sgg.cg/JO/2003/congo-jo-2003-03-sp.pdf.
[13] Available at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=113545.
[14] The Organic Law provides that it provisions "abrogate all previous or contradictory provisions, in particular those in Title II" of the Communications Law.
[15] Article 6(1).

Recommendation

- Articles 6(9) and 6(10) of the 2022 Organic Law should be repealed.

3. Independence of the Regulatory Body

The Superior Council is composed of 11 members.[16] The President of the Republic is responsible for designating three of these members; one member is designated by each of the President of the Senate, the President of the National Assembly, the Prime Minister and the Supreme Court; two members are designated by the consultative council of civil society and non-governmental organisations; and a further two are elected by information and communication professionals.[17]

It is well-established under international law that any body which exercises regulatory powers over the media – whether this be in relation to licensing, accreditation, allocation of subsidies or any other issue – should be independent in the sense of being protected against interference of a political or commercial nature due to the evident risk that regulatory powers could otherwise be used for improper purposes. The 2003 and 2022 Organic Laws contain certain positive elements from the standpoint of ensuring independence, including having a multi-stakeholder designation process as part of the appointment process, requirements that the Superior Council's members and staff not exercise certain other professions[18] and a prohibition on dismissing members for opinions expressed during their tenure.[19]

However, certain other aspects of this legislative framework provide insufficient guarantees of independence for this body. Although the President of the Republic is responsible for designating only three of the 11 members on the Council, he is also responsible for naming its president.[20] The President of the Council has significant powers under the legislation, including that specialised commissions fall under his or her authority.[21] Some of these commissions are responsible for key tasks in media regulation, such as "ensuring the technical prerogatives" of granting or revoking professional ID cards, accreditations and broadcasting frequencies.[22] The President of the Council is also responsible for its budget,

[16] 2022 Organic Law, Article 9.
[17] *Ibid*., Article 9(2)(a)-9(g).
[18] *Ibid*., Articles 14 and 18(5).
[19] *Ibid*., Article 13.
[20] 2013 Organic Law, Article 16.
[21] 2022 Organic Law, Article 18.
[22] *Ibid*., Article 18(3)(c).

although accounts are submitted to the Court of Accounts and Budgetary Discipline.[23] In view of the significant powers of the President of the Council, this post should not be named by the President of the Republic. An alternative would be to have the members of the Council themselves elect one of their number to be the President of the Council.

A further concern is that the indemnity received by Council members is determined by the Council of Ministers.[24] This provides an insufficient guarantee of independence in so far as the executive branch is directly responsible for determining members' remuneration. Better practice here is to link salaries and benefits to those of an established post, such as a specific level of judge or civil servant.

Recommendations

- Article 16 of the 2013 Organic Law should be amended to ensure that the President of the Council is not named by the President of the Republic.
- Article 22 should be amended to provide for a more independent process for determining the indemnification of Council members, such as by linking this to another established position.

4. Licensing Procedures

Article 7 of the 2022 Organic Law provides that the Superior Council is authorised to determine conditions for and to make decisions on granting and revoking authorisations to operate for information and audio-visual companies, attributing and withdrawing of radio and televisions frequencies, prohibiting the diffusion of a programme through one of the communications channels listed in Article 4 of the Law,[25] the granting and revocation of professional ID cards, the granting and withdrawing of approvals for certain audio-visual equipment, and the suspension or halt of an audio-visual programme or publication for non-compliance with the charter ("cahier des charges") of the information and communications company.

The Communications Law is unclear as to who is responsible for developing the charter. Article 80 provides that the government is responsible for establishing the charter of private audio-visual companies, and Article 85 provides that all usage of radio and television frequencies is subject to the authorisation of the government and must respect the charter established by the government. However, Article 70 provides that any natural or legal person

[23] *Ibid*., Article 21.
[24] *Ibid*., Article 22.
[25] The "channels of communications" listed in Article 4 of the 2022 Organic Law are fibre optic, mobile phones, social media and all other digital modes of communication.

wishing to create an audio-visual or communications company must first lodge a declaration with the Republic's prosecutor about the place of diffusion which includes, among other things, the charter as an attachment.

This licensing regime raises several human rights concerns. First, all licensing decisions should be undertaken by an independent regulatory body. It should be clarified that the government has no role in adopting charters for individual licensees. Second, media licensing processes should be open, fair and transparent. The Communications Law fails to set out any details on licensing processes and there do not appear to be any implementing regulations for this Law. Third, the Superior Council appears to be free to determine the conditions for exercising the various (extensive) powers under Article 7 of the 2022 Organic Law, with the laws failing to place any limits on the Council's discretion in this regard. However, consistently with the requirement that restrictions on freedom of expression be provided by law, the main substantive criteria for exercising these powers and basic procedural framework for doing so should be set out in the primary legislation.

Recommendations

- The Communications Law should be amended to make to make it clear that it is up to licence applicants to determine their own charters, not the government.
- The law should set out a clear framework of procedures and substantive rules governing the licensing process.
- The law should also set out a clear framework of both procedures and substantive rules for the exercise, by the Superior Council, of the powers set out in Article 7 of the 2022 Organic Law.

5. Media Diversity

The Communications Law contains some provisions relevant to combatting media concentration and regulating foreign media. Specifically, Article 5(1) prohibits "all forms of concentration of information and communications" under the authority of a sole legal or natural person. Article 5(2) proscribes the direct or indirect ownership of more than one company or having a stake in ("détenir une participation dans") more than one company of the same nature. Article 5(3) prohibits the accumulation of national, regional or local authorisations for different services. Article 5(4) establishes a 20% cap on direct or indirect ownership by foreigners in radio and television companies absent a provision in an international commitment by Congo to the contrary. Article 38 imposes a residency requirement for directors and codirectors of publications, while Article 57 authorises courts to ban foreign publications the contents of which are deemed to compromise public order or national security. The Law also establishes a separate accreditation procedure for

professional journalists working for a foreign organisation, with accreditation issued by the Minister of Foreign affairs upon the advice of the Superior Council (Article 91), although no details on the substantive criteria needed for accreditation are listed.

In addition to providing for applications to run private audio-visual companies,[26] the Communications Law authorises but does not require the creation of public audio-visual companies, the statutes of which are to be determined by regulations (Article 76) and which can rely upon private capital as needed (Article 77).

Promoting media diversity is a key aspect of the right to seek and receive information and ideas of all kinds, an essential part of the right to freedom of expression. Media diversity has three aspects: diversity of outlet, meaning that States should create an enabling environment for different types of broadcasters, including public service, commercial and community broadcasters; diversity of source, meaning preventing undue concentration of media ownership; and diversity of content, meaning the provision of range of content that serves the needs and interests of different groups in society, which is ultimately the most important kind of diversity, and which is dependent on the other kinds.[27]

In terms of outlet diversity, the Communications Law does not establish a public service broadcaster and, in practice, the Republic of Congo appears to lack such a broadcaster.[28] These are also no provisions in the Law for community broadcasters, which are a key part of any diverse broadcast media landscape. While anti-concentration measures are necessary to ensure source diversity, the restrictions in Articles 5(2) and 5(3) are excessively stringent, as merely having a stake in more than one information or communications company or having authorisations for different kinds of services does not necessarily pose a threat to media pluralism. Excessively stringent restrictions on concentration can undermine investment in the media sector and can also constitute an undue restriction on freedom of expression. This is particularly true when rules on concentration are inconsistently applied, as has reportedly occurred in the Republic of Congo.[29]

The Communications Law's provisions on foreign journalism should also be amended to better comport with international standards. Any form of media regulation, including the granting of accreditation, should be done by an independent body. The current special

[26] Article 80.

[27] See, for example, 2007 Joint Declaration of the special international mandates on freedom of expression, Joint Declaration on Diversity in Broadcasting, https://www.osce.org/files/f/documents/f/0/29825.pdf.

[28] The radio and television divisions of Congo National Radio-Television Service ("Radiodiffusion Nationale Congolaise") are run by directors appointed by and accountable to the Ministry of Communication and Media and thus fail to meet the key requirement of independence needed to qualify as a public service broadcaster. See State Media Monitor, "Radiodiffusion Nationale Congolaise", 8 February 2022, https://statemediamonitor.com/2022/02/radiodiffusion-nationale-congolaise/.

[29] Reporters Without Borders, "Congolese government shows double standard over media concentration", 22 May 2014, https://rsf.org/en/congolese-government-shows-double-standard-over-media-concentration.

accreditation procedure for professional journalists working for a foreign organisation fails to meet this standard because the Minister of Foreign Affairs is responsible for accreditation even if he or she does this on the advice of the Superior Council. It also fails to provide any information on the criteria which are used to make accreditation decisions, although as mentioned above, the President of the Superior Council is responsible under the 2022 Organic Law for the commission which elaborates "technical prerogatives" for granting accreditations.[30] The provision in Article 57 of the Communications Law for courts to ban foreign publications the contents of which have been deemed to compromise public order or national security is overbroad in so far as the notion of "compromising" public order and State security establishes an unduly low threshold for banning content. Instead, accepted restrictions on freedom of expression require a close nexus between the speech and the risk of harm such as might be signalled by the term "incitement". The provision is also disproportionate as it allows for the banning and seizure of entire publications even though only certain content in them may be problematic.

Recommendations

- The Communications Law should be amended to align better with international standards on outlet diversity by providing for special, less onerous easier licensing procedures for community broadcasters and by establishing a public service broadcaster.
- Article 5 of the Communications Law should be amended to provide for more carefully tailored regime governing undue concentration of media ownership.
- All accreditation procedures, including those set out in Article 91, should be overseen by an independent body and be based on transparent and fair criteria.

6. Content Restrictions

A large part of the Communications Law, namely the provisions in Title XI, is devoted to proscribing the dissemination of certain types of content via the press or other means of communication. Several of these offences are not justifiable restrictions on freedom of expression. The Superior Council is authorised under the 2022 Organic Law to impose fines for certain of these infractions.

6.1. Criminal Insult, Defamation and False News Provisions

Article 190 provides that any word or action harming dignity or honour is an offence but does not provide for any punishment. Article 191 proscribes offending the President of the

[30] 2022 Organic Law, Article 18(3)(c).

Republic and provides for a punishment of a fine of CFA Francs 300,000 to 3,000,000 (approximately USD 490-4900) or, in case of a repeat offence, a prison sentence of one to three years and a fine of CFA Francs 300,000 to 3,000,000 (approximately USD 490-4900).

Article 192 provides for a fine of CFA Francs 150,000 to 1,500,000 (approximately USD 250-2,500) for insults[31] of the bodies or people designated in Articles 196 and 197 of the Communications Law. The bodies listed in Article 196 are courts, tribunals, the armed forces, constituted bodies ("les corps constitués") and public administrations, and those listed in Article 197 are members of the executive branch, parliament, the high court of justice or supreme court, or a public functionary, a depositor or agent of a public authority, a citizen entrusted with a temporary or permanent public service or mandate, a jury or witness. Articles 196 and 197 also provide that defamation[32] of these individuals and bodies are also offences and prescribe as punishment a fine between CFA Francs 300,000 to 3,000,000 (approximately USD 490-4900).

Article 194 criminalises the publication, diffusion and reproduction of false news; fabricated, falsified or dishonest content attributed to third parties; or defamatory imputations made in bad faith[33] when such actions will or may disturb public peace, harm the national interest, or shake national morale. This article imposes a punishment of a fine of CFA Francs 300,000 to 3,000,000 (approximately USD 490-4900) and, in case of a repeat offence, three months to two years' imprisonment and a fine of CFA Francs 300,000 to 3,000,000 (approximately USD 490-4900). Article 194 also provides that the means used to commit the offence may be seized and specifies that the judgment may order the confiscation, suppression or destruction of these means depending on the case. In addition, it authorises courts to order the complete or partial restriction on civic, civil and family rights for a period of two to five years and a travel ban for up to two years.

Article 198 provides for a general defamation provision, punishable by a fine of between CFA Francs 200,000 to 2,000,000 (approximately USD 330-3,300]. In the case of defamation on grounds of belonging or not belonging to an ethnic group, nation, race, religion or philosophical movement, Article 198 provides for heightened penalties in the form of a fine of CFA Francs 300,000 to 3,000,000 (approximately USD 490-4900) and/or one month to one year's imprisonment.

Article 199 proscribes unprovoked insults and provides for fines of CFA Francs 100,000 to 1,000,000 (approximately USD 160-1,600). In the case of unprovoked insult on grounds of

[31] An insult is defined in Article 195 as any "outrageous expression, disparaging term or invective which does not contain the imputation of any fact".
[32] Defamation is defined in Article 195 as any "allegation or imputation of a fact which undermines the honour or consideration of the person or body to which the fact is imputed".
[33] Any reproduction of information which has been judged to be defamatory is subject to a rebuttable presumption of bad faith under Article 202.

belonging or not belonging to an ethnic group, nation, race, religion or philosophical movement, Article 199 imposes a heightened punishment of one year's imprisonment and a fine of CFA Francs 1,500,000 (approximately USD 2,500).

Article 200 provides that Articles 197-199 are not applicable to defamation and insult of the dead, except where this is intended to undermine the honour of heirs, spouses and universal legatees. Article 213 exempts parliamentary speeches and good faith written or audio-visual reporting on public parliamentary sessions from liability and exempts accurate and good faith reporting on judicial debates and statements and written documents produced during these debates from liability for outrage, defamation and insult.

Publicly offending foreign heads of State and members of government is punishable by a fine of CFA Francs 300,000 to 3,000,000 (approximately USD 490-4900) under Article 203 of the Communications Law. Article 204 imposes a fine of CFA Francs 200,000 to 2,000,000 (approximately USD 330-3,300] for outrage made through words, gestures, threats, writings and drawings, whether public or not, which undermine the honour and dignity of foreign plenipotentiary ministers and diplomatic agents.

The criminal insult and defamation provisions in the Communications Law raise a number of freedom of expression concerns. First, international standards regard criminal defamation as constituting an unnecessary restriction on freedom of expression in view of the existence of an effective and less rights-restrictive alternative in the form of civil defamation laws. For example, in their 2002 Joint Declaration, the special international mandates on freedom of expression stated: "Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."[34] Although States should decriminalise defamation fully, at a minimum defamation law should never provide for imprisonment and any fines or damages should not be excessive or punitive in nature. Unfortunately, several of the Communications Law's insult and defamation provisions impose custodial sentences and many of the fines are high relative to the *per capita* GDP of the Republic of Congo which, in December 2021, was estimated at USD 1,516.[35]

Second, international human rights law mandates that public officials, whether domestic or foreign, should enjoy less protection from criticism than others in view of the importance of free and open debate on matters of public interest[36] and considering that these officials have generally voluntarily chosen to assume public roles with the additional scrutiny that entails. As such, dedicated prohibitions of the defamation or insult of public officials and institutions,

[34] Adopted 10 December 2002, https://www.osce.org/files/f/documents/8/f/39838.pdf.
[35] See https://tradingeconomics.com/republic-of-the-congo/gdp-per-capita.
[36] UN Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, 12 September 2011, para. 38, https://undocs.org/CCPR/G/CG/34.

such as those found in Articles 191-192 and 196-197 of the Communications Law, are problematic from a human rights perspective.

Third, various defences should be available against allegations of defamation, including that the impugned statement was true, that it was an opinion, that it was reasonable in all of the circumstances to make the statement, even if it ultimately proves to be inaccurate, and that it was a good faith statement made in the performance of a legal, moral or social duty or interest. A positive aspect of the Communications Law is the protections found in Article 213 for parliamentary statements and good faith reporting on parliamentary and judicial proceedings. However, other defences to defamation are absent from the Communications Law.

Lastly, the false news prohibition in Article 194, which provides for particularly harsh sanctions, raises significant freedom of expression concerns. While accurate reporting is, of course, an important professional aspiration for journalists, there are serious problems with blanket false news provisions, which unjustifiably restrict freedom of expression.[37] They exert a chilling effect on journalists, who have a professional obligation to report in a timely manner on matters of public interest, and they may be abused to elevate widely held views to the status of 'facts' or to limit the expression of unpopular opinions. As the special international mandates on freedom of expression stated in their 2017 Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda:

> General prohibitions on the dissemination of information based on vague and ambiguous ideas, including "false news" or "non-objective information", are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished.[38]

While Article 194 limits its application to content which will or may disturb public peace, harm the national interest or shake national morale, this amounts to an insufficient check on the vast scope of content susceptible to being captured by this provision for three reasons. First, protecting the "national interest" and "morale of the nation" are not among the exclusive list of interests recognised as legitimate justifications for restricting freedom of expression under Article 19(3) of the ICCPR, namely respect for the rights or reputations of others, or the protection of national security, public order, public health or public morals. This is for good reason, as what constitutes the "national interest" is inherently subjective and properly the subject of rigorous national debates in open and democratic societies.

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[37] UN Human Rights Committee, Concluding Observations on Cameroon, UN Doc. CCPR/C/79/Add. 116, November 1999, para. 24, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.116.

[38] Adopted 3 March 2017, para. 2(a), available in English at: https://www.law-democracy.org/live/legal-work/standard-setting/ and in French at: https://www.law-democracy.org/live/wp-content/uploads/2018/11/mandates.decl_.2017.French.pdf.

Second, several of the undefined terms in Article 194 – specifically, public peace, national interest and national morale – are overly vague for any rule which limits freedom of expression and all the more so for a provision which provides for criminal sanctions. Third, the reference to "will or may" establishes too limited a nexus between the content and any risk of harm to justify restricting freedom of expression.

Recommendation

- The criminal defamation, insult and false news provisions found in Articles 190-199 and 203-204 of the Communications Law should be removed. Legitimate reputational interests should instead be protected by a precisely drafted set of civil defamation provisions which include all of the defences recognised as legitimate under international human rights law and which provide only for non-punitive damage awards.

6.2. General Incitement and Apology Provisions

Article 187 of the Communications Law provides for liability for those who directly provoke crimes or delicts as accomplices, where the provocation is successful ("a été suivie d'effet"). It also includes a long list of means through which such provocation can occur including, for example, speeches in public meetings or places, written publications and images.

Under Article 188(1), the direct provocation of theft, murder, pillage, arson and several offences in the criminal code is punishable by fines of CFA Francs 150,000 to 1,500,000 (approximately USD 250-2,500) in cases where the provocation was unsuccessful. In case of a repeat offence or if the provocation was successful, a punishment of one to three years' imprisonment in addition to a fine may be imposed.[39] In addition, Article 188(3) provides that the direct provocation of crimes against internal security attracts the same punishment as the crimes do under the Penal Code.

While it is legitimate to proscribe direct incitement to serious crimes, Article 188(4) goes much further than this by criminally proscribing apology for murder, pillage, arson, theft, the various property offences in Articles 434-435 of the Penal Code,[40] war crimes, crimes against humanity, genocide and crimes of collaborating with the enemy. The concept of "apology" for crimes is overbroad and vague and risks being abused to target speech which falls short of inciting criminal offences. For this reason, in their 2016 Joint Declaration on Freedom of Expression and Countering Extremism, the special international mandates on freedom of expression expressed their alarm at the proliferation of "broad and unclear" offences which

[39] Article 188(2).

[40] See https://www.oarh.cg/wp-content/uploads/2022/07/codes_d_audience-2.pdf.

refer to countering and preventing violent extremism, such as "glorification of" or "apology for" terrorism.[41] In addition, Article 102(6), which imposes a vague requirement on journalists to refuse to disseminate all apologies for violence, intolerance, crimes and delicts, should be removed, even if no punishment is specified for breach of that article.

Recommendations

- Article 188(4) of the Communications Law should be amended to remove the offence of "apology" for crimes and Article 102(6) should be removed.
- Article 188 should be amended to ensure that all punishments for incitement crimes are proportionate.

6.3. Sedition and Incitement to Military Disobedience

Under Article 188(5), seditious yells and chants uttered in public places or meetings are punishable with a fine of CFA Francs 100,000 to 500,000 (approximately USD 160-800]. Under Article 188(6), in case of repeat offences, two months to two years' imprisonment may be imposed in addition to a fine of CFA Francs 100,000 to 500,000 (approximately USD 160-800). The Communications Law does not define the term "seditious". Article 189 criminalises provoking members of the armed forces to disobey their commanders, punishable by a fine of CFA Francs 120,000 to 1,200,000 (approximately USD 200-2,000) for unsuccessful provocation and, in the case of a repeat offence or successful provocation, six months to three years' imprisonment and a fine of CFA Francs 120,000 to 1,200,000 (approximately USD 200-2,000).

The UN Human Rights Committee has cautioned that "extreme care" must be taken to ensure that sedition laws are drafted and applied in a manner that respects the strict test for legitimate restrictions of freedom of expression under Article 19(3) of the ICCPR.[42] The broad proscription of seditious speech in Article 188(5) and failure to provide guidance as to what kinds of speech qualify as seditious are inconsistent with the requirement that laws be drafted sufficiently precisely to meet the "provided by law" standard of Article 19(3) of the ICCPR.

While certain restrictions on soldiers' rights, including that of freedom of expression, are allowed under international human rights law to maintain military discipline,[43] a broad

[41] See https://www.osce.org/files/f/documents/e/9/237966.pdf.
[42] UN Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, 12 September 2011, para. 30, https://undocs.org/CCPR/G/CG/34.
[43] See *Engel and Others .v the Netherlands*, Applications Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 54, 8 June 1976 (European Court of Human Rights), para. 100, available in English at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%225100/71%22],%22documentcollectionid2%22:[%22GR

proscription on any member of the general public inciting disobedience to military orders is unnecessary and carries risks from the standpoint of freedom of expression. In particular, such a provision could be abused to criminalise criticism of military policies or the role of the armed forces in society or militarism more generally, whereas these subjects are a matter of public concern and should be open to debate. In view of these risks, any benefits to national security are outweighed by the chilling effect Article 189 is likely to have on legitimate public discourse. This is particularly true in a State like the Republic of Congo which does not have mandatory conscription and where recruits have voluntarily enlisted and chosen to subject themselves to military discipline, and are thus unlikely to be easily swayed by external appeals to disobey orders. A further problematic aspect of the provision is its failure to provide for an explicit exception for cases of provoking disobedience of illegitimate orders (such as orders to commit atrocities or, arguably, to undertake suicidal missions).

Recommendations

- The broad and undefined prohibition of sedition in Article 188(5) should be removed.
- The crime of provoking disobedience in Article 189 should be removed.

6.4. Administrative Sanctions

The Superior Council is authorised under Article 8 of the 2022 Organic Law to impose financial and administrative sanctions on information and communications companies for "flagrant and repeated" violations of laws and regulations. Five categories of violations are listed in Articles 8(a)-(e), which establish a graduated system of penalties ranging from CFA Francs 100,000-200,000 (approximately USD 165-330) in 8(a) up to CFA Francs 500,000 to 1,000,000 (approximately USD 820-1,640) in 8(e).

Several of these violations are overly broad or vague and therefore fail to meet international standards on freedom of expression. These include the "retention of information" (Article 8(a)(5)). While the retention of some kinds of information can raise significant privacy concerns, companies must retain some information on their clients, so more detail is needed, including what kinds of information is covered and the applicable timelines for non-retention. Other vague provisions include the failure to promote or the lack of defence of local cultures and national languages (Article 8(a)(8)) and undermining free access to information (Article 8(b)(1)).

ANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57479%22]} and French at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-62037%22]}.

Also listed as a violation is the use of "disloyal" means to obtain information, documents or taking advantage of anyone's good faith ("surprendre la bonne foi de quiconque") (Article 8(b)(6)). While engaging in undercover journalistic activities can raise ethical concerns, the formulation of this violation and what exact tactics are considered "disloyal" is unclear. In addition, while journalists should generally avoid hiding their identity and engaging in subterfuge, it is accepted that this can be justified where there is no other practical way to obtain public interest information, which this provision fails to recognise.

Other concerns include rules on not respecting truth and not respecting the "rule of impartiality" in news reporting as violations (Articles 8(b)(9) and 8(b)(10)). In addition, "lying statements" ("déclarations mensongères") by the press are listed as a separate offence (Article 8(b)(15)), as is the diffusion of unfounded or unverified information (Article 8(c)(7)). Striving for accuracy and impartiality in reporting are, of course, important professional aspirations and legitimately the subject of professional codes of conduct. However, they should not be the subject of administrative proscriptions. In addition, they should not operate as strict liability provisions. Despite taking due precautions journalists may make mistakes in coverage or may not fully grasp both sides of a story, and it is neither realistic nor fair to hold them to standards of perfection in this regard. As a result, these should be reframed as obligations of means and not obligations of result so that journalists are only required to take reasonable measures to report accurately and impartially.

Some of the listed violations are altogether illegitimate. Included as administrative offences are calumny (Article 8(d)(4)); defamation or harming the honour of a person (Article 8(d)(5)); and insult, outrageous expression and terms of disdain or invective (Article 8(d)(6)). The inclusion of defamation and calumny as administrative offences for information and communications companies is unnecessary and duplicative, as these matters are already dealt with in laws of general application. In addition, the defamation and calumny provisions are overbroad in their failure to include recognised defences, including an absolute defence of truth. In addition, a general prohibition on disdainful, insulting and outrageous expressions is overbroad and could be interpreted as encompassing, for example, critical social and political commentaries or controversial political cartoons, which are a legitimate part of public discourse.

Other illegitimate violations include the failure to respect the secular nature of the State (Article 8(b)(16)). It is unclear what is meant by "respect" in this context. While States may legitimately take certain steps to ensure the secular nature of public institutions, these should still be able to be debated openly. Of further concern is the inclusion of undermining the head of State ("l'atteinte au Chef de l'Etat") (Article 8(d)(28)), which could be abused to target legitimate, critical political opinions. Other problematic violations are those of divulging military or economically strategic information or which is information harmful to ("portant atteinte à") the interior or exterior security of the State (Article 8(d)(25) and Article 8(d)(26)). Both of these violations fail to account for the often justifiable nature of divulgations of such

information, for example where it contains revelations of corruption or other kinds of abuses. In addition, it is unclear what exactly is meant by "information which is harmful to interior or exterior security", a vague formulation which is susceptible of abuse.

Recommendations

- The administrative sanctions listed in the 2022 Organic Law should be reviewed and those provisions which are inconsistent with international standards, notably Articles 8(a)(8), 8(b)(1), 8(b)(6), 8(d)(4), 8(d)(5), 8(d)(6), 8(b)(16), 8(d)(28), 8(d)(25) and 8(d)(26), should be removed.
- The administrative provisions on reporting false information found in Articles 8(b)(9), 8(b)(10), 8(b)(15) and 8(c)(7) should either be removed entirely or redrafted to represent obligations of means and not of result.

7. Rights of Response, Reply and Correction

Article 121 of the Communications Law provides for a right of any natural or legal person to respond to erroneous facts or malicious assertions of such a nature as to cause them moral or material harm. The director of the audio-visual company or publication is required to publish the response for free or risk a fine of CFA Francs 100,000 to 500,000 (approximately USD 165-820).[44] Article 124(1) provides for the possibility of refusing a response where it would constitute a delict. Article 124(2) allows for a right to appeal to the Superior Council in case a request to publish or broadcast a response is refused or not replied to. Article 126 provides for a right of reply for any person who is impugned ("mise en cause") by a written publication or an audio-visual programme, and Article 126(3) provides that this right of reply follows the same procedure as the right of response. Articles 127-129 provide for a right to require publications to publish corrections following inaccurate reporting.

Rights of correction and reply, if appropriately framed, can provide redress against wrongs such as defamation and invasion of privacy without having to go to court, thereby providing a less intrusive means of redress. Although they represent a restriction on the right to freedom of expression, they are widely accepted as a positive, "more speech" approach to countering harmful speech, as long as they meet certain conditions. The American Convention on Human Rights even affirmatively establishes a right of reply. As between a right of reply and a right of correction, the former is a more intrusive remedy so that the latter should be preferred whenever it will effectively redress the harm caused.

However, to conform to international standards, any mandatory rights of correction and reply should be appropriately circumscribed and offer sufficiently clear procedures. Like any

[44] Articles 122 and 201.

restriction on freedom of expression, they must meet the requirements of the three-part test. One of these is that a right of reply should only apply to inaccurate facts, not to truthful statements or opinions and, even then, only where the statement in question has harmed the rights of the person requesting the reply. The Committee of Ministers of the Council of Europe has mandated other restrictions on the right of reply, including that a reply may be refused if it goes beyond correcting contested facts, would involve a punishable act, expose the publisher to liability or transgress public decency standards, or is contrary to legally protected interests of a third party.[45]

The Communications Law's regime for corrections and responses/replies could be strengthened in various ways to better comport with international standards. First, it is unclear why both a right of response and a right of reply are needed. Although there are certain differences between them under the Communications Law, in most countries only one such remedy is deemed to be sufficient. Second, the Communications Law does not set out any clear preference for exercising the right of correction over the rights of response and reply, whereas the former should be preferred where it would provide effective redress. Third, for both the rights of response and reply under the Communications Law, there is no requirement that the impugned content have been false or have violated a right. Fourth, there is no clear procedure for publishers or broadcasters to contest requests to issue responses, replies and corrections. In the case of replies and responses, they could refuse to issue one and wait for the requestor to exercise their right to appeal to the Supreme Council of Freedom of Information. However, the possibility of incurring fines for may make them unlikely to do this. In the case of corrections, the procedures are even less clear in that it does not provide for a penalty for refusing to publish the correction, nor for a right to appeal such refusals to the Supreme Council of Freedom of Information.

Recommendations

- Consideration should be given to removing one of the rights of response and reply, given that one of these remedies is sufficient.
- The Communications Law should provide that a right to correction is to be preferred where it would provide an effective remedy and clear procedures should be instituted for situations where the publisher or broadcaster contests the demand.
- Whichever of the rights to reply or response is retained, it should be limited to cases where the dissemination by the media of false information harms one or more rights of the aggrieved party.

[45] Council of Europe Recommendation Rec(2004)16 on the right of reply in the new media environment, 15 December 2004, para. 5, available in English at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805db3b6 and in French at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805db38a.

8. The Right to Information

Article 3 of the Communications Law provides that the exercise of freedom of information and communication may be limited only to protect the following interests:

- Respect of human dignity;
- Liberty and property of others;
- The pluralist and character of the expression of thought and opinion;
- The safeguarding of public order;
- National defence;
- Demands of public service;
- Technical constraints inherent to the means of communication; and
- The promotion of peace and national culture.

Article 95 of the Communications Law provides for a right for journalists to demand access to and investigate information, subject to the exceptions found in Article 3. Article 96 then allows for access to the information to be refused where it is of such a nature as to undermine interior and exterior State security; reveal a military or economically strategic secret; compromise an ongoing investigation or judicial procedure; or undermine the dignity or life of a citizen.

It is now widely recognised that everyone has a right to access information held by public authorities (the right to information), subject only to a limited set of exceptions to protect overriding public and private interests. This right must be implemented through legislation, and such legislation has been adopted at the national level in some 140 countries, as well as by numerous subnational legislative bodies.[46] Such legislation should establish a broad presumption in favour of access to all information held by all public bodies; place an obligation on public bodies to disclose a wide range of information of public interest on a proactive basis; put in place clear procedures for making requests for information; detail a clear and narrow set of exceptions to the right of access; and provide for an independent appeals mechanism to contest refusals to grant access.

Articles 95 and 96 of the Communications Law establish a limited right to information which applies to only journalists. Consistent with the universal nature of the right to information, this regime should be replaced by a proper right to information law of general application so that anyone, not just journalists, can exercise this fundamental right. While the intention of the drafters of the Communications Law was likely to refer to information held by public authorities, Articles 95 and 96 refer to "information" generally, which introduces confusion as to the scope of this regime. The Communications Law also fails to provide many of the key details which are necessary to operationalise a right to information in practice, including

[46] See https://www.rti-rating.org/country-data/.

procedures and timelines for making and processing requests for information, and clear systems for appeals and for proactive disclosure.

While States may legitimately withhold certain public information, the regime of exceptions in the Communications Law is unclear and overbroad. At a general level, the relationship between Article 3, which provides a list of considerations for limiting the right to freedom of information and communication, and Article 96, which refers more specifically to the grounds for refusing to provide information to journalists, is unclear. Article 95, which establishes a limited right to information, refers specifically to this being subject to Article 3, while Article 96 is more precise and appears to be specifically tailored to restrictions on the right of access. This issue is a complex area and officials need clear and detailed guidance on when exactly they may refuse to provide information.

Otherwise, one of the exceptions in Article 96, that of undermining the dignity and life of the citizen, is overbroad. This should be limited to harm to legitimate privacy interests. Moreover, all exceptions should be subject to a public interest override whereby information is still disclosed even if it falls under an exception if the public interest in having access to this information outweighs the harm this may cause. For example, the public interest in making public information revealing corruption by a public official may outweigh any applicable privacy or national security interest, in which case this information should be disclosed.

Article 3 is also problematic as a framework for restrictions on both freedom of expression and the right to information as it goes well beyond the exhaustive list of legitimate interests for restrictions on freedom of expression which are enumerated in Article 19(3) of the ICCPR, namely respect for the rights or reputations of others, or the protection of national security, public order, public health or public morals. For example, the requirements of public service and promoting national culture are not legitimate grounds for restricting freedom of expression.

Recommendations

- Article 3 of the Communications Law should be amended so that is applies only to restrictions on freedom of expression and not to restrictions on information, and the list of interests it protects should be amended to align with the legitimate interests for restrictions found in Article 19(3) of the ICCPR.
- A separate, comprehensive right to information law should be enacted to replace the limited and unclear right to information regime found in Articles 95 and 96 of the Communications Law.

9. Protection of Sources

Article 99 provides an unqualified guarantee for the protection of sources of information. While journalists normally identify their sources, sometimes doing so poses a risk to the source or breaches a promise the journalist has made to the source not to reveal his or her identity. Such promises are often a condition for sources to give information to journalists in the first place, so granting journalists the right to offer this sort of protection ensures that sources will speak to them, better protecting the flow of information to the public. International law thus recognises a right of journalists to protect the confidentiality of their sources, which applies at all stages of the system of the administration of justice, including during court proceedings, with very limited exceptions.

Article 99 is thus welcome but it could be improved in various ways. First, the scope of its application is unclear; the intent behind the provision was likely to limit this to confidential journalistic sources but this is not specified, so that should be added to Article 99. Insofar as it does apply only to journalists, Article 87 of the Communications Law contains a narrow definition of a professional journalist as someone for whom journalism is their principal occupation from which they derive most of their financial resources, although Article 88 extends the category somewhat by including some other professions such as sound reporters and stenographers. This would exclude certain actors who play a vital role in the digital media ecosystem, such as amateur bloggers and podcasters, part-time journalists and journalists working on a volunteer basis.

Second, most countries and international law recognise exceptions to the right of source protection. While absolute protection might appear superficially to represent stronger protection for media freedom, in fact this is likely to be overruled by courts in certain circumstances. As such, it is better to outline narrow and clearly defined exceptions to the right to protect sources, such as where the information cannot be obtained in any other way and is it needed for the protection of an accused person or for the prosecution of a serious crime.

In addition, in the digital era, electronic surveillance can pose a threat to source confidentiality. Any revision of the Communications Law should consider adding language to protect journalists from such surveillance, such as affirming that the right to protect sources applies notwithstanding any surveillance operation (subject to the general limits on source protection mentioned above), requiring any searches or seizures involving journalists or the media to be allowed only on the authorisation of a judge and to take into account the right to source confidentiality, and requiring law enforcement authorities to develop guidelines on this issue so as to avoid violating source confidentiality unintentionally.[47]

[47] For international standards on this topic see special international mandates on freedom of expression, 2018 Joint Declaration, available in English at https://www.law-democracy.org/live/wp-content/uploads/2018/12/mandates.decl_.2018.media-ind.pdf and French at https://www.law-democracy.org/live/wp-content/uploads/2018/12/mandates.decl_.2018.media-ind.French.pdf; *Sanoma*

Recommendations

- The scope of Article 99 should be clarified, albeit it should apply more broadly than the definition of a professional journalist in Article 87.
- Consideration should be given to developing a narrow set of exceptions to source disclosure.
- The right of source protection should be amended to make it clear that it applies not only to direct requirements to disclose the source but also to indirect means of identifying him or her, such as via surveillance or search and seizures, while law enforcement authorities should be required to adopt guidelines on this.

10. Emergency Takeover Powers

Article 11(1) grants the government the power to take over (requisition) all or part of the operations of private information and communications companies during exceptional circumstances where public order is seriously undermined or where national unity or territorial integrity is threatened. Article 11(2) requires judicial authorisation for requisitions lasting longer than 45 days, although it does not specify the criteria to be considered by the tribunal in deciding whether or not to grant such an extension.

The partial or complete takeover of a media outlet is a very severe restriction on freedom of expression which is very unlikely ever to be justifiable and, if so, certainly only if sufficient procedural safeguards were in place. Such a takeover would completely disrupt the ability of a media outlet to function during the period of the takeover, leading to consequences such as loss of audience share and advertising, and a breakdown of trust with audiences. It would also potentially have other consequences, for example by compromising the confidentiality of sources and dissuading future sources from stepping forward, thus impacting the public's right to receive information and ideas.

Under the ICCPR, the rights to freedom of expression and privacy are among the rights from which States may legitimately derogate during emergencies. However, under Article 4 of the ICCPR, such derogations may be made only during an emergency which "threatens the life of the nation and the existence of which is officially proclaimed". Part of the latter involves

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Uitgevers B.V. v. The Netherlands, Application No. 38224/03, 14 September 2010 (European Court of Human Rights, Grand Chamber), available in English at: https://bit.ly/3lCSdMb and in French at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-100449%22]}; and African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression and Access to Information in Africa*, 2019, Principle 25(3), available in English at: https://bit.ly/3EYOEGH and in French at: https://achpr.au.int/sites/default/files/files/2023-03/declaration-principles-freedom-expression-2019fre.pdf.

informing other States Parties to the ICCPR about the derogation through a notification to the Secretary-General of the UN. The substantive scope of such derogations must be "strictly required by the exigencies of the situation", may not be inconsistent with a State's other international law obligations and may not be discriminatory. The UN Human Rights Committee has made it clear that this applies not only to the proclamation of a state of emergency but also to "any specific measures based on such a proclamation".[48] The African Charter on Human and Peoples' Rights contains no derogation clause, and consequently States may not derogate from its guarantee of freedom of expression or any other rights protected under that instrument.

A primary reason why having the government take over a media outlet could never be justified is that it is simply not necessary to address even serious threats to security or public order. Instead, the presence of a robust, free and diverse media sector, including a strong public service broadcaster, is what is needed in such situations, in addition to an administration of justice response. If certain media outlets are inciting citizens to acts of violence, there are other, more appropriate, measures to address this than having the government take them over.

There are also more technical problems with Article 11(1). It is unclear about the substantive criteria or procedures for determining whether exceptional circumstances exist. The meaning of "threatening national unity" is unclear and open to potentially expansive interpretations, and there is no requirement an official state of emergency have been declared.[49] This lack of clarity is particularly worrisome in the context of the Republic of Congo, which has a long history of armed conflicts and whose current peace is viewed as fragile. The Article 11(2) requirement of judicial authorisation for takeovers after 45 days is a wholly insufficient check in view of the massive intrusion into freedom of expression that even a relatively short takeover implies. Further concerns are the lack of any requirement that the takeover be necessary or strictly required, the lack of guidance to the administrative court on the criteria justifying extending a takeover and the lack of any absolute time limit on takeovers which have been authorised by a court.

Recommendation

- Article 11(1) of the Communications Law should be removed.

[48] General Comment No. 29, States of Emergency (Article 4), 31 August 2001, para. 5, https://undocs.org/CCPR/C/21/Rev.1/Add.11.

[49] This is now provided for under Article 157 of the Republic of the Congo's 2015 Constitution, which requires parliamentary authorisation for extensions of states of siege or emergency beyond 20 days. See https://www.constituteproject.org/constitution/Congo_2015?lang=en (in English) or https://www.sgg.cg/fr/constitution/constitution.html (in French).

11. Revealing Authors' Identities

Article 41 of the Communications Law requires the director of a publication to reveal the identity of the author of an article which was published anonymously or under a pseudonym following a request by a Prosecutor who is seized with a legal complaint against the author. No judicial authorisation is required, and there are no requirements for the complaint to be well-founded or that the need for revealing the identity outweigh any resulting harms to privacy rights or freedom of expression. There are legitimate reasons for the real names of authors to be withheld in some cases, for example if the journalist's safety would be at risk or if the article is an opinion piece by an anonymous whistle-blower who is likely to face retaliation. As a result, the exercise of this power requires far more robust procedural safeguards to be put into place.

Recommendation

- Article 41 of the Communications Law should be amended to provide far more robust safeguards before an order to reveal the identity of an anonymous author may be issued, including the substantive requirements that the complaint be well-founded and that the interest in revealing the author's name outweighs any resulting harms to human rights, and the procedural requirement that judicial authorisation be obtained.