



# Decriminalisation of Laws Limiting Freedom of Expression in Africa: Benin Executive Summary

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# EXECUTIVE SUMMARY: BENIN

## 1. INTRODUCTION

This report into the use of laws that criminalise freedom of expression in Benin is one of six country research projects into the impact of these laws conducted by the University of Pretoria on behalf of the Freedom of Expression Rapporteur of the African Commission on Human and Peoples Rights. The objective of the study is to assess whether or not the existence of such laws does limit freedom of expression in practice – and if so, the impact these laws have on this.

### *1.1 KEY FINDINGS*

- Benin's 1990 Constitution protects freedom of expression, however, two key laws dating from the colonial era and pre-multiparty democracy include provisions that criminalise this right. The Constitution further establishes a regulatory body which has the power to suspend publication and broadcasting for periods for breaching the code of ethics.
- The laws are currently under review and a new information code is being considered.
- Criminal defamation cases have increased since 2008 – although there are no records of cases relating to insults or publication of false information. According to a magistrate interviewed for the research, between January 2012 and May 2013 alone 86 judgements are recorded in relation to defamation charges. Media organisations and their staff are most vulnerable to charges under the laws and, according to the magistrate interviewed, 98% of the cases he studied were against journalists or other media personnel. He stated that in the cases he is aware of, more than 80 per cent resulted in a conviction and only five per cent of the cases were dismissed. Settlement was reached between the parties in 15 per cent of the cases. Where sentences were imposed, these were usually suspended, though there were instances where those accused were jailed for up to six months. Other penalties given included fines, orders to publish judgements, suspension of the publication for generally a maximum of one month
- Media organisations have launched campaigns to decriminalise freedom of expression, however, the research recommends that the campaign to be extended to involve a wider range of human rights and civil society organisations.
- There are differing views on the laws, with many journalists, media related people and human rights activists arguing for them to be reviewed, but others, including those within government, concerned that any review would need to be linked to increased professionalism in the media sector.

## 2. BACKGROUND

### *2.1 COUNTRY FACTS*

Benin (formerly Dahomey) gained independence from colonial power France on 1 August 1960. The period that immediately followed independence was, however, marred by political and economic turbulence, with several coups and regime changes taking place up to 1972 when a revolutionary military council took control of the country. Between 1972 and 1990, the country was comparatively stable, though the revolutionary council suppressed several fundamental rights, including freedom of expression, in the interests of national unity. This period ended in 1990 when an agreement was reached on constitutional reform and the introduction of multi-

party elections. A new constitution was put in place in December 1990 following a national referendum and multi-party elections were held in 1991. Since 1991, no political party has secured an absolute majority in elections.

The Constitution includes several provisions promoting freedom of expression and information. Article 8 stipulates that the state must ensure citizens have equal access to information. Article 23 states that everyone has the right to freedom of expression and opinion “while respecting public order as stipulated in laws and regulations”. Article 24 specifically recognises and protects freedom of the press and gives responsibility for this to the Higher Authority for Audio-visual Media and Communication (HAAC).

However, while the constitution does guarantee freedom of expression, many repressive laws from the colonial and subsequent revolutionary eras remain in place. Government leaders have indicated that they intend to amend these laws, but these statements have not as yet been acted on. HAAC furthermore has powers to suspend publications and broadcasting services for breaches of the code of ethics. A new Bill proposing an information and communication code in line with constitutional rights is under discussion to remedy this. It was sent to Parliament for consideration in May 2014.

## *2.2 OVERVIEW OF MEDIA*

There are a large number of print and radio services in the country. There are, for example, over 100 regular daily newspapers of varying size and popularity – including national and regional papers. The largest daily newspaper (La Nation) is a publicly owned entity. There are also a number of bi-weekly, weekly and monthly publications. There are 71 licensed radio stations<sup>1</sup> – including community services operated by local non-profit entities and commercial stations. Nine of the radio stations are publicly owned – including a national service, a parliamentary station and rural and local services.

There are three public television channels (two national and one regional youth service) and four private television channels on air with another three licensed in 2013. While there are internet media services and a range of bloggers, access to the internet is still limited to less than five per cent of the population.

Radio is the most pervasive medium – reaching over half of the population. Television penetration is much smaller (about 24% of households have television sets) and is predominantly urban.

There is a self-regulatory media standards body (the Observatory of Ethics and Professional Conduct in the Media – ODEM) which both adjudicates on and mediates complaints about the media. The organisation however faces financial challenges as members do not always pay their fees and it relies on a grant from the statutory audio-visual council – HAAC - and international donors. HAAC still maintains some control over professional standards in all media and has the power to suspend publications and journalists for breaches of ethics.

## *2.3 LAWS THAT IMPACT ON FREEDOM OF EXPRESSION*

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<sup>1</sup> Seven of these were newly licensed and not yet on air at the time the research was completed

The table below summarises some of the key legal provisions that criminalise freedom of expression. There are two main laws in Benin that potentially criminalise freedom of expression. The first, Law no 60-12, was passed before independence and covered the print media. The second, Law no 97-010, was approved in 1997 and extends the same provisions to the audio-visual media (radio and television). The later law has stiffer penalties for transgressions.

Offence	Detail	Law	Penalties
Defamation	This section of the law deals with defamation of individuals or identifiable groups (based on race, region or religion). The 1997 law clarifies that defamation against a group (which includes that based on a philosophy in this law) must be intended to incite hatred	Articles 26 & 29, Law no 60-12 (as amended) on press freedom, June 1960  Articles 83 & 86, Law no 97-010 on audio-visual media and communication crimes, August 1997	Six months to three years imprisonment and/or US\$ 2000 – 20 000 fine.
Defamation of institutions	These sections of the law bar with defamation of public officials and of public institutions, the armed and security forces and the courts. Unlike ordinary defamation, if the accusation is proven true the charge no longer stands.	Articles 27-28, Law no 60-12 (as amended) on press freedom, June 1960 Articles 85 & 89, Law no 97-010 on audio-visual media and communication crimes, August 1997	If against armed forces, 2-5 year sentence and a fine of US\$2 000 If against foreign head of state, 1-5 years and a fine of US\$200 - \$10 000 If against any other public institution or individual 1-3 years and fine of US\$2000 – US\$ 20 000.
Publication of false news	Bars “bad faith” publication of false news which will or is likely to impact on public order	Law no 60-12 on press freedom (as amended), June 1960 Law no 97-010 on audio-visual media and communication crimes, August 1997	2-5 year year sentence and/or fine of between US\$2 000 & US\$20 000.
Offence against the head of state, head of the legislature or a foreign head of state	Any statement that includes an offence against a head of state, head of the legislature or a foreign head of state is subject to litigation.	Articles 23 and 34, Law no 60-12 (as amended) on press freedom, June 1960 Article 81, Law no 97-010 on audio-visual media and communication crimes, August 1997	From 1-5 years imprisonment and a fine of between US\$2 000 – US\$20 000 for offence against the head of state. 1-5 years and a fine of between US\$ 1 000 and US\$10 000 if against a foreign head of state
Insults	An insult is defined as any “offensive expressive, term of contempt or invective” against a public institution or any individual or group of people that is not proven.	Articles 26(2) and 30, Law no 60-12 (as amended) on press freedom, June 1960  Articles 87 & 88, Law no 97-010 on audio-visual media and communication crimes, August 1997	3-12 months imprisonment and fine of between US\$1 000 – US\$20 000

Penalties for other crimes provide a useful means of comparing how seriously these freedom of expression related transgressions are considered. The punishment for corruption is five to 20 years in prison and/or a fine of US\$ 2 000 to US\$200 000.

### 3. LAWS IN PRACTICE

#### *3.1 SUMMARY OF KEY CASES CHALLENGING THE LAWS*

There have not been any constitutional court challenges of the laws.

#### *3.2 SUMMARY OF KEY CASES WHERE LAW HAS BEEN USED*

There have reportedly been no cases relating to insults and false information lodged since the introduction of the Constitution in 1990, though there have been instances where other provisions criminalising freedom of expression have been used. It should be noted however that there are limited records of all cases across the country.

Court action in relation to criminal defamation and other such charges has increased in the last five years and between January 2012 and May 2013, for example, 86 judgements are recorded in relation to defamation charges in two towns alone.<sup>2</sup> Charges have been brought by politicians, the private sector and government. Media professionals have been the most targeted according to a magistrate interviewed for the research, who stated that 98% of the cases were against journalists or other media personnel. He stated that in the cases he is aware of, more than 80 per cent resulted in a conviction and only five per cent of the cases were dismissed. Settlement was reached between the parties in 15 per cent of the cases. Where sentences were imposed, these were usually suspended, though there were instances where those accused were jailed for up to six months. Other penalties included fines, orders to publish judgements, suspension of the publication for generally a maximum of one month.

#### *3.3 ADVOCACY INITIATIVES IN THE COUNTRY*

While there have been some initiatives to challenge the criminalisation of freedom of expression (including by the journalist's union, Amnesty International office in Benin and other human rights organisations), there does not seem to have been a concerted united campaign relating to this issue. Several organisations interviewed identified the need for more concerted joint action alongside campaigns to create awareness about the issues involved.

One of the successes of some of the actions has been the initiation of the process to draft a new information and communication bill. Concern was however raised by a range of those interviewed (including, for example, human rights activists and members of the security forces) about whether or not there had been sufficient consultation in the initial drafting and widespread awareness of the process. Consultation it was argued is essential to ensure broad acceptance and understanding of any new provisions. The Minister of Communications appointed in 2013 has pledged to push for introduction of the Bill and to fast track its progress through the Supreme Court. A draft Code was submitted to Parliament for its consideration in May 2014.

### 4. IMPACT OF LAWS

Thirty people were interviewed for the research in order to gain a broad picture of views on the laws and people's experiences of them. These included members of the judiciary, a prosecutor

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<sup>2</sup> There are limited records and this figure is based on information provided in an interview with a magistrate for the research

and lawyers who had defended cases related to freedom of expression, journalists from both the independent and public media, publishers and media managers, human rights activists, members of parliament and opposition members as well as members of the security forces.<sup>3</sup> Four of those interviewed did so on condition of anonymity.

While generally all of those interviewed were aware of the laws, there was differing knowledge about their implications in relation to the right to freedom of expression. Those linked to the ruling party or in other positions of power, for example, were generally, though not exclusively, of the view that the provisions did not criminalise diverse expression but rather were necessary to address poor standards in the media. Journalists, publishers, members of the opposition, civil society and lawyers however raised concerns about the laws and said they are contrary to the African Charter on Human and People's Rights. Some stated that the constitution in the country itself has clauses that are problematic – in particular the establishment of the state regulatory authority, HAAC, which has powers to suspend publications.

One of the key issues evident from the research is that there is a lack of consolidated information on the number of cases brought under the laws and the outcomes of such cases.

#### *4.1 EXPERIENCES OF LAWS*

Political activists, members of the opposition, lawyers and those involved in the media are generally aware of the laws – though there are differing views on whether or not the provisions should be reviewed. While there are exceptions, those in power and members of the security forces do not all believe that the laws limit freedom of expression, but rather argue that they are necessary to promote democracy and ensure professionalism among journalists.

People interviewed from a range of different media organisations – including independent and state owned services, publishers, editors and journalists - were particularly adamant on the need for reform of the laws. They say that the laws definitely limit the information and perspectives they cover – and that at times they avoid contacting a range of organisations/people on a story in order to avoid prosecution. Women journalists interviewed said that they were particularly concerned about the impact of charges on their families.

Several of those that participated have faced charges under the laws.

Director of private television channel Canal 3 Benin, Berthe Angèle Mensah Cakpossa, has recently faced prosecution for covering a press conference by a former spokesperson of the Presidency criticising the president's handling of a corruption scandal in 2012. The former spokesperson and Cakpossa were both charged with offending the head of state. She received a three month sentence and a US\$1000 fine from the court, but has appealed this. The president in 2013 granted a pardon and the case has subsequently been dropped.

The impact on the channel of the case has been significant according to Cakpossa. She said in an interview that it affected all staff and programming as producers were wary of reprisals. A range of political leaders also refused to be interviewed on the channel over the period of the trial and several advertisers withdrew their advertising for fear of being associated with it. She

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<sup>3</sup> A full list of interviewees is provided in the appendix to the summary

had also suffered personally and had become ill from stress while her children were concerned about her being in prison and had been victimised at school.

Head of an online publication, Pierre Matchoudo, is one of the other interviewees who have faced charges. In 1999 he was given a six month suspended sentence for exposing bad financial management at a state agency and has been threatened with charges for many stories on corruption. He also highlighted that advertisers and proprietors of media organisations put pressure on editorial staff not to run certain stories after being contacted by politicians. He said for this reason his online newspaper did not carry advertising – but it meant that they were very vulnerable as even the smallest fine could put them out of business.

Another media figure interviewed said that his experience of being charged, sentenced, jailed and fined had made him move from editorial to management positions in the newspaper to avoid further such experiences. The former editor-in-chief of the newspaper *L'Informateur* was sentenced to six months in jail for running a story on allegations that a court official had given special treatment in a case to a woman he was having an affair with. He said they had confirmation of the affair from the woman herself as well as others but still were convicted for invasion of privacy. He spent 71 days in jail before a settlement of US\$ 50 000 was reached with the court official.

Other publishers confirmed that the threat of fines makes them cautious in selecting stories. Vincent Foly, the publisher of the daily newspaper *La Nouvelle Tribune*, noted that he had previously been arrested and the experience made him very cautious though his paper had only lost one case despite being charged four times in twelve years. He said that it would be difficult for his publication to pay a fine of US\$10 000 and it could be forced to close down if the fine exceeded this.

He said that his jailing had negatively affected his family psychologically and financially. His daughter had failed her exams and after his release he had not been able to get work in Benin.

A lawyer interviewed said that in her experience the laws are misused to limit any dissent and that provisions promoting public order in particular have been abused to stifle expression. She noted that protests about particular issues have been banned using this law. Another lawyer however stated that he believed it was important to have rules such as those on defamation to protect people from false accusations that damaged their reputations. He said that he had prosecuted members of the media for making false accusations.

Those interviewed generally indicated that media organisations and journalists are most often targeted under the laws, though the Minister of Communication says that this is often necessary as he claimed the media is at times “irresponsible”. He indicated that he had previously charged two newspapers with criminal defamation resulting in their conviction after they had asserted that his management was poor but had not provided any evidence of this or given him an opportunity to respond to the allegations.

People not related to the media who participated in the research however also stated that they had been charged under the laws. The president of an anti-corruption coalition for example stated that he had been charged twice for criminal defamation after exposing corruption. In 2004 he had gone public on allegations that a Minister had interfered in a tender to promote a bidder that did not meet minimum requirements. In 2009-2010 the organisation had exposed a

director-general of a department for not adhering to procurement codes, resulting in overbilling of the department. The organisation however won both cases as they were able to provide proof of the charges.

Opposition politician, Andoche Amègnissè, has also been convicted twice under two different laws since 2011. In 2011 he was sentenced to six months imprisonment for publishing a newsletter without the necessary authorisation. After his release, he got authorisation for the newsletter but was charged with insulting the President after publishing a picture of him napping during a meeting. He received a two year suspended sentence in this instance.

Members of the security forces interviewed were not all aware of the laws, and where they did know of the provisions, stated that they were necessary to protect other rights. A member of the army asserted, for example, that there are no laws which criminalise freedom of expression in Benin, while the deputy director of the national police stated that he was aware of the laws but believed there was a need to ensure people understood that freedom of expression did not include the right to spread unverified information or make wild accusations before decriminalising this. He did acknowledge that certain of the laws were possibly too broad and highlighted, for example, that provisions that allowed prosecution for disturbance of public order could be abused.

Many of those interviewed said that the laws did result in self-censorship, though again views differed. An opposition MP indicated that he was careful about what he said not because of fear of prosecution but in order to ensure coverage of his views. He said that media organisations were wary of the laws and did not therefore publish statements that they thought might result in prosecution. However, an MP who is part of the presidential camp stated that he was openly critical and did not feel the need to temper his speech in any way – even though he had previously been charged under the laws. All the media members interviewed indicated that they carefully considered what they covered and who they gave coverage to in order to avoid prosecution.

Others raised concern about the impact of the laws on exposing corruption in Benin. Two representatives of the Front of National Anti-Corruption Organisations indicated that the laws required that all accusations be proven before publication and that this stopped whistle blowers from making allegations as it was difficult at times to prove unequivocally.

#### *4.2 GENERAL VIEWS ON THE LAWS*

The views on the laws vary, with some believing there is a need to address poor journalism standards and others arguing that legislation must be brought in line with the African Charter and other international treaties that Benin is party to.

One interviewee (an MP from the presidential camp) argued that the laws limit accountability as those in power know that it is difficult for the media to expose these. Others however were concerned that removal of the laws would result in abuse of the right of freedom of expression, with a sergeant in the army for example stating that this might itself undermine democracy.

### **5. RECOMMENDATIONS**

The report makes the following recommendations:



- There should be a robust campaign to create awareness of the implications of the laws that criminalise freedom of expression. This should include information on how the laws are contrary to commitments made in African legal instruments.
- Media organisations, together with other human rights institutions, should engage with those responsible for considering amendments to the constitution to ensure the issue is dealt with should there be any constitutional review. This should include lobbying of members of parliament, Ministers in Government and members of the Constitutional Court.
- Campaigns should include information on the countries neighbouring Benin which have decriminalised freedom of expression to allay concerns that such action will result in unprofessional reporting.
- There should be specific lobbying of members of the judiciary to create awareness among judges and magistrates of the implications of the laws. This should include a project to document cases relating to the laws to ensure information about this issue.
- There should be ongoing training of media personnel about professional standards. This should include information about the self-regulatory structure (ODEM) to promote adherence to its standards.
- The Special Rapporteur on Freedom of Expression should participate in campaigns, including engaging with the authorities about the campaign. This could include giving a presentation to the National Assembly and interacting with the President.

### ***Possible Quotes to include in lay out and design***

*“[T]he professional associations would like media offences to be decriminalised. Such a solution would not necessarily guarantee absolute freedom for them to say what they want because, alongside the decriminalisation, the legislators may impose more substantial fines, which would stifle the press organs and force them out of business. The simpler solution would be for the media practitioners to act with a higher level of professionalism and responsibility.”* An Assistant Public Prosecutor at the Cotonou court

*“In order for democracy to be complete, there is need to reform those laws to guarantee absolute freedom of expression and obviate the need for media practitioners to engage in unnecessary self-censorship. Generally speaking, public authorities take advantage of the repressive nature of those laws to perpetrate disreputable acts, in the knowledge that it would be difficult, or even impossible for the citizens to expose them. This means that if we want to ensure accountability as required in a democracy, this can only be effective when, and especially if there are relevant instruments to enforce such accountability, or to authorise other parties to expose any indiscretions.”* MP from the Presidential camp

*“Many citizens possess information and are willing to denounce the facts but are unable to produce the relevant evidence within the time-limits prescribed by the law. They therefore refrain from doing so, whereas they are certain of their information, and their denunciations would likely have had positive effects on society.”* Jean-Baptiste Elias, President of the Front of National Anti-Corruption Organisations (FONAC)

*“Admittedly, these laws restrict and criminalise the freedom of expression, but they are necessary in light of the level of maturity of media professionals in particular, and of ordinary citizens in general, considering that they confuse democracy with anarchy. And this can lead to disturbances or mob justice. In my opinion therefore, there is a need to educate all segments of the population before envisaging the possibility of decriminalising offences in this domain.”* Deputy Director General of the National Police, Inspector General Nazaire Hounnonkpè

*“The public order imperative has become a tool to legitimise the banning of protest marches against the executive branch of government and police crackdowns on citizens. .... (T)he laws make it possible for the authorities to stifle any protests by the citizens against their excesses and caprices.”* Lawyer Aline Odjè

*“It was written in an article that my client was a dealer, that the police were after him, and that he was on the run, whereas he was present in the country, and had just returned from a trip a few days earlier. Further insinuations were also made, and we know that drug trafficking is prohibited and there are international organisations dedicated to fighting against it. In such a situation, publishing such allegations is a serious matter. And when we press charges for an attack on the honour or reputation of a client, the journalists either plead the defence of truth, invoke good faith, or the necessity to protect their sources.”* Gustave Anani Cassa, lawyer and formerer Keeper of the Seals, Minister of Justice, Legislation and Human Rights

*“My health suffered as a result. My family and my children lived in constant fear of separation from me in the event of my imprisonment. On one occasion, my children returned from school in tears after having been designated by their friends as “the children of the woman who insulted the Head of State”. Some members of my family living abroad who learnt of the case through the media and believed that I was in prison travelled to Cotonou to offer their moral support to me.....*

*As the case discussed was unfolding, partners with whom we had advertising or other contracts, notably state-owned entities, made a point of writing to us requesting that we “defer for a certain period” the broadcast of their various messages and other announcements over our airwaves.” Berthe Cakpossa, director Canal 3 Benin on the effects of being charged for insulting the presidency and criminal defamation.*

*“I stayed behind bars for 71 days. The prison conditions were harsh. I was in a building holding 40 people, each with his own bed, but my journalist was in a different building holding 80 inmates. My private life suffered as a result because my business was no longer operational, and the turnover was dwindling. My wife was pregnant but I could not assist her during that period. She gave birth to our child a mere eight days after my release. However, the trial did not change anything in the way I was regarded by people around me. It also did not blemish my record as, not only was it not a common law offence, but the settlement agreed upon led to the nullification of the conviction.” Clément Adéchian, former editor-in-chief and now director L’ Informateur*

*“... during the 12 years that the Nouvelle Tribune has been in existence, we have been involved in four trials, only one of which we lost. Whenever we found ourselves in a difficult position, we had to negotiate. As for the legal costs, we paid them ourselves since the lawyers do not charge us high fees. But when it comes to fines, it would be difficult for us to pay 5,000,000 CFA francs (10,000 USD). By the way, in the event that we are sentenced to a fine of 10 or 20,000,000 CFA francs (20 to 40,000 USD), we may be forced to close down.” Vincent Foly, publisher of the daily newspaper La Nouvelle Tribune*

## *Interviewees*

Political commentator and vocal critic of government - Andoche Amègnissè

Opposition MP - Eric Houndété

MP and member of presidential grouping in parliament – asked to remain anonymous.

Minister of Communication and New Information and Communication Technology since 2013, Komi Koutché

Civil society activist who works with a wide range of advocacy groups, Joël Attayi-Guèdègbé

Jean-Baptiste Elias, President of the Front of National Anti-Corruption Organisations (FONAC) and former president of the Anti-Corruption Observatory

Sergeant in the Benin army

The Deputy Director General of the National Police, Inspector General Nazaire Hounnonkpè

Aline Odjè, a member of the Benin Bar

Gustave Anani Cassa, lawyer and formerer Keeper of the Seals, Minister of Justice, Legislation and Human Rights

Antoine-Marie Claret Bede, trial lawyer

Ulrich Gilbert Togbonon, a criminal court judge

Deputy public prosecutor in the Cotonou court of first instance

Clémentine Lokonon is a journalist at the National Television and head of the women;s wing at Union of Media Professionals of Benin

Hyacinthe-Ange Koudhorot journalist at the state-owned daily newspaper *La Nation*

Berthe Angèle Mensah Cakpossa, the director of the private television station *Canal 3 Benin* a former director of a state-owned media organ

Pierre Matchoudo, the Director General of the on-line newspaper Benin Actu

Clément Adéchian, manager and former editor-in-chief of newspaper, *L'Informateur*

A programme director in one of the most popular private radio stations

Vincent Foly, publisher of the daily newspaper *La Nouvelle Tribune*

Jean-Marie Sèdolo, publisher of the daily newspaper *La Presse du Jour*

Jérôme Carlos, founder of the private radio station **CAPP FM** based in Cotonou and in which he hosts a daily show

Yélian Quenum, founder of the daily newspaper Kini-Kini,

Clément Capo-Chichi, Executive Director of Amnesty International Benin

Landry Ganyè<sup>4</sup> of the NGO Human Rights, Peace and Development (DHPD)

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<sup>4</sup> Interviewed in August 2013.

Joël Dimitri Vihoundjè, a web user and moderator of the forum “Jeunes démocrates prompts (JDP)

Martin Assogba, President of the NGO “ALCRER” (Association for the Fight against Racism, Ethnocentrism and Regionalism)