

## Nigeria: Prohibitions on false news and criminal defamation should be repealed

ARTICLE 19 is concerned that several Nigerian laws regulations, adopted during and before the COVID-19 pandemic, fail to meet international human rights standards. In particular, prohibitions of dissemination of false news under certain circumstances contained in the Criminal Code, and Ebonyi State Coronavirus and Other Dangerous (Infectious) Diseases and Related Matters Law (No. 005) of 2020, are overbroad and have been used to suppress the reporting about the pandemic. ARTICLE 19 calls on the Nigerian Government to ensure that any legislation restricting freedom of expression is necessary and proportionate to the threat posed by the pandemic. Crucially, for the public to trust the government, transparency and accountability must be at the heart of any Government's response to the public health crisis.

### Background to the Nigerian laws

During the Covid-19 pandemic, Nigeria has sought to adopt new legislation to address the pandemic. The proposed [Control-of-Infectious-Diseases-Bill](#), adopted in the first and the second reading at the House of Representatives in April 2020, aimed to address shortcomings in Nigeria's National Quarantine Act of 2004 by granting extraordinary powers to the president and Ministry of Health. Based heavily on Singapore's controversial Infectious Disease Act of 1977, it included sections on expanded police powers, discretionary authority to conduct public health-related surveillance, and compulsory vaccinations with no mention of informed consent. It levies fines of up to 2 million Nigerian naira (about \$5,100 or £4,200) on violators, a steep increase from the 500-naira penalty imposed by the current law. The draft Bill was heavily criticised by human rights activists as well as a member of the Federal House of Representatives, for its draconian nature and for not meeting human rights standards, as set in the international and regional treaties and the Nigerian Constitution.

While the [Nigerian Criminal Code Act](#) was not specifically promulgated in response to the COVID-19 pandemic, it contains several provisions that have impacted the dissemination of information in Nigeria during COVID-19. These include provisions that criminalise defamation (Chapter 33) and the 'publication of false news with intent to cause fear and alarm to the public' (Section 59). The offences carry punishments of up to seven and three years imprisonment respectively, and the former has been used against journalists reporting on COVID-19.

Individual Nigerian states have been also making emergency laws and establishing executive orders ostensibly for ensuring social distancing and other safety measures in response to the pandemic. However, some of these laws and executive orders contain clauses that allow the local government to infringe on fundamental rights. For instance, the **Ebonyi State Coronavirus and Other Dangerous (Infectious) Diseases and Related Matters Law** (No. 005) of 2020, which came into force on 2 April 2020, also [criminalises](#) disseminating "false information" about COVID-19 as well as other infectious diseases. The Law is not publically available but it has been reported that it replicates the provisions of the Criminal Code on false news. Further, according to [information in the media](#), at least three other states—Anambra, Kano, and Lagos – have enacted similar legislation subsequently.

These laws also need to be seen in the context of a range of other laws – in particular the [Terrorism Law](#) or [Cybercrime Law](#) that [have been used](#) to suppress freedom of expression and media freedom.

## **Applicable international freedom of expression standards**

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR), and given legal force through Article 19 of the ICCPR. Moreover, freedom of expression is guaranteed in the African Charter on Human and Peoples' Rights and in the Declaration of Principles on Freedom of Expression in Africa.

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice. While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19(3) of the ICCPR, provided that the limitation meets a "three-part test." The UN Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States' compliance with the ICCPR, specified that this requires that any restrictions:

- **Be prescribed by law;**
- **Pursue a legitimate aim** listed in Article 19(3). The list of aims is an exhaustive one, and thus an interference that does not pursue one of those aims violates Article 19; and
- **Be necessary in a democratic society** to secure one of those aims. The word "necessary" has a specific meaning in this context. It means that there must be a "pressing social need" for the interference; that the reasons given by the State to justify the interference must be "relevant and sufficient" and that the State must demonstrate that the interference is proportionate to the aim pursued. The requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect.

The concept of 'false news' is not defined under international human rights law. Also, protecting persons from 'false news' is not, as such, a legitimate aim for justifying restrictions on the right to freedom of expression under Article 19(3) of the ICCPR. As four special mandates on freedom of expression cautioned in their 2017 [Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda](#), the label of 'fake news' is increasingly being used by persons in positions of power to denigrate and intimidate the media and independent voices, increasing the risk of such persons to threats of violence, and undermining public trust in the media.

An important point of principle remains that "the human right to impart information is not limited to 'correct statements', [and] that the right also protects information and ideas that may shock, offend or disturb." The four special mandates made clear that "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."

## **ARTICLE 19's comments on the Nigerian legislation**

### ***Criminal defamation***

Chapter 33 of the Criminal Code provides for the criminalisation of various forms of defamation. For instance, Section 375 stipulates that "any person who publishes any defamatory matter, is guilty of a misdemeanour and is liable to imprisonment for one year; and any person who publishes any defamatory matter knowing it to be false, is liable to imprisonment for two years."

ARTICLE 19 notes that laws that aim to protect the reputation of individuals pursue the legitimate aim of 'protecting the rights of others,' which is a legitimate aim under Article 19(3) of the ICCPR. Consistent with international human rights law and practice, ARTICLE 19 is of the view that defamation should not be punished through the application of criminal laws but rather should be subject only to civil or administrative sanctions. The three-part test stipulates all restrictions on freedom of expression must be proportionate to the harm done and not go beyond what is necessary for the particular circumstances. In general, a particular measure will not be regarded as necessary where a less restrictive means could be employed to achieve the same end or where the sanction itself is so overwhelming that it cannot be regarded as a proportionate response to the harm done. Criminal defamation provisions breach the guarantee of freedom of expression both because less restrictive means, such as the civil law, are adequate to redress the harm and because the sanctions they impose are not proportionate to the harm done.

Nigerian criminal defamation laws fail to pass muster in both respects. The criminal defamation regime, under which a person may be imprisoned for up to two years, is disproportionately harsh. It should be abolished in its entirety and replaced with an adequate civil regime for defamation. The existing civil regime is not sufficiently well-developed to pass the 'provided by law' hurdle set by Article 19(3) ICCPR, and it is also disproportionately harsh, for example by failing to provide adequate defences. It needs to be amended to clearly set out the tort of defamation, provide adequate defences, and ensure that any compensation that may be awarded is proportionate to the harm caused by the impugned publication.

### ***Publication of false news***

Section 59 of the Criminal Code prohibits the **publication of false news with intent to cause fear and alarm to the public**. It prohibits the publication or reproduction of "any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb public peace, knowing or having reason to believe that such statement, rumour or report is false." The offence carries a possibility of imprisonment for three years. Not knowing or not having reason to believe that the information is false is not a defence, unless the defendant proves that they "took reasonable measures to verify the accuracy of such statement, rumour or report." As noted above, these provisions have been reportedly replicated in the state laws.

ARTICLE 19 finds that these provisions do not meet the requirement of the three-part test. First, the provisions are overbroad and vague, contrary to the requirement that the restrictions are "provided by law." This requires that any regulation be formulated with sufficient precision to enable individuals to regulate their conduct accordingly. The scope of what it means for information to be 'false' is an entirely subjective one. It was precisely this type of subjectivity and its propensity for abuse that the freedom of expression mandates focused upon in their 2017 Joint Declaration when warning against the adoption of 'fake news' or disinformation laws.

This problem is exacerbated by the fact that the prohibitions also cover "reproductions" of false information. This widens the scope of the provisions of Section 59 of the Criminal Code and state laws not only to initial publishers of information but to anyone who redistributes that content. Therefore, simply clicking the 'share' button on a social media platform may subject individuals to criminal sanction under the Criminal Code.

Further, Section 59 of the Criminal Code and respective provisions of the state laws do not require intent to cause the particular harm (that is "fear and alarm to the public or [disturbing] the public peace"), nor the likelihood of that harm occurring as a direct consequence of the accused's act. In practice, this could mean the government itself could penalise criticism of the government. Importantly, public authorities should not be in charge of defining what is true and what is not as such

dictate of officially approved truthfulness could discretely lead any society towards authoritarian rule. In the case of COVID-19 related information, the national or local public authorities may also be lacking access to the ongoing research and most recent scientific developments at the international level to safely determine the ultimate truthfulness of virus-related information. Moreover, insituations like the one surrounding the COVID-19 virus, the lack of pre-existing relevant research and scientific studies resulted in official sources like the World Health Organisation (WHO) and leading scientists changing their opinion on certain pandemic-related issues over the course of its advancement.

Finally, ARTICLE 19 also finds the penalties (up to three years of imprisonment) stipulated in the provisions of Section 59 of the Criminal Code and respective provisions of the state laws manifestly disproportionate and contrary to the international freedom of expression standards and good practices.

These provisions also conflict with values important for the realisation of a democratic society. There are many forms of so-called 'false' information that are in the public interest. Artists may engage in satire and parody in order to convey important ideas. There are instances where false statements may need to be shared or repeated in order to provide commentary on them. The vagueness of the provisions of the Criminal Code and respective provisions of the state laws open them up to abuse by the public authorities to remove critical public commentary by simply labelling it as 'likely to cause fear or alarm.'

The lack of limitations undermines many important forms of social commentary during the COVID-19 pandemic, including newsgathering, discussion of scientific information, and other commentaries in the public interest. The punishment of individuals for unwittingly spreading false information casts a severe chilling effect on communication, impeding the type of information sharing that is needed to quickly identify and respond to a viral outbreak. Heavy-handed approaches to misinformation stifle the type of public reporting that can lead to early detection and effective mitigation efforts. These provisions can have a chilling effect on expression.

### ***Problematic enforcement of the legislation against the media***

ARTICLE 19 notes that the prohibitions of false information [have been already used](#) to suppress the work of the media. The Ebonyi State Coronavirus and Other Dangerous Infectious Diseases and Related Matters Law was cited in the arrest of a journalist with the Sun newspapers over a report he wrote. Chijioke Agwu, a correspondent of The Sun newspapers, was arrested in April 2020 for writing a story on Lassa fever which a state governor claimed violated the law. In a separate incident, also in April 2020, police in Ebonyi arrested Okutu, a reporter with the privately owned *Vanguard* newspaper, for his reporting on military activity in the state, claiming that the reporting was false and questioning him about his sources.

These two incidents show state legislation was being used indiscriminately to limit critical reporting.

### **Recommendations**

ARTICLE 19 calls on the Nigerian Government to urgently amend the legislation. Criminal defamation and false news prohibitions should be abolished. The Government should refrain from coercive approaches to countering disinformation in the context of an epidemic or pandemic. It is imperative that individuals feel empowered to raise concerns about the spread of COVID-19 or the response of authorities without fear of punishment if their concerns turn out to be unjustified.

Additionally, while extra measures may be undertaken to address a public health crisis, any government actions adopted to protect and improve public health and security situation are, by their nature, policy measures and as such, they should be open to public discussion and public scrutiny. As our societies are steadily grappling with the fact that the pandemic will be a long-term trial rather than a one-off short-term attack, it is essential for a functioning democracy to continuously scrutinise public health protection measures in a manner in which we normally ensure transparency of government decisions and accountability of public administration.

