

CHAPTER 9

MADAGASCAR





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MADAGASCAR KEY INDICATORS
<p style="text-align: center;">2023 WORLD PRESS FREEDOM RANKING: 34th globally; 4th out of 48 African countries</p> <p style="text-align: center;">“Despite a long media tradition going back more than 150 years, Madagascar’s media landscape is highly polarised and politicised, and heavily impacted by corruption.”</p>
<p>MALABO CONVENTION: NOT signatory or party</p>
<p>BUDAPEST CONVENTION: NOT signatory or party</p>
<p>CONSTITUTIONAL PROTECTION FOR FREEDOM OF EXPRESSION: Madagascar’s 2010 Constitution (in English)</p> <p>ARTICLE 10</p> <p>The freedoms of opinion and of expression, of communication, of the press, of association, of assembly, of circulation, of conscience and of religion are guaranteed to all and may only be limited by the respect for the freedoms and rights of others, and by the imperative of safeguarding the public order, the national dignity and the security of the State.</p> <p>ARTICLE 11</p> <p>Any individual has the right to information. Information under all its forms is not submitted to any prior constraint, except that which infringes the public order and the morality. The freedom of information, whatever the medium, is a right. The exercise of this right includes duties and responsibilities, and is submitted to certain formalities, conditions, or sanctions specified by the law, which are the measures necessary in a democratic society. All forms of censorship are prohibited. The law organizes the exercise of the profession of journalist.</p>
<p>KEY LAWS:</p> <ul style="list-style-type: none"> • Loi n°2014-006, as amended by Loi n°2016-031: La lutte contre la cybercriminalité • Loi n°2016-029, as amended by Loi n°2020-006: Code de la Communication Médiatisée • Code Pénal, Mis à jour au 31 mars 2005 (selected provisions)
<p>CRIMINAL DEFAMATION: Yes¹</p>

¹ “[Madagascar’s 3rd Universal Periodic Review, 34th Session \(Oct-Nov 2019\), Submission by Southern Africa Litigation Centre](#)”, paragraphs 12-17.



DATA PROTECTION: Madagascar has a law on data protection.²

ACCESS TO INFORMATION: Madagascar does not have a law on access to information³ although Article 11 of the Constitution (quoted above) guarantees the right to information.

THIS CHAPTER WAS PREPARED WITH THE AID OF VARIOUS ONLINE TRANSLATION TOOLS.

9.1 CONTEXT

Reporters Without Borders provides the following overview of the media sector:

Due to a high rate of illiteracy, radio is the main source of news. The state controls the public media, and state broadcasters RNM and TVM still tend to follow government communication directives. Privately owned radio stations can only broadcast by satellite. The mostly French-language written press remains confined to urban areas. Privately owned media outlets are politicised and polarised between those who support the government and those who support the opposition. This severely limits the availability of objective and independent reporting.

The state controls the public media and has the power to appoint or dismiss key officials. The stranglehold of politicians on the media undermines pluralism and journalistic freedom. It is common for media outlets to be controlled directly or indirectly by government ministers, parliamentarians and businessmen with close ties to politicians. The polarisation between pro-government and pro-opposition media is all-pervasive. No media outlet is politically independent.

The precariousness of Madagascar's media has had disastrous consequences on their independence and the quality of their reporting. The level of media concentration creates dominant positions and both the current president and communication minister head a media group. [...] Very low salaries leave journalists vulnerable to corruption, including the widespread practice of "felaka" (an envelope with a few banknotes given by the organisers of the event to journalists covering it). It is not uncommon for journalists to take on odd jobs and to find themselves in a conflict of interest as a result of working for politicians. Journalists tend to censor themselves mainly to comply with the editorial line imposed by the politician who owns the media outlet they work for, or to comply with a ban on criticising advertisers.⁴

The US State Department's 2002 Report on Human Rights Practices also notes the tendency towards self-censorship, and the influence of the business and political interests of the owners of media outlets. It observes that organizers of official events often invited only state-owned or pro-government media outlets to attend, and that

² Law No. 2014-038 relating to protection of personal data (Malagasy Data Protection Law). A summary of the law in English can be found [here](#).

³ "Republic of Madagascar", IMF Country Report No. 23/117, March 2023, paragraph 35.

⁴ "2023 World Press Freedom Index: Madagascar", Reporters Without Borders.



state broadcasters allegedly received unwritten orders from the minister of communication regarding the content that may be aired.⁵

The African Media Barometer 2021 states that although Madagascar has ratified and domesticated most of the regional and international instruments on freedom of expression and press freedom, it does not necessarily enforce them.⁶

The key legal framework for the communications sector is contained in **Law no. 2016-029: Code of Media Communication**, adopted in 2016 and amended in 2020 by **Law no. 2020-006**.⁷ The 2020 amendments were intended to be a response to some of the criticisms of media practitioners.

Several aspects of both the original 2016 law and the 2020 amendments were declared unconstitutional by the High Constitutional Court.⁸ In terms of the Constitution, all laws must be submitted by the President to the High Constitutional Court, which decides on their conformity with the Constitution. A provision judged to be unconstitutional may not be brought into force.⁹ The Court's opinion on the original 2016 law is discussed in some detail in the section on the Constitution below, because its discussion in that case defined the parameters of constitutional the right to freedom of expression in general terms. Its opinion on the 2020 amendments was less detailed since it made reference to the 2016 opinion on many issues. (Note that some of the findings of the Court in both of these judgements concern matters of detail that are not relevant to this discussion and are therefore not discussed here.)

This law covers communications that take place through written, audiovisual or electronic media, as well as speeches in public places and posters or announcements displayed to the public. This includes radio and television broadcasting, cinema, telecommunications and social media.¹⁰ However, the High Constitutional Court found that the definition of “online press and digital communication” needed clarification because the law should not combine “online press”, which refers to articles published by journalists, with “digital communication” which could encompass communications by ordinary citizens in many different forms for many different purposes. It directed a change of wording that would essentially separate professional and non-professional activities.¹¹

⁵ “[2022 Country Reports on Human Rights Practices: Madagascar](#)”, US State Department, section 2A. Similarly, BTI states: “In practice, the media are free to publish a variety of opinions, but the government does not hesitate to call them to order if it considers them to have overstepped their role. This means they are often subject to interference or government restrictions, and some journalists consequently practice self-censorship.” “[Madagascar Country Report 2022](#)”, BTI Transformation Index, Bertelsmann Stiftung, 2022.

⁶ “[African Media Barometer: Madagascar 2016](#)”, Media Institute of Southern Africa (MISA) and Friedrich Ebert Stiftung (FES), page 6.

⁷ [Loi n°2016-029 du 14 juillet 2016](#): Code de la Communication Médiatisée, often referred to simply as the “Communications Code”. It was amended by [Loi n°2020-006](#): portant modification de certaines dispositions de la Loi n° 2016-029 du 24 août 2016 portant Code de la Communication Médiatisée. The 2020 amendments also changed the date of the original law in its title. [Loi n°2020-006](#), Article 1 on the amendment of the law's title: L'intitulé de la Loi n°2016-029 du 14 juillet 2016 sus visée est modifié comme suit : «**Loi n°2016-029 du 24 août 2016** portant Code de la communication Médiatisée».

⁸ [Décision no 30-HCC/D3 du 12 août 2016 relative à la loi no 2016-029 portant Code de la communication médiatisée](#), 12 August 2016; [Décision n°13-HCC/D3 du 31 août 2020 relative à la loi n°2020-006 portant](#), 31 August 2020.

⁹ [Madagascar's 2010 Constitution](#), Article 117.

¹⁰ [Loi n°2016-029](#), Article 1 (see definitions of “media communications”, “audiovisual communications” and “communications”) and Article 2.

¹¹ [Décision n°13-HCC/D3 du 31 août 2020 relative à la loi n°2020-006 portant](#), paragraphs 13-14.



The law **reiterates the constitutional rights to freedom of expression and information**,¹² with the provisions on these basic principles having been generally strengthened in respect of their application to the press by the 2020 amendments:

ARTICLE 5 NEW: *The right to freedom of expression is a universal, inviolable and unalterable right, guaranteed by article 11 of the Constitution which is exercised in accordance with the provisions of the International Covenant of Civil and Political Rights, other conventions relating thereto, adopted by the State. It is the right to seek, receive and freely communicate information and opinions regardless of the media used.*

It focuses on political discourse, commentary on public affairs, electoral propaganda, debate on human rights, journalism, cultural and artistic expression, teaching and religious discourse. It deals with commercial advertising.

The press has the mandate, in complete freedom and independence of mind, to express all opinions and report all events or facts likely to interest the public and contribute to its education, subject to the provisions of Articles 15 to 31 of this law [on the media-related offences].

No one may limit the freedom of exchange of information which could hinder access to information or infringe the right of citizens to free, pluralistic and transparent information.

ARTICLE 7 NEW: *No journalist may be impeded, denied access to sources of information, or harassed in any way whatsoever in the regular exercise of his mission as a journalist. The journalist has the right of access to all sources of information, including data and statistics. The journalist has the right to obtain information without hindrance on all facts of public interest.*

The conditions, methods and procedures relating to access to the administrative documents of public bodies will be defined by regulation.

*However, the publication of in camera debates, reports or any other document kept or drawn up within the Institutions of the Republic is prohibited.*¹³

One problematic feature here is the prohibition on publication of government documents in the new Article 7.¹⁴ The High Constitutional Court found that this provision violated the right to information in the Constitution as well as Madagascar's international commitments and held that it must be removed.¹⁵

Another issue identified by the High Constitutional Court as being unacceptable was the reference to subjecting the right of access to information on conditions and procedures established by *regulation*; it held that the Constitution requires that limits on any of the fundamental rights must be expressly set by law and not contained in a regulatory act, holding that the phrase "by regulation" must be replaced with the phrase "by legislative means".¹⁶

¹² [Loi n°2016-029](#), Articles 5-8.

¹³ [Loi n°2016-029](#), Article 5 new and Article 7 new.

¹⁴ In French: "Toutefois, est interdite la publication des débats à huis clos, des rapports ou tout autre document tenus ou établis au sein des Institutions de la République."

¹⁵ [Décision n°13-HCC/D3 du 31 août 2020 relative à la loi n°2020-006 portant](#), paragraph 12.

¹⁶ *Id.*, paragraph 11.



The law also establishes the regulatory body, the **National Authority for the Regulation of Media Communication or ANRCM** (“Autorité Nationale de Régulation de la Communication Médiatisée”).¹⁷ After the 2020 amendments, ANRCM has 13 members, with more specificity of membership than in the original law, to ensure a wider diversity of representation:

- one representative of the Ministry in charge of Communication;
- one representative of the Ministry in charge of Culture;
- one representative of the Ministry in charge of Telecommunications;
- one representative of the Order of Journalists of Madagascar;
- one magistrate elected by the Superior Council of the Judiciary;
- one representative of national television;
- one representative of the national radio;
- one representative of private radio stations;
- one representative of private television stations;
- one representative of the written press;
- one representative of a civil society platform working in the field of human rights;
- one representative of an online press organ recognized by the Order of Journalists of Madagascar;
- one representative of the advertising sector.¹⁸

The law does not say exactly how these members will be appointed, but provides that the organization and functioning of ANRCM will be set out in a decree issued by the Council of Ministers.¹⁹ ANRCM'S functions including regulating media activities and arbitrating disputes that arise from media such activities, including the handing of complaints from members of the public.²⁰ Initially, the ministry responsible for communications was still responsible for granting and withdrawing operating licences,²¹ but this responsibility was passed to ANRCM as a result of the 2020 amendments.²² The 2020 changes removed the word “independent” from the description of ANRCM, but this was found to be unacceptable by the High Constitutional Court, which reiterated its finding about the original 2016 law, where it stated that ANRCM must be able to take measures “in complete freedom and sheltered from all instructions and pressure”, and receive “neither orders nor instructions from the government”, as well as being independent of both political power and the power of players in the media communications sector.²³

However, as of May 2023, ANRCM had reportedly not yet been established, due to the fact that the Decree governing its operation has not yet been issued. Its functions are being carried out by the ministries of communication and culture. The leader of

¹⁷ Id, Article 51.

¹⁸ [Loi n°2020-006](#), Article 52 new.

¹⁹ Id, Article 53 new.

²⁰ Id, Articles 51bis new.

²¹ [Loi n°2016-029](#), Article 49, prior to the 2020 amendments.

²² [Loi n°2020-006](#), Article 51bis new.

²³ [Décision n°13-HCC/D3 du 31 août 2020 relative à la loi n°2020-006 portant](#), paragraph 15, referring to [Décision no 30-HCC/D3 du 12 août 2016 relative à la loi no 2016-029 portant Code de la communication médiatisée](#), paragraph 53.



the opposition party Malagasy Miara Miainga (MMM) has called for this issue to be addressed as the country heads towards the 2023 elections.²⁴

Private radio and television broadcasters must be licenced - including those that broadcast on the internet.²⁵ **Public broadcasters** are subject to a few duties set out in the law. The Madagascar Radio and Television Office (ORTM) is the state broadcaster. It includes TVM (the national television channel) and RNM (the national radio). ORTM is not independent, being administered by a Board composed entirely of public officials.²⁶ **Film production and dissemination** both require prior authorisation from the relevant ministries.²⁷ **Print media outlets** do not require licensing or prior authorisation, but must provide a declaration to the Public Prosecutor that includes identifying details of the publication director (including information on his or her criminal record) and the printer.²⁸ The same applies to **online press** that is produced on a professional basis.²⁹

The professional online press must also employ at least one professional journalist legally registered on the roll of the Order of Journalists (explained below), and provide ANCRM and the ministry responsible for communication with the digital identifier of the site or online medium as well as of its administrator. Online press organs must also maintain a digital archive for a minimum of three months, of which the ministry in charge of communication is “an executor by right”. On the personal contribution spaces of Internet users (ie the space for comments on published articles), the publisher must implement appropriate measures to fight against illegal content, including a mechanism that allows anyone to report the presence of such content, upon which the publisher must remove them promptly or make access impossible. The online press also has a duty (amongst others) to ensure that the content they publish “must not be likely to shock the Internet user by a representation of the human person undermining his dignity and decency or presenting violence in a favourable light”³⁰ More broadly, **Internet access providers and any other online service providers** have a duty to verify the content of the sites they host and to notify ANCRM of any illegal activity or content that they discover. They must also collect information on the identity and contact details of customers and website owners.³¹

The Code on Media Communication does not appear to restrict the exercise of journalism, but it establishes a category of professional journalists who must meet

²⁴ Frederic Ange Toure, “[In Madagascar, criticizing the president can be expensive](#)”, *Le Journal de Afrique*, 31 March 2023; “[Liberté de presse: la mise en place de l’ANRCM sollicitée](#)”, *Newsmada*, 5 mai 2023.

²⁵ [Loi n°2016-029](#), Article 121, as amended by [Loi n°2020-006](#).

²⁶ [Loi n°2016-029](#), Articles 157-168; “[African Media Barometer: Madagascar 2016](#)”, Media Institute of Southern Africa (MISA) and Friedrich Ebert Stiftung (FES), page 37. The Board is established by a ministerial order.

²⁷ [Loi n°2020-006](#), Article 194 new; [Loi n°2016-029](#), Article 198.

²⁸ [Loi n°2020-006](#), Article 100 new. Identifying information must also appear on every press publication. [Loi n°2016-029](#), Article 102.

²⁹ [Loi n°2020-006](#), Article 174bis new; [Loi n°2016-029](#), Article 175 as amended by [Loi n°2020-006](#).

³⁰ [Loi n°2020-006](#), Article 74bis new. This article defines “online press” as “any communication service to the public on digital media published on a professional basis by a natural or legal person who has editorial control of its content, consisting of the production and making available to the public of ‘original content, of general interest, regularly renewed, composed of information presenting a link with current events and having been the subject of treatment of a journalistic nature, which does not constitute a promotional tool or an accessory of an industrial or commercial activity”.

³¹ [Loi n°2016-029](#), Article 176: “Le fournisseur d’accès internet et tout autre prestataire de service en ligne a le devoir de vérifier le contenu des sites qu’il héberge. Il notifie l’Autorité Nationale de Régulation des Communications Médiatisées de toute activité ou contenu illicite dont il a connaissance. A défaut de notification immédiate, il est sanctionné par une peine d’amende de 1.000.000 à 3.000.000 Ariary. Les clients d’un hébergeur ou les propriétaires de site web doivent lui fournir leur identité réelle et leurs coordonnées exactes.”



certain requirements to obtain a professional identity card issued by a Commission within the **Order of Journalists of Madagascar (OJM)**. The OJM is a body of journalists with a statutory duty to regulate the profession and “act as a guardian of the rules of ethics and professional conduct of the profession”. However, it cannot be described as a purely self-regulatory body; the law requires that the Commission which issues professional credentials to journalists must be composed of an equal number of government officials, journalists and representatives of employers' organizations in the media sector. The law also states that the organization and functions of the OJM will be set by regulation.³²

A “**professional journalist**” is a person “whose main and regular occupation is to seek facts from sources and communicate them by appropriate means to the public”, and who earns most of his or her income from this occupation. This category includes reporter photographers, reporter cameramen, reporter sound recordists and editors amongst others. To receive a professional identity card from the Order of Journalists, a person must hold a diploma or other qualification from a recognised journalism training institution and must have worked as a professional journalist for at least three years.³³

The 2020 amendments sought to give the OJM “a right of control” over all the activities of professional journalists who hold professional cards;³⁴ however the High Constitutional Court found that this was too broad, since the right to freedom of expression can be restricted only by law and only on limited grounds and any form of censorship is prohibited. Thus, this “right of control” must be qualified.³⁵

The law lists the **duties and obligations of a journalist**:

The duties of the journalist:

- Respect the facts, whatever the consequences for themselves, because of the public's right to know the truth;
- Only publish information whose origin, veracity and accuracy are established. Otherwise, accompany them with the necessary reservations;
- Not to delete essential information and not to alter words, texts and documents;
- Defend, in all places and all circumstances, the freedom to inform, comment and criticize, taking scruples and concern for justice as the first rule in the honest publication of his information;
- Not to use unfair methods to obtain information, photographs or documents, nor to confuse its role with that of a police officer;
- Never confuse the profession of journalist with that of an advertiser or propagandist;
- Do not accept any direct or indirect instructions from advertisers, or administrative or political authorities.

³² [Loi n°2016-029](#), Article 53; [Loi n°2020-006](#), Articles 54bis new, 54b new, 54c new, 55 new.

³³ [Loi n°2020-006](#), Article 54 new, read with [Loi n°2016-029](#), Article 1 (definition 30).

³⁴ [Loi n°2020-006](#), Article 56bis new.

³⁵ [Décision n°13-HCC/D3 du 31 août 2020 relative à la loi n°2020-006 portant](#), paragraphs 18-21.



- Refuse any benefit in cash or in kind, regardless of the value and the provenance, for services rendered or expected;
- Refuse any pressure and only accept editorial directives from those in charge of the editorial staff. Assume full responsibility for all writings.
- Never reveal the circumstances in which the journalist became aware of the facts he is reporting, for the protection of the source of the information collected;
- Refrain from any violation of social ethics: incitement to tribalism, xenophobia, revolt, crimes and offences; contempt of good morals, apology for crimes, war crimes and crimes against humanity;
- Respect people's privacy. The human right to protection of reputation and integrity must be respected. Avoid posting information that violates privacy;
- Rectify any published information that proves to be inaccurate;
- Recognize only the jurisdiction of his sovereign peers in matters of professional honour.

The obligations of the journalist:

- The journalist verifies the accuracy of his information;
- He keeps sound or visual recordings, in particular to provide proof of what is reported;
- The journalist distinguishes between facts and comments;
- The journalist, in the collection, processing and dissemination of information must act with the maximum possible objectivity;
- The journalist must, in all circumstances, and whatever his own personal convictions, act in his soul and conscience, with honesty;
- The journalist must keep his editorial independence and resist political, social or financial pressures likely to influence his rigor in the treatment of information. He does not accept directives other than those responsible for his editorial staff, his morals or his personal ethics when working alone.
- The journalist informs people who are unfamiliar with the press that their remarks may be broadcast and therefore brought to the attention of a large public;
- The journalist refrains from any plagiarism and quotes the colleagues from whom he takes the information;
- The journalist signs the photos illustrating his article or clearly refers to their source.³⁶

Violation of any of these duties and obligations is grounds for disciplinary action by the OJM.

There are also **other breaches that may warrant disciplinary action:**

- Harmful imputations, personal attacks or insinuations malicious towards a citizen, a group of citizens, an association or a professional body;
- Insulting or outrageous words towards a citizen, a group of citizens, an association or a professional body;

³⁶ [Loi n°2016-029](#), Article 58.



- Defamation which damages the honour of a person;
- The call to disturb public order;
- Publications contrary to modesty and good morals;
- Dissemination of obscene, licentious or pornographic images, photographs, publications or illustrations;
- The publication of false information;
- Unauthorized publications compromising the general interest;
- Failure to sign publications or the use of false names;
- Non-compliance with specified requirements;
- Violations of ethics and fair access to public service media;
- Invasion of the privacy of any citizen.³⁷

Possible sanctions following a disciplinary action include warnings, temporary suspension or delisting, notwithstanding the application of the other penalties provided for in the law.³⁸

It should also be noted that there are detailed requirements and procedures for a **right of reply and rectification** when a media communication directly damages a person's honour or reputation or reports inaccurately.³⁹

The law provides **a degree of protection for journalists' sources**. Both journalists and editorial staff have the right to withhold the identity of their informants as well as any information, recordings and documents that might make it possible to identify the informants. However, the identity of a source can be demanded by a judicial authority if three conditions are all met:

- it is likely to prevent the commission of a serious offence constituting a serious threat to the physical integrity of one or more persons; and
- the information requested is of crucial importance to prevent the commission of these offences; and
- the information requested cannot be obtained in any other manner.⁴⁰

Another potentially helpful provision, at least in theory, states "Any aggression committed by any natural or legal person, by the public authorities, by the police against journalists or a reporting team or a radio and television station that is detrimental to their **working materials and equipment**, is liable to prosecution and sanctions in accordance with the provisions of the Penal Code." This provision also prohibits the alteration and destruction of any data contained in these items.⁴¹

One controversial aspect of the Code on Media Communications concerns its **offences**. According to the Explanatory Memorandum that accompanies the Code, it was aimed at "decriminalization", not in the sense of removing offences, but rather through the replacement of custodial sentences with fines – although other offences

³⁷ Id, Article 59. The final point on privacy is also discussed in Article 60, which says: "Every journalist claims free access to all sources of information and the right to investigate freely on all the facts which condition public life. The secret of public or private affairs may, in this case, be revealed to the journalist only by way of exception and by virtue of clearly expressed reasons."

³⁸ Id, Article 59.

³⁹ Id, Articles 70-ff.

⁴⁰ Id, Articles 9-12.

⁴¹ Id, Article 69.



will continue to be governed by the common law, the Penal Code or other specific legal provisions.⁴² The Law in some instances cross-references offences in the Penal Code and provides detail about how they are to be applied in respect of communications media.⁴³ Criminal offences relevant to freedom of expression are discussed below in section 9.4 in combination with specific cybercrime offences.

The original 2016 legislation was strongly criticized by journalists and international media organizations. In fact, before it was passed by National Assembly, 45 media outlets aired special information programs in a continuous loop to raise public awareness of its potentially harmful effects. Key complaints were the vagueness of some provisions and the excessive fines for some offences aimed at journalists.⁴⁴ The 2020 amendments, even though they aimed to respond to the demands of media practitioners, were also not viewed as being sufficient to correct the deficiencies, with some fines having increased as imprisonment was removed.⁴⁵

In terms of **Law no. 2005-023** on institutional reform of the telecommunications sector, the **Regulatory Authority of Communication Technologies (ARTEC)** regulates **telecommunications networks** and ensures compliance with regulations in the telecommunications sector. Its Board of Directors is established by a Decree of the Council of Ministers.⁴⁶

9.2 CONSTITUTION

In **Article 10 of the Constitution** (quoted on the first page of this chapter), the grounds for limiting freedom of expression, communication and the press are broadly worded: “respect for the freedoms and rights of others” and “safeguarding the public order, the national dignity and the security of the State”. There is no mention of necessity or proportionality, nor any requirement that limitations may be imposed only by law – although Article 7 does state that the exercise of the individual rights and fundamental freedoms guaranteed by the Constitution is organized by the law.⁴⁷

In its 2016 **decision on the constitutionality of the Communications Code**, the High Constitutional Court of Madagascar provided some general observations about the import of Article 10. It stated that “freedom of expression and communication represents an important constitutional achievement, all the more precious since its exercise is a condition of democracy and constitutes one of the essential guarantees of respect for other rights and freedoms as well as national sovereignty”, as well as contributing to respect for the rule of law. The Court also stated that Article 10 encompasses the right to information and the reception of information, and appears

⁴² Id, Explanatory Memorandum on the first page of the law.

⁴³ Id, Articles 15, 18, 26-27 and 33, for example.

⁴⁴ “[Madagascar: Controversial Mass Media Code Approved](#)”, Library of Congress, 9 September 2016 (references omitted).

⁴⁵ [African Media Barometer: Madagascar 2016](#)”, Media Institute of Southern Africa (MISA) and Friedrich Ebert Stiftung (FES), page 6.

⁴⁶ [Loi n°2005-023](#): portant refonte de la loi n°96-034 du 27 janvier 1997 portant Réforme institutionnelle du secteur des Télécommunications (revising law no. 96-034 of January 27, 1997 on institutional reform of the telecommunications sector). ARTEC replaced the Malagasy Office for the Study and Regulation of Telecommunications (OMERT) as of 1 April 2015. “[Madagascar Telecommunications](#)”, Logistics Cluster, 2022.

⁴⁷ [Constitution de la Quatrième République](#): “Article 7.- Les droits individuels et les libertés fondamentales sont garantis par la Constitution et leur exercice est organisé par la loi.”



in many respects, “to be one of the most important foundations of a democratic society”.⁴⁸ Moreover, the Court stated that, given the widespread use of online communication services, and the resulting importance that such communications have in democratic life and the expression of idea and opinions, the freedom of expression and communication guaranteed by Article 10 of the Constitution “implies freedom of access to the internet”.⁴⁹

The Court also stated that the limitations clause in Article 10 “emphasizes that these freedoms are neither general nor absolute and must be reconciled with other constitutional requirements”⁵⁰ – but noted that any interference with their exercise must be necessary, appropriate and proportionate to an objective of general interest. Limitations on these rights must also be imposed by a law with general applicability and must correspond to measures that are necessary in a democratic society and justified by an imperative social need.⁵¹ Furthermore, considering that freedom of information must be balanced against the notion of public order, democratic standards require that “the notion of public order must be interpreted restrictively”.⁵² Also, when offences implicate freedom of expression, the “sanctions should never be so severe as to hinder the exercise of the right to freedom of expression” or to deter others from exercising this right.⁵³

Against this background, the Court analysed several provisions of the Communications Code against the Constitution and, subject to some conditions, upheld all but a portion of Article 6:⁵⁴

ARTICLE 6.- *Information in all its forms is not subject to any prior constraint, except where it would undermine public order and good morals.*

*Freedom of information, whatever the medium, is a right. The exercise of this right entails duties and responsibilities and is subject to certain formalities, conditions, or penalties provided for by the laws and regulations in force, which constitute necessary measures in a democratic society.*⁵⁵

⁴⁸ [Décision no 30-HCC/D3 du 12 août 2016 relative à la loi no 2016-029 portant Code de la communication médiatisée](#), paragraph 15.

⁴⁹ Id, paragraph 14.

⁵⁰ Id, paragraph 16.

⁵¹ Id, paragraphs 20-21.

⁵² Id, paragraph 30.

⁵³ Id, paragraph 60.

⁵⁴ The Court explicitly confirmed the constitutionality of the first paragraph of Article 6, provided that public order is interpreted narrowly. It also withheld several other articles, subject to some conditions, including the last paragraph of Article 7 (regarding the limitation of right of access to information by means of conditions, terms and procedures defined by a specific text. provided that these are set by law.), the first paragraph of Article 20 (invasion of privacy) and its reiteration in Article 59, Article 30 (false news), Article 44 (the Ministry’s power to permanently close a media company or suspend a journalist for repeated violation of the Code, on the condition that this power is exercised constitutionally), Article 51 (on guarantees for the independence of ANRCM), Article 85 (requiring that a publication director must be the owner or majority shareholder or legal representative of the media entity), Article 157 (on the obligations of public service radio and television, subject to the condition of political neutrality and the obligation to provide a diversity of views), the differentiated penalties for different offences under the Code and several provisions restricting the broadcast of advertisements for private non-commercial radio and television advertisements in the public interest.

⁵⁵ “**Article 6.-** L’information sous toutes ses formes n’est soumise à aucune contrainte préalable, sauf celle portant atteinte à l’ordre public et aux bonnes mœurs.

La liberté d’information, quel qu’en soit le support, est un droit. L’exercice de ce droit comporte des devoirs et des responsabilités et est soumis à certaines formalités, conditions, ou sanctions prévues par les textes législatifs et réglementaires en vigueur, lesquelles constituent des mesures nécessaires dans une société démocratique.”



With respect to the second paragraph of Article 6, the Court found that the phrase “formalities, conditions and penalties for exercising the right to freedom of information” should be clarified and that specific legislative and regulatory texts should be listed. It held that greater precision was necessary to satisfy the constitutional value of the accessibility and intelligibility of the law, and to protect against applications that could be contrary to the Constitution.⁵⁶

The constitutional right to freedom of expression and its limitations have thus been interpreted in a manner that is consistent with international treaties on this topic, but this understanding is not always applied in practice. According to Freedom House, although the Constitution provides for freedom of the press, this guarantee “has been undermined by criminal libel laws and other restrictions, as well as safety risks involved in the investigation of sensitive subjects such as cattle rustling and the illicit extraction and sale of natural resources”.⁵⁷

9.3 CASE STUDIES

According to Reporters without Borders: “Journalists are sometimes publicly verbally attacked by politicians or are victims of smear campaigns on social media. Physical attacks are very rare. Sometimes it is the journalists who have been won over to the government’s cause who launch verbal attacks on their colleagues who do not share the same political opinion.”⁵⁸

In March 2023, the offices of a publication critical of the President, *La Gazette de la Grande Île*, were **raided**. Fernando Cello, who has had his own run-ins with government authorities and is now the vice-president of the Federation of Journalists’ Associations of Madagascar, identifies this media outlet – reportedly the only one not affiliated with a political party – as also being the only one that denounces injustice and dares to criticize the President and the government. Cello is convinced that the State is behind the intrusion. The owner of the magazine, Lôla Rasoamaharo, was arrested shortly before the raid for charges related to **attempted extortion, defamation, threats and insults** as well as facing a complaint of being in **arrears with water and electricity payments**, in what some view as “judicial harassment”.⁵⁹

In February 2022, a prominent opposition figure Mahery Lanto Manandafy was arrested on charges of **“spreading false information”** and **“insulting an institution”** in connection with a Facebook post alleging that the construction of a bridge was structurally flawed. He was given a six-month suspended prison sentence. In September 2022, he was arrested again on similar charges combined with a charge of **defamation**, after a post on his Facebook page denouncing a foreign national for providing ammunition to cattle rustlers in collaboration with a member of the President’s staff. He was placed in pre-trial detention and was reportedly still being

⁵⁶ [Décision no 30-HCC/D3 du 12 août 2016 relative à la loi no 2016-029 portant Code de la communication médiatisée](#), paragraphs 24-28.

⁵⁷ “[Freedom in the World 2023: Madagascar](#)”, Freedom House, section D1.

⁵⁸ “[2023 World Press Freedom: Madagascar](#)”, Reporters Without Borders, “Safety”.

⁵⁹ Frederic Ange Toure, “[In Madagascar, criticizing the president can be expensive](#)”, *Le Journal de Afrique*, 31 March 2023.



held in custody at the end of 2022.⁶⁰ Press reports indicate that he was summoned by the police cybercrime unit in connection with these charges, so they were likely brought under Article 20 of the cybercrime law which criminalises insult or defamation of government institutions.⁶¹

In March 2022, police arrested teacher Jeannot Randriamanana for defamation after he posted information on Facebook about irregularities in the distribution of food supplies after cyclone disasters in his region. He was sentenced to two years in prison for **defamation** and the **humiliation of Members of Parliament and civil servants**. His appeal against the conviction was unsuccessful, but his prison sentence was suspended, and he was released.⁶² Reports of this incident did not cite the statutory instrument that was the basis for the charge, but it sounds likely that it was Article 20 of the cybercrime law which criminalises insult or defamation of members of Parliament.⁶³

In May 2022, the local newspaper *La Gazette* reported that a Member of Parliament made a **death threat** against one of its journalists in connection with a specific article alleging that he had attempted to use his influence to expropriate land. *La Gazette* stated that this was the second time that this MP had threatened one of their journalists and reported that family members of its journalists had also received threats.⁶⁴

Also in May 2022, the police cybercrime unit summoned opposition municipal counsellors Lily Rafaralahy and Clemence Raharinirina for investigation, acting on a complaint of **defamation** after they stated that the mayor was a stakeholder in a company that would soon manage the capital city's parking lots. They were convicted and ordered to pay a fine.⁶⁵ This also probably involved **Article 20 of the cybercrime law**, which covers **insult and defamation of various government authorities and institutions**.⁶⁶

In July 2022, Mendrika Razafimahefa was arrested by presidential guards for making a “thumbs down” sign as the presidential motorcade drove by. He was released after several days in custody, and eventually given a one-month suspended prison sentence for a **traffic violation**, based on allegations that he had refused to give way to the motorcade as well as making the negative gesture.⁶⁷

In July 2022, two opposition leaders, Rina Randriamasinoro and Jean-Claude Rakotonirina, were arrested on charges of **“inciting hatred and public unrest”** during a protest by hundreds of people against rising living costs and deteriorating economic

⁶⁰ “Freedom in the World 2023: Madagascar”, Freedom House, section B1; “2022 Country Reports on Human Rights Practices: Madagascar”, US State Department, section 2A.

⁶¹ [Loi n°2014-006](#), as amended by [Loi n°2016-031](#), which contains a new Article 20.

⁶² “2022 Country Reports on Human Rights Practices: Madagascar”, US State Department, section 2A.

⁶³ [Loi n°2014-006](#), as amended by [Loi n°2016-031](#), which contains a new Article 20.

⁶⁴ “2022 Country Reports on Human Rights Practices: Madagascar”, US State Department, section 2A.

⁶⁵ *Id.*

⁶⁶ [Loi n°2014-006](#), as amended by [Loi n°2016-031](#), which contains a new Article 20.

⁶⁷ “2022 Country Reports on Human Rights Practices: Madagascar”, US State Department, section 2A.



conditions in the capital city of Antananarivo. Most of the organisers of the protest were affiliated with opposition parties.⁶⁸

In August 2022, a Malagasy citizen who worked as a driver at the country's UNESCO office in Paris after he published a photograph on social media suggesting that the President received special privileges allowing him to check an overweight bag on the airline. The driver was repatriated to Madagascar after the incident and arrested on charges of **infringement of the life and security of the President and his family**, the **disclosure of confidential information considered to be a state secret**, **offence to the fulfilment of a state mission** and **defamation**.⁶⁹

In February 2021, the president of the National Assembly 'reminded' opposition members of Parliament that, since parliamentary immunity did not apply to statements made by Members of Parliament in public or through the media, they could be sued for such statements. She indicated that this message was in response to the complaints from ministries, politicians, and ordinary citizens regarding the actions of some Members of Parliament.⁷⁰

Also in February 2021, in the town of Ankilimanilike, two journalists from a local private radio station were **detained by community leaders, with the support of the local authorities**. The community falsely accused the journalists of spreading false news reports concerning the disappearance of children in the area. The journalists were **forced to pay a ransom to secure their release** after three days of detention, with their release being secured with the help of advocacy by members of the regional journalists' association.⁷¹

In May 2021, the union of journalists reported that security forces **forced journalists** from the *Tia Tanindrazana* newspaper and the MBS TV channel **to delete images on their cameras that could discredit the government**.⁷²

In June 2021, the police cybercrime division summoned Ravo Nambinina Rasoamanana, for a hearing on charges of **spreading false news** and **defamation** in connection with a Facebook page about anomalies in the management of public funds within the Ministry of Public Health, where he was previously employed. The charge appears to have been based on **Article 92 of the Penal Code**.⁷³

Another 2021 incident involved France 24 correspondent and Pulitzer Prize-winning Malagasy journalist Gaelle Borgia. She was "the target of a **smear campaign** by high-ranking politicians and government officials on social media after she filmed and published a documentary showing persons in the southern region of the country cooking and eating cowhides from scraps of shoes due to local famine conditions". The governor of the region issued a statement accusing Borgia of spreading **false news**. The state-

⁶⁸ "[Madagascar bans public protests ahead of presidential election](#)", *Aljazeera*, 3 April 2023; "[Freedom in the World 2023: Madagascar](#)", Freedom House, section B1.

⁶⁹ "[2022 Country Reports on Human Rights Practices: Madagascar](#)", US State Department, section 2A.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* "A court notice published in September [2021] indicated that he was accused of acts that may compromise public security, lead to serious political trouble, or incite hatred of the government or infringement of the laws." This describes Article 91 of the Penal Code.



owned television channel TVM later published interviews with persons who said that the journalist bribed them into being filmed eating shoes – but then Norgia aired a video a few days later in which the same individuals reported that they had been coerced through threats of violence to speak against Borgia.⁷⁴

In April 2020, the publishing director of the newspaper *Ny Valosoa Vaovao*, Arphine Helisoa, was arrested in April 2020 for **disseminating false news** and **inciting hatred of the President**, in violation of **Article 91 of the Penal Code** after the newspaper published a report critical of the government's response to Covid-19.⁷⁵

The 2019 “Helicopter Case” involved the publication of photographs of a helicopter flying over the Mahamasina Municipal Stadium. Following a complaint filed by the Malagasy Army, the journalists who published the photo were charged under **Article 20 of the cybercrime law**, which makes it an offence to **insult or defame the armed forces**. They were convicted and fined.⁷⁶

One case with many components involved investigative journalist Fernand Cello of *Radio Jupiter*. In August 2016, the local power company turned off *Radio Jupiter*'s power supply after Cello, whose real name is Avimana Fernand, accused it on the air of colluding with Ilakaka's mayor to cheat consumers. The power company justified this move on the grounds of “*defamation of the electricity supply company*” and “*disrespect and contempt towards the authorities.*” In December 2016, Cello exposed the existence of an illegal sapphire mine in Ilakaka run by Gondwana, a mining company owned by government allies. The army raided *Radio Jupiter* and confiscated its transmitter after that story aired, and Cello went into hiding for several months after receiving death threats. On 21 April, the ministry of mining ordered Gondwana to suspend operations for contravening the mining code, and Cello came out of hiding. Cello was then arrested and charged with **defamation**, “**spreading false news**”, “**inciting hatred**”, “**endangering state security**”, “**malicious allegations**” and “**verbal death threats**”. An additional charge of **stealing a cheque** was filed against him by an executive of the power company that was implicated in the August 2016 story. After four and a half months in provisional detention, Cello was convicted on the cheque-stealing charge and given a suspended sentence of two year's imprisonment along with a stiff fine. He was acquitted on appeal in 2019, but reportedly still faced charges of defamation, malicious allegations and verbal death threats under the Penal Code.⁷⁷

Looking at the role of **social media** in particular, journalists and others have citizens faced police investigation and prosecution for defamation and infringement of public order in response to posting criticism of government performance and public services on

⁷⁴ Id.

⁷⁵ “[LEXOTA Country Analysis: Madagascar](#)”, last updated July 2022; “[Madagascar journalist Arphine Helisoa jailed on false news, incitement allegation](#)”, Committee to Protect Journalists, 22 April 2020.

⁷⁶ [African Media Barometer: Madagascar 2016](#)”, Media Institute of Southern Africa (MISA) and Friedrich Ebert Stiftung (FES), page 12 (footnotes omitted); [Loi n°2014-006](#), as amended by [Loi n°2016-031](#), which contains a new Article 20.

⁷⁷ “[Madagascar: municipal authorities short-circuit overly critical radio station](#)”, Reporters Without Borders, 9 August 2016; “[Madagascar goes after Jupiter](#)”, IFEX, 10 May 2017; “[Journalist freed after receiving suspended sentence](#)”, Reporters Without Borders, 28 September 2017; “[Southern Africa: Media freedom muzzled as journalists are targeted for telling the truth](#)”, Amnesty International, 3 May 2019. Note that the Amnesty International source states that Cello spent two years in jail, while Reporters Without Borders and IFEX refer to a suspended sentence of two years.



social media.⁷⁸ And, when it comes to social media, there are accusations that the government has used it to sow biased views and disinformation. The Media Institute of Southern Africa (MISA) reports that, late in 2021, some of the highest authorities in Madagascar were accused of financing troll farms for this purpose.⁷⁹

9.4 CYBERCRIME LEGISLATION AND OTHER LEGAL PROVISIONS RELEVANT TO FREEDOM OF EXPRESSION

A) LAW NO. 2014-006 ON THE FIGHT AGAINST CYBERCRIME (AS AMENDED)

Madagascar's cybercrime law is **Law no. 2014-006 on the fight against cybercrime**⁸⁰ as amended by **Law no 2016-031**.⁸¹ The law defines "cybercrime" as "any illegal act committed by means of a computer system or network or any other physical network connected or in relation to an information system".⁸²

It contains three chapters: (1) crimes related to information systems; (2) attacks on individuals through information systems, and (3) responsibilities of operators and service providers. Amongst other things, this law criminalises online defamation and spreading 'false information'. Freedom House reports that these offences have been applied in practice against social media users.⁸³

In the tables below, titles have been added for ease of reference. The provisions in the cybercrime law do not have titles.

LAW NO. 2014-006 ON THE FIGHT AGAINST CYBERCRIME (AS AMENDED) - TECHNICAL OFFENCES	
Article 6 read with Article 3: Fraudulent access	It is an offence to access all or part of an information system intentionally, without legitimate excuse or justification, or beyond a legitimate excuse or justification. This offence is punishable only by a fine. The possibility of imprisonment is added for fraudulent access that damages, erases, deteriorates, modifies, alters or deletes computer data contained in the system, or hinders or alters the operation of all or part of the system. <ul style="list-style-type: none"> o The provision of the possibility of a legitimate excuse is a positive element.
Article 4 read with Article 4:	It is an offence to remain connected to a computer system or a part of an information system of information, or to continue to use an information system, intentionally, without legitimate excuse or a higher justification. This

⁷⁸ "2022 Country Reports on Human Rights Practices: Madagascar", US State Department, section 2A.

⁷⁹ Lizette Feris, "The State of Media and Information Literacy in Southern Africa", *The State of Press Freedom in Southern Africa 2020-2021*, Media Institute of Southern Africa, page 65, citing "Facebook 'troll farms' play outsized role in Madagascar's politics", France 24, 5 October 2021. A "troll farm" refers to a body that employs people to make deliberately offensive, provocative or false online posts to cause conflict, discredit certain individuals or institutions or manipulate public opinion.

⁸⁰ [Loi n°2014-006 du 17 juillet 2014](#): sur la lutte contre la cybercriminalité.

⁸¹ [Loi n°2016-031 du 14 juillet 2016 et du 15 juillet 2016](#): modifiant et complétant certaines dispositions de la loi n°2014-006 du 17 juillet 2014 sur la lutte contre la cybercriminalité. The amending law provides a new section 20 and also provides for regulatory texts to be adopted, as necessary, for the application of the law.

⁸² [Loi n°2014-006](#): Article 1.

⁸³ "Freedom in the World 2023: Madagascar", Freedom House, section D4.



Fraudulent remaining	<p>offence is punishable only by a fine. The possibility of imprisonment is added for fraudulent remaining that damages, erases, deteriorates, modifies, alters or deletes computer data contained in the system, or hinders or alters the operation of all or part of the system.</p> <ul style="list-style-type: none"> o It has been asserted that "illegal-remaining" offences are unnecessary because they are covered by the offence of unauthorized access.⁸⁴
Article 7: Fraudulent data interference	It is an offence to fraudulently introduce, damage, erase, deteriorate, modify, alter or delete computer data, or to act fraudulently in such a way as to modify or delete a method of data processing or transmission.
Article 8: Fraudulent use of computer data	It is an offence to fraudulently use computer data that is deliberately damaged, erased, deteriorated, modified or altered.
Article 9: Computer-related forgery	It is an offence to fraudulently introduce, alter, erase or delete computer data, to generate non-authentic data, with the intention that the data be taken into account or used for legal purposes as if it were authentic, whether or not the data is directly legible and intelligible.
Article 12 read with Article 11: Breach of integrity of an information system	<p>It is an offence to fraudulently hinder or alter the operation of all or part of an information system.</p> <p>Altering the operation of an information system means any action that distorts the operation of an information system to make it produce a result other than that for which it is normally designed and used.</p> <p>Hindering the operation of an information system means any action having the effect, object or purpose of paralyzing an information system by the introduction, transmission, damage, deletion, modification, alteration or deletion of computer data.</p>
Article 13: Fraudulent data interception	It is an offence to fraudulently intercept computer data by technical means, during non-public transmissions, to, from or within an information system. This includes the interception of electromagnetic emissions from an information system that are transporting such computer data.
Article 14: Fraudulent devices	<p>It is an offence to fraudulently produce, import, hold, offer, transfer, distribute or make available -</p> <ul style="list-style-type: none"> • equipment or a device, including a computer program or any data, that is designed or adapted mainly to enable the commission of one or more of the offences provided for in Articles 3, 4, 7, 8, 11 and 12; • a password, an access code or similar computer data allowing access to all or part of an information system to commit one or more of the offences provided for in Articles 3, 4, 7, 8, 11 and 12. <p>This offence is punishable by the same penalties as the offence for which it was used or intended to enable.</p> <p>It is not an offence where the prohibited acts were <i>not</i> carried out for the purposes of the offences referred to, such as in the case of authorized testing, research or protection of an information system.</p>

⁸⁴ [Assessing Cybercrime Laws from a Human Rights Perspective](#), Global Partners Digital, [2022], page 14.



	<ul style="list-style-type: none"> o The required intention helps to narrow the offence appropriately.
Article 15: Computer-related fraud	<p>It is an offence to cause a loss of property to another person, with the intention of obtaining a benefit without right, by -</p> <ul style="list-style-type: none"> • entering, altering, erasing or deleting computer data; • any form of interference with the operation of an information system. <ul style="list-style-type: none"> o The required intention helps to narrow the offence appropriately.

Conspiracy and **aiding or abetting** the crimes set out in Articles 3, 4, 7, 8 and 11 are also criminalised.⁸⁵

Looking at **penalties**, access that does not cause any damage to data is punishable only by a fine. All of the other technical offences are punishable by imprisonment and a fine, *or by one of these penalties only*. In other words, imprisonment is not an inevitable consequence of conviction on any of the technical offences. In contrast, most of the content-based offences are punishable by a minimum term of imprisonment *and* a fine.

LAW NO. 2014-006 ON THE FIGHT AGAINST CYBERCRIME (AS AMENDED) - CONTENT-BASED OFFENCES

Articles 16-18: Threats for purposes of extortion	<p>It is an offence to use a computer or electronic medium to transmit a threat of assassination, poisoning or any other attack against persons that would constitute a serious crime for the purpose of ordering the person in question to deposit a sum of money in a specified place or to fulfil any other condition. This applies to any crime that is punishable by death, life imprisonment with hard labour, or deportation.</p> <p>If the threat is made by means of anonymous or signed writing, image, symbol or emblem, the minimum penalty is two years' imprisonment and a fine (Article 16).</p> <p>If the threat is made verbally ("<i>verbale</i>"), the minimum penalty is six months' imprisonment and a fine (Article 17).</p> <p>If the threat is made against a person or a group of persons on the grounds of origin, sex, ethnicity, nationality, race or religion, real or supposed, the minimum penalty is two years' imprisonment and a fine, regardless of the form the threat took (Article 18).</p> <p>In any of these cases, the culprit may be deported ("<i>l'interdiction de séjour</i>") (Article 18).</p> <ul style="list-style-type: none"> o The prohibited grounds set out here for the imposition of enhanced penalties do <i>not</i> include disability, even though disability is part of the similar list under Article 20. o This offence overlaps to some extent with Articles 305-308 of the Penal Code.⁸⁶
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⁸⁵ [Loi n°2014-006](#), Article 10.

⁸⁶ [Code Pénal. Mis à jour au 31 mars 2005](#) (as amended to 31 March 2005). There have been some subsequent amendments on trafficking in persons that do not affect the provisions discussed in this chapter.



<p>Article 19: Identity offence</p>	<p>It is an offence to knowingly usurp the identity of any natural or legal person on a computer or electronic medium, with a view to disturbing the tranquillity of the person being impersonated or someone else, or to undermine the honour of the person being impersonated or that person's reputation with others. The minimum penalty is six months' imprisonment and a fine.</p> <ul style="list-style-type: none"> ○ Impersonation on its own, without the required intention, is not an offence.
<p>Article 20: as replaced in 2016;⁸⁷ Insult or defamation</p>	<p>Insult or defamation is an offence.</p> <p>Where this offence is committed against constituted bodies, courts, tribunals, armed forces, public administrations, members of the Government, Parliamentarians, public officials, depositaries or agents of public authority, citizens charged with a public service or mandate, assessors or witnesses by reason of their depositions. This applies when the insult or defamation is made by means of –</p> <ul style="list-style-type: none"> • speeches, cries or threats uttered in public places or meetings • by writings, printed matter, drawings, engravings, paintings, emblems, images or other conveyance of writing, words or images that are sold, distributed, put for sale or exhibited in public places or meetings; • by placards or posters exposed to public view; or • by means of a computer or electronic medium, <p>The penalty is a fine of 2 million to 100 million Ariary.</p> <p>Where the insult is committed against any individual through a computer or electronic medium, and not preceded by provocation, the penalty is a fine of 100 000 to 10 million Ariary. Where this form of the offence is committed against a person or a group of persons on the grounds of origin, sex, disability, ethnicity, nationality, race or specific religion, the penalty is a fine of 2 million to 100 million Ariary. In the event of a conviction for an insult in either of these two categories, the court may order the display or dissemination of its decision.</p> <ul style="list-style-type: none"> ○ Note that many of the means of communication on the list of means of insulting or defaming public figures or bodies do <i>not</i> involve cyber communication at all, which is odd in cybercrime law. ○ The provision on public figures and bodies refers to both "insult and defamation" by a range of means of communication, while the provision on other individuals refers only to "insult" through a computer or electronic medium. ○ Note that the option of requiring dissemination of the court's conviction does not apply to the insult or defamation of public officials and entities. ○ The amendment of Article 20 removed prison sentences for the offences of insult or defamation, but the fines that can be imposed in the amended version are stiff. ○ According to Reporters without Borders, "the law's failure to define what is meant by 'insult' or 'defamation' leaves room for very broad interpretation and major abuses."⁸⁸

⁸⁷ [Loi n°2016-031](#), which amended [Loi n°2014-006](#), contains a new Article 20.

⁸⁸ "2022 Country Reports on Human Rights Practices: Madagascar", US State Department, section 2A. The original source is not indicated.



	<ul style="list-style-type: none"> ○ This provision overlaps with Articles 23 and 24 of the Code on Media Communications.⁸⁹
Article 21: Genocide and crimes against humanity	<p>It is an offence to use a computer or other electronic medium to disseminate or otherwise make available to the public material that denies, grossly minimizes, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law. The minimum penalty is six months' imprisonment and a fine.</p>
Article 22: Child pornography	<p>It is an offence to fix, record, produce, procure or transmit an image or representation of a child which is of a pornographic nature, with a view to its distribution by means of a computer or electronic medium. The minimum offence is two years' imprisonment and a fine. Attempt to do this is punishable by the same penalties.</p> <p>It is also an offence, punishable by the same penalties to offer or disseminate such an image or representation, by means of a computer or electronic medium, or to import or export it.</p> <p>It is also an offence to –</p> <ul style="list-style-type: none"> • habitually consult an online public communication service that makes such images or representations available; or • possess such an image or representation in any form whatsoever. <p>The minimum offence is two years' imprisonment and a fine.</p> <p>The penalties for child pornography offences are increased when the child involved is under age 15.</p> <ul style="list-style-type: none"> ○ "Child pornography" is defined in this section 3 to mean "any representation, by any means whatsoever, of a child engaging in explicit, real or simulated sexual activities or any representation of the sexual organs of a child, primarily for sexual purposes. ○ "Child" means a person under the age of 18. ○ "Online public communication service" means "any transmission of digital data not having the character of private correspondence, by an electronic communication process using the Internet network allowing a reciprocal or non-reciprocal exchange of information between the issuer and the receiver". ○ These offences also apply to pornographic images of a person who appears to be a minor, unless it is established that the person was at least age 18 on the day the image was fixed or recorded. ○ "Pornographic image" includes – <ul style="list-style-type: none"> ○ the image or representation of a minor engaging in sexually explicit behaviour ○ the image or representation of a person who appears to be a minor engaging in sexually explicit behaviour ○ the realistic image representing a minor engaging in sexually explicit behaviour, with "realistic image" referring in particular to the altered image of a natural person created in whole or in part by digital methods. ○ There is no defence for materials with a genuine artistic, educational, legal, medical, scientific or public benefit purpose.

⁸⁹ [Loi n°2014-006](#), Articles 23 and 24 (discussed below).



	<ul style="list-style-type: none"> o This offence overlaps with Article 346 of the Penal Code⁹⁰ and Articles 18 and 146 of the Code on Media Communications.⁹¹
<p>Article 23: Using a computer or other electronic medium in aid of debauchery, corruption or child prostitution to satisfy the passions of others</p>	<p>It is an offence to use a computer or other electronic medium to attack morals, by exciting, favouring or facilitating debauchery, corruption or child prostitution (involving children of either sex) to satisfy the passions of others, punishable by hard labour, in two situations:</p> <ul style="list-style-type: none"> • when the acts are committed in teaching or educational establishments or in the premises of the administration, or in the vicinity of these establishments or premises during the entrances or exits of pupils or the public or in a time very close to these (punishable by hard labour for a specified period); or • when the acts have been committed in an organized gang (punishable by hard labour for life). <hr/> <p>Art.23.- Quiconque aura attenté aux mœurs, par l'utilisation d'un support informatique ou électronique, en excitant, favorisant ou facilitant, pour satisfaire les passions d'autrui, la débauche, la corruption ou la prostitution enfantine de l'un ou de l'autre sexe, est puni des travaux forcés à temps, dans chacun des deux cas suivants :</p> <p>1° Lorsque les faits sont commis dans des établissements d'enseignement ou d'éducation ou dans des locaux de l'administration, ainsi que, lors des entrées ou sorties des élèves ou du public ou dans un temps très voisin de celles-ci, aux abords de ces établissements ou locaux;</p> <p>2° Lorsque les faits ont été commis en bande organisée, les coupables seront punis des travaux forcés à perpétuité.</p> <hr/> <ul style="list-style-type: none"> o Cybercrime law appears to provide heavier penalties in certain circumstances, where the means of communication used is a computer or other electronic medium. The circumstances articulated seem somewhat unclear but could refer to using such media in the places described to display violence or pornographic material. The lack of clarity could be a problem of translation, so the original text is quoted above. o Even in the original French, broad terms such “<i>la débauche</i>” and “<i>la corruption</i>” are not defined. Note that “<i>debauchery</i>” may encompass same-sex conduct.⁹² o This offence overlaps with Article 346 of the Penal Code. The Penal Code covers messages of a violent or pornographic nature or of a nature to seriously undermine human dignity, in any circumstance where the message is likely to be seen by a minor. The minimum penalty

⁹⁰ [Code Pénal. Mis à jour au 31 mars 2005](#) (as amended to 31 March 2005), Article 346: It is an offence to fix, record or transmit the image of a minor, with a view to its dissemination, when this image presents a pornographic character. The minimum offence is two years' imprisonment and a fine. The penalties are increased when the child involved is under age 15.

⁹¹ [Loi n°2014-006](#), Article 18: The import, distribution, export, production, publication, exhibition and sale of pornographic materials involving children are punishable by the penalties provided for in Article 346 of the Penal Code. Article 146: All production, filming and distribution of cinematographic work of a child pornography nature or incitement to debauchery in any form of violence are prohibited. Any breach of this provision is liable to the penalties provided for in the various laws in force and the confiscation of the materials used in the commission of the offence.

⁹² See “[2021 Country Reports on Human Rights Practices: Madagascar](#)”, US State Department, section 6: “The Ministry of Interior ordered the cancellation of an evening event that members of the LGBTIQ+ community organized in an Antananarivo bar for July 3 to celebrate Pride Month. The event had taken place in the same location during previous years. Authorities cancelled the event because they claimed it was an incitement to **debauchery** and **offense to morals**.”



	<p>is two years' imprisonment and a fine. The Penal Code offence also provides that where the means used to communicate the message is the written or audiovisual press, the specific provisions of the laws which govern those matters are applicable as regards the determination of the persons responsible. This appears to refer to Article 146 of the Code on Media Communications.⁹³</p>
Article 24: Grooming	<p>It is an offence for an adult to use an electronic means of communication to make sexual proposals to a minor or to a person presenting himself as a minor. The minimum penalty is two years' imprisonment and a fine. The minimum period of imprisonment is increased to five years when the proposals were followed by a meeting.</p>
Article 25: Racist and xenophobic material	<p>It is an offence to manufacture, transport, disseminate by any means and via any medium, a message of a violent or pornographic nature, of a racist or xenophobic nature, or of a nature that seriously violates human dignity, or to trade in such a message, <i>when this message is likely to be seen or perceived by a minor</i>. The minimum punishment is two years' imprisonment and a fine.</p> <p>Where the offences provided for in Article 346 of the Penal Code or in this Article are committed by means of communication to the general public online, the specific provisions of the laws which govern these matters are applicable.</p> <ul style="list-style-type: none"> ○ The prohibited materials are not defined in this law and are worded in a very broad fashion. ○ It is not clear how a person would ascertain if the message "is likely to be seen or perceived by a minor".

B) LAW NO. 2014-006 ON THE CODE ON MEDIA COMMUNICATIONS (AS AMENDED)

The content-based cybercrime offences need to be read together with the offences in the Code on Media Communications.⁹⁴

CODE ON MEDIA COMMUNICATIONS – KEY CONTENT-BASED OFFENCES	
Article 19: Prohibited publication	<p>The unauthorized publication of debates <i>in camera</i>, reports or any other document held by or drawn up within the institutions of government that could compromise public order or national security is prohibited. Whether or not material falls within this category is to be assessment by the courts. The penalty is a fine.</p>
Article 20: as replaced in 2020, ⁹⁵ read with	<p>The "right to image" is the right for any person to oppose both the capture of his image and his property and the dissemination thereof, without his prior and express consent. The right to image and private life relates to the</p>

⁹³ [Loi n°2014-006](#), Article 146: All production, filming and distribution of cinematographic work of a child pornography nature or incitement to debauchery in any form of violence are prohibited. Any breach of this provision is liable to the penalties provided for in the various laws in force and the confiscation of the materials used in the commission of the offence.

⁹⁴ Id, as amended by [Loi n°2020-006](#).

⁹⁵ [Loi n°2020-006](#), Article 20 new.



<p>Articles 21-22: Right to image and invasion of privacy</p>	<p>protection against any attack on the right to the name, the image, the voice, privacy, honour, reputation, state of health, sentimental life, reputation, religious practice, family relationships, and everything that relates to a person's intimate and personal sphere.</p> <p>There are exceptions:</p> <ul style="list-style-type: none"> • The image and/or private life of a person and their property may be captured and disseminated, without their prior and express consent where the person in question is linked to a historical event or a current event, under the principle of citizens' right to legitimate information subject to respect for the dignity of the human person and the respect due to the deceased; • There is no breach of privacy when the acts were carried out in full view of the interested parties without their opposing them when they had an opportunity to do so. • Although a journalist must refrain from infringing on the privacy of individuals, even when these individuals assume political functions or roles, the journalist can reveal information when this compromises public morals if the public interest justifies it. • Consent for use of an image is not required when the image is public information.⁹⁶ • Any image taken, published or broadcast in the context of any public event, including official ceremonies, sports meetings and shows of all kinds does not constitute an infringement of image rights. <p>The disclosure of the intimate private life of a person is an invasion of privacy in these circumstances:</p> <ul style="list-style-type: none"> • the capture, recording, storage, transmission or publication, without the consent of their author, of spoken words, images, photos or videos that were made on a private or confidential basis; • the publication, by any means whatsoever, of a montage made with the words or the image of a person, without his consent, if it is not obvious that it is a montage. <p>Any invasion of privacy committed by one of the means listed above is punishable by a fine of 1 million to 6 million Ariary, without prejudice to the application of Law No. 2014-006 on cybercrime.</p> <p>In the event of violations of privacy and image rights, a judge may also order:</p> <ul style="list-style-type: none"> • seizure or sequestration of the publication, deletion of contentious passages or publication of an insert; • ordering the offender to pay damages, whether it is a television channel, a press magazine, a photographer, or an unknown person; • the removal of illegal content, in particular videos, photographs, or any other medium involved in the infringement; • the return of any original photographs; • the prohibition of the rebroadcasting of disputed content; • the publication or insertion of the court decision in the press.
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⁹⁶ "Pour l'information du public, le consentement du sujet n'est pas requis".



	<ul style="list-style-type: none"> o Given the broad protection for privacy, it would likely be difficult for a journalist to anticipate in advance when a publication that would violate the right to image or privacy would be justified in the "public interest". o It has been asserted that, despite the amendments to this provision, it still acts as a "sword of Damocles" hanging over the heads of social media users", because of the heavy fines involved, with some worrying that even publishing satirical or parodic images might result in exorbitant fines.⁹⁷
<p>Article 23 read with Article 25: Defamation</p>	<p>Any allegation or public imputation of an incorrect fact which undermines the honour or esteem of a person, or the presumption of innocence which a person enjoys before final conviction of an offence, or a body to which the fact is imputed, constitutes defamation where it results in personal and direct harm to the person or body concerned.</p> <hr/> <p>Toute allégation ou imputation publique d'un fait incorrect qui porte atteinte à l'honneur ou à la considération d'une personne, à la présomption d'innocence dont elle bénéficie avant toute condamnation définitive, ou d'un corps auquel le fait est imputé constitue une diffamation à condition qu'il en résulte un préjudice personnel et direct à la personne ou au corps visé.</p> <hr/> <p>Both direct publication and republication are punishable as defamation, even if it is reported in doubtful form or even if it targets a person or a body not expressly named, but who can be identified by other clues.</p> <p>The penalty is a minimum fine of 1 million Ariary. The maximum fine is higher where the defamation was made against the State, a State institution, a court, a tribunal or the armed forces.</p> <p>Defamation can be committed against the memory of a deceased person if committed with the intention of attacking the honour or reputation of the deceased's heirs.</p>
<p>Article 24 read with Article 25: Insult</p>	<p>Any offensive expression, terms of contempt or invective uttered against a person that does not involve an imputation of fact but does constitute an insult is an offence.</p> <hr/> <p>Toute expression outrageante, termes de mépris ou invectives qui ne renferment l'imputation d'aucun fait et proférés contre une personne, constitue une injure.</p> <hr/> <p>The penalty is a fine of 1 million to 2 million Ariary, with a higher fine applicable in cases where the insult incites discrimination, hatred or violence against a person or a group of people on the basis of nationality, origin, race or religion.</p> <p>Insult can be committed against the memory of a deceased person if committed with the intention of attacking the honour or reputation of the deceased's heirs.</p>

⁹⁷ [African Media Barometer: Madagascar 2016](#)", Media Institute of Southern Africa (MISA) and Friedrich Ebert Stiftung (FES), page 6.



<p>Article 26: Incitement</p>	<p>It is an offence to use media communication -</p> <ul style="list-style-type: none"> • to incite hatred between genders or religions; • to incite violence, murder, attack on bodily integrity, xenophobia or discrimination • to glorify crimes, war crimes and crimes against humanity, or • to undermine morality and the integrity of the national territory; or • to jeopardize national unity. <p>The penalties are as provided in the Penal Code, but no specific provisions are referenced.</p> <p>○ This crime is widely-worded, which could contribute to subjective application.</p>
<p>Article 27: Incitement to crime</p>	<p>It is an offence to use a wide range of means, explicitly including electronic publications, to incite someone to commit a crime, regardless of whether or not the crime actually takes place. The penalties are as provided in the Penal Code, but no specific provisions are referenced.</p>
<p>Article 28: Provocation of armed forces</p>	<p>It is an offence to provoke members of the armed forces, to divert them from their duties and from the obedience they owe to their commanders in the execution of the laws and regulations that govern them. The penalty is a fine.</p>
<p>Article 29: Provoking collective refusal of tax</p>	<p>It is an offence to use communications or other means to organize or attempt to organize the collective refusal of tax. The penalty is a fine.</p>
<p>Article 30: as replaced in 2020:⁹⁸ (1) Publication of false information (2) Hindering public holiday celebrations (3) Publications that affect public finance</p>	<p>It is an offence to deliberately publish, disseminate or produce by any means whatsoever false information, or material where parts or facts have been doctored, altered, falsified or falsely attributed to third parties, where such information or material has misled the public or disturbed public order. The penalty is a fine ranging from 5 million to 10 million Ariary. The same applies when the publication, distribution or reproduction is likely to shake the discipline or the morale of the armed forces or to hinder civil peace.</p> <hr/> <p>La publication, la diffusion ou la production de manière délibérée par quelque moyen que ce soit d'informations mensongères, de pièces ou faits trafiqués, altérés, falsifiés ou mensongèrement attribués à des tiers et laquelle aura induit le public en erreur, troublé l'ordre public, est punie d'une amende de 5 000 000 à 10 000 000 d'Ariary.</p> <p>Les mêmes faits sont punis de la même peine lorsque la publication, la diffusion ou la reproduction faite est de nature à ébranler la discipline ou le moral des armées ou à entraver la paix civile.</p> <hr/> <p>The same penalty applies to any hindrance by any means whatsoever to the celebration of national holidays or any incitement, by any audiovisual medium, to abstain from participating in national holiday celebrations, whether or not this incitement has been followed by effect.</p> <hr/> <p>The penalty applies to a publication, distribution or republication that is likely to undermine public confidence in the soundness of the currency, to cause withdrawals of funds from public coffers or establishments required</p>

⁹⁸ [Loi n°2020-006](#), Article 30 new.



	<p>by law to make payments to public funds, to incite the public to sell public securities or effects, or to divert them from the purchase or subscription of these securities or effects, whether or not these allegations or provocations have been followed by results.</p> <ul style="list-style-type: none"> ○ “It is not clear how to determine whether information is “false” or the scope of something that is likely to undermine the discipline or the morale of armed forces, obstruct civil peace; undermine public confidence in the strength of currency, or cause withdrawals of public funds. Article 30 therefore fails to provide clear guidance for individuals and provides an overly wide degree of discretion to those charged with the enforcement of this law.”⁹⁹ ○ Journalists have criticized the high fine imposed for any interference in the celebration of national holidays.¹⁰⁰
<p>Article 31: Outrage against public decency</p>	<p>It is an offence to outrage public decency (“l’outrage aux bonnes moeurs”) by means of media communications, or through any exhibition of drawings, engravings, paintings, emblems or obscene images via any audiovisual medium. The penalty is a fine ranging from 2 million to 5 million Ariary.</p> <ul style="list-style-type: none"> ○ This is another vague prohibition.

With respect to liability under the Code on Media Communications, Article 32 provides that responsibility falls first on the director of the publication, then on the editor-in-chief, then on the author of the publication. The Code also provides a number of procedural directives in relation to criminal offences, particularly for prosecution for defamation and insult.¹⁰¹

In the case of a conviction for any offence under the Code, the judge can order permanent confiscation of any equipment used in the commission of the offence.¹⁰² Also of particular note is that this law authorises the suspension of programmes or sections of a publication, or in the case of a repeat offence, permanent closure of the media outlet altogether and/or the removal of the journalist involved in the offences.¹⁰³ Concerns have been cited about these far-reaching powers to suspend media licenses and seize the property of media outlets for as few as two infractions of the law.¹⁰⁴ It has also been pointed out that, in effect, the law allows the authorities to close media outlets or ban programmes deemed likely to disturb public order.¹⁰⁵

According to CIVICUS, the adjudication of the provisions of this law that affect expression is also cause for concern; CIVICUS states that “the Code of Media Communications Law imposes heavy fines for offences such as contempt, defamation and insult against a government official. In addition, flaws in the criminal justice system allow the judiciary to rule under the influence of the executive. Pre-trial

⁹⁹ “[LEXOTA Country Analysis: Madagascar](#)”, last updated July 2022.

¹⁰⁰ “[Madagascar: Controversial Mass Media Code Approved](#)”, Library of Congress, 9 September 2016 (references omitted).

¹⁰¹ [Loi n°2014-006](#), Articles 36-46.

¹⁰² Id, Article 43.

¹⁰³ Id, Articles 44-45

¹⁰⁴ “[2022 Country Reports on Human Rights Practices: Madagascar](#)”, US State Department, section 2A.

¹⁰⁵ “[2023 World Press Freedom Index: Madagascar](#)”, Reporters Without Borders, “Legal Framework”.



detention including of human rights defenders and journalists is prevalent and used as a strategy to force them to self-censor."¹⁰⁶

While both the cybercrime law and the Code on Media Communications remove custodial sentences for most content-based crimes, they still criminalise and impose heavy fines for defamation, insult and other similar crimes. The crimes of insult and defamation in the cybercrime law appear to be even more onerous than their counterparts in the Code on Media Communications, in their formulation and in the higher maximum fines that can be imposed.

According to the Southern Africa Litigation Centre: "These laws have a chilling effect on journalists', human rights defenders' and every citizen's freedom of expression. It will raise incidents of self-censorship for those who fear heavy fines and other punishments. This law poses a great risk to freedom of expression which is protected by Article 10 of the Constitution of Madagascar and Article 19 of the ICCPR [International Covenant on Civil and Political Rights]."¹⁰⁷

C) OFFENCES RELATING TO EXPRESSION IN THE PENAL CODE

Another provision that is used in practice to stifle free expression is **Article 91 of the Penal Code**, which criminalises acts likely to compromise public security, cause serious political disturbances, provoke hatred of the Malagasy Government or infringe the laws of the country. This crime is punishable by imprisonment for at least one year and at most five years – a significant point since other provisions on defamation and insult are now punishable only by fines. According to LEXOTA:

Article 91 of the Penal Code broadly criminalises any acts that are likely to compromise public security, cause serious political unrest, or provoke hatred of the government. It is unclear what types of statements would be included within the scope of this provision, or what threshold would need to be reached for an act to be likely to compromise public security, cause serious political unrest, or provoke hatred of the government. Article 91 has been used to restrict and punish those critical of the government under the guise of false news.¹⁰⁸

¹⁰⁶ "[Madagascar: Journalist acquitted but severe civic space restrictions persist](#)", CIVICUS, 13 March 2020.

¹⁰⁷ "[Madagascar's 3rd Universal Periodic Review, 34th Session \(Oct-Nov 2019\), Submission by Southern Africa Litigation Centre](#)" March 2019, paragraph 16.

¹⁰⁸ "[LEXOTA Country Analysis: Madagascar](#)", last updated July 2022.

**CODE PENAL, ARTICLE 91**

[...] Les autres manoeuvres et actes de nature à compromettre la sécurité publique ou à occasionner des troubles politiques graves, à provoquer la haine du Gouvernement malgache, à enfreindre les lois du pays, seront déférés aux tribunaux correctionnels et punis d'un emprisonnement d'un an au moins et de cinq ans au plus. [...]

PENAL CODE, ARTICLE 91

[...] Other manoeuvres and acts likely to compromise public security or to cause serious political unrest, to provoke hatred of the Malagasy Government or to infringe the laws of the country, will be referred to the criminal courts and punished by imprisonment for at least one year and at most five years. [...]

D) INVESTIGATION TOOLS AND STATE SURVEILLANCE

In terms of procedure, the **Law on the Fight against Cybercrime** provides that **service providers can be ordered not to erase or anonymous certain technical data for a period of up to one year**, for the purposes of criminal investigation or for the provision of information to the judiciary. The categories of data covered, and the duration of their conservation may be set by decree. The data covered by these provisions relates exclusively to the identification of the persons using the services in question, the technical characteristics of the communications and location information; the law forbids the application of such **preservation orders** to the content of the correspondence exchanged or the information consulted. Service providers otherwise have a legal duty to erase or anonymise all traffic data.¹⁰⁹

Anyone with knowledge of a **secret agreement for the decryption of encrypted communications**, made for purposes of preparing, facilitating or committing an offence, also commits a crime if they refuse to provide this information to appropriate authorities.¹¹⁰

The **Code on Media Communications** states that investigation measures such as excavations, searches, seizures, telephone tapping and recordings that attempt to uncover **journalists' sources** are permitted only where this information is likely to prevent the commission of the offences involving a serious threat to the physical integrity of one or more persons, is of crucial importance to preventing that offence and cannot be obtained in any other way.¹¹¹

The **Code of Criminal Procedure** empowers judges to issue **warrants**, valid for a maximum of three months, authorising police to intercept communications for purposes of criminal investigation if the communications concern bank accounts or historical data about phone conversations. Service providers are not required to disclose intercepted data in the absence of a warrant. No warrant is required in

¹⁰⁹ [Loi n°2014-006](#), Articles 25-27 and 31.

¹¹⁰ [Id](#), Article 40.

¹¹¹ [Loi n°2016-029](#), Articles 11-12.



emergency situations, but only limited types of data can be disclosed in these circumstances.¹¹²

An investigating judge can order the surveillance of bank accounts, access to systems and phone tapping during an investigation of **money laundering or financial crimes**.¹¹³

In 2014, three lawyers of former President Marc Ravalomanana were reportedly subject to phone surveillance, at a time when Ravalomanana was under house arrest and only being allowed to communicate with his lawyers.¹¹⁴

There have been no official reports of the government monitoring online activity in recent years.¹¹⁵

E) SIM CARD REGISTRATION

Law no. 2005-023 on telecommunications obligates operators to comply with the conditions for providing the information necessary for the production of the general directory of subscribers, which are to be set by decree.¹¹⁶ The Decree on this topic was not located online, but according to other sources, Madagascar has introduced mandatory SIM card registration.¹¹⁷

F) TAKE-DOWN NOTIFICATIONS

In terms of the Code on Media Communications, which applies to online materials as well as print publications and broadcast media, a **judge may order the removal of illegal content in the event of violations of privacy and image rights**.¹¹⁸

The Code also mandates, as noted above, that there must be a **mechanism in respect of the online press that allows anyone to report the presence of illegal content**

¹¹² [“Privacy Imperilled: Analysis of Surveillance, Encryption and Data Localisation Laws in Africa”](#), CIPESA (Collaboration on International ICT Policy for East and Southern Africa), February 2022, pages 36-37, citing the Code of Criminal Procedure, Articles 103, 129-130. The primary source has not been checked. Note that the text of the secondary source refers incorrectly to the Penal Code, but footnotes the Code of Criminal Procedure.

¹¹³ *Id.*, pages 36-37, citing Article 9 of Law No. 2016-017, which modified and amended some provisions of the Code of Criminal Procedure (which the secondary source mistakenly refers to as the Penal Code). See the [Explanatory Memorandum for Loi n° 2016-17](#), which states that Article 9 of this amending law concerns additions to the Code of Criminal Procedure to enable the fight against money laundering and other financial offences, including a new article 260.1 that extends the jurisdiction and power of the investigating judge to order the placement under surveillance of bank accounts, access to these systems and telephone tapping. The primary source was not checked.

¹¹⁴ [“Privacy Imperilled: Analysis of Surveillance, Encryption and Data Localisation Laws in Africa”](#), CIPESA (Collaboration on International ICT Policy for East and Southern Africa), February 2022, page 37.

¹¹⁵ See, for example, [“Freedom in the World 2023: Madagascar”](#), Freedom House, section D4; [“Freedom in the World 2022: Madagascar”](#), Freedom House, section D4.

¹¹⁶ [Law 2005-023](#), Article 7(1).

¹¹⁷ See, for example, [“Africa: SIM Card Registration Only Increases Monitoring and Exclusion”](#), Privacy International, 5 August 2019; [“Access to Mobile Services and Proof of Identity 2021: Revisiting SIM Registration and Know Your Customer \(KYC\) Contexts during COVID-19”](#). GMSA, April 2021, page 55.

¹¹⁸ [Loi n°2020-006](#), Article 20 new.



in the comments made by the internet audience, upon which the publisher must remove them promptly or make access impossible.¹¹⁹

There may be other provisions on the removal of illegal or allegedly illegal content which we have not located. No provision analogous to the take-down notification procedures provided in most other SADC countries was found.

9.5 ELECTION LAW AND FREEDOM OF EXPRESSION

Presidential elections are scheduled for 9 November 2023, with a second round of voting on 20 December if required. President Andry Rajoelina will be seeking a second 5-year term of office. Rajoelina initially came to power through a 2009 military coup that displaced the democratically elected government of Marc Ravalomanana. Rajoelina stepped down in 2014 as part of a negotiated post-coup transition. Hery Rajaonarimampianina served as Madagascar's President from 2014 to 2018. Rajoelina was then elected President in 2018. In 2023, Rajoelina will be competing against both Ravalomanana and Rajaonarimampianina.¹²⁰

This overview looks at the country's longer electoral history:

Since its independence in 1960, Madagascar has organized 12 presidential elections, 12 legislative elections, eight senatorial elections, seven referendums and several local elections, and it has experienced four republics. The country is one of the few countries in sub-Saharan Africa that has gone through several electoral transitions (1993, 1996, 2001 and 2018). However, the regimes elected in the run-offs tend to be hegemonic, as one party "takes it all" and installs authoritarian governance practices. These practices and the lack of credibility and transparency in the organization of the electoral process have led to various problems. These include violent protests in the post-election phase, the mobilization of power outside the institutions, and the seizure of power through public demonstrations and a coup d'état in 2009. The latter caused a political crisis for almost five years and the international isolation of the country. Internal and external mediation efforts suffered serious challenges but ultimately led to the organization of elections as a necessary condition to end the crisis in 2013.

The presidential election of December 2018 led to a change of power with the election of Andry Rajoelina. His opponent, Marc Ravalomanana, accepted defeat and called for reconciliation and solidarity and for the demonstrations to stop.

In May 2019, a legislative election was held with the participation of several political parties, just like the local elections of December 2019. These elections were generally free, fair and transparent with regard to registration and media access. The question of electoral campaigning is always problematic as certain political parties and candidates run a disguised campaign before the official date, and the financing of

¹¹⁹ [Loi n°2020-006](#), Article 74bis new.

¹²⁰ Joseph Siegle and Candace Cook, "[Africa's 2023 Elections: Democratic Resiliency in the Face of Trials](#)", Africa Centre for Strategic Studies, 31 January 2023 (updated on 10 July 2023).



electoral campaigns are also an issue. The presidential party won the majority in the two elections.¹²¹

Andry Rajoelina has a majority in all institutions after his victory in the national and local elections. Given this domination, national reconciliation is not one of the priorities of the current government even though there are clear tensions. Indeed, the opposition, which created a coalition led by Marc Ravalomanana, emphasizes that reconciliation is necessary for the development of the country and asks the government to be more open. The opposition therefore boycotted the [2020] senatorial elections. It accused the regime of authoritarian practices accentuated during the lockdown due to the COVID-19 pandemic.¹²²

Madagascar's political institutions are inefficient, partly due to the lack of a stable pattern of political-party organization, which in turn is an expression of the parties' shallow roots in society. Nearly all presidents have created their political parties after their elections. With about 195 registered political parties in March 2019, the system is highly fragmented, volatile and polarized.

However, polarization changes according to power relations. Politicians will easily change party according to where they have their interests met, and most will try to belong to the party in power. [...] This situation confirms the winner-takes-all nature of Malagasy politics and illustrates the prevailing reluctance of politicians to play an opposition role.¹²³

In the last presidential election in 2018, because the incumbent government controlled much of the formal media space, campaigns on social media were considered by many parties to be useful and cost-effective - even though internet penetration at that stage was not very wide.¹²⁴ On the other hand, Russia reportedly used the media to try and influence the outcome of the 2018 elections through disinformation and paying journalists to write flattering stories, as well as hiring young people to attend political rallies.¹²⁵

Elections are supervised by the **Independent National Electoral Commission (CENI)**. Freedom House states that the CENI, although ostensibly independent, is subject to some influence by the executive, which controls member nomination and budget allocation processes. It also reports that CENI's independence and credibility have been seriously undermined by its lack of resources and expertise, particularly in database management and information technology.¹²⁶

The main **Election Law** is Law no. 2018-008, which replaced the previous 2012 Election Law.¹²⁷ It contains a number of provisions on "electoral and referendum propaganda", which refers to public meetings, parades, processions, rallies, advertisements in audiovisual, written and electronic media, as well as any other

¹²¹ "[Madagascar Country Report 2022](#)", Bertelsmann Transformation Index (BTI), Bertelsmann Stiftung, "Political Participation".

¹²² Id, "Executive Summary".

¹²³ Id, "Political and Social Integration".

¹²⁴ [Madagascar election: campaigns on social media](#), AfricaNews, 5 November 2018.

¹²⁵ Joseph Siegle and Candace Cook, "[Africa's 2023 Elections: Democratic Resiliency in the Face of Trials](#)", Africa Centre for Strategic Studies, 31 January 2023 (updated on 10 July 2023).

¹²⁶ "[Freedom in the World 2023: Madagascar](#)", Freedom House, section A3.

¹²⁷ [Loi n° 2018-008](#), relative au regime general des elections et des referendums (Organic Law no. 2018-008 relating to the general regime of elections and referendums), which repealed Organic Law no. 2012-005 on the Electoral Code.



activity aimed at inducing voters to support and vote for a candidate or a list of candidates". Ensuring compliance with these provisions is the duty of **ANRCM, acting in consultation with CENI**.¹²⁸ It is explicitly stated that the prohibitions and restrictions on electoral propaganda are applicable to any message having the character of electoral propaganda disseminated by any means of communication to the public, including electronic means.¹²⁹

The Election Law states that **the various means of propaganda used by candidates must respect the limits of freedom of expression** – meaning that election propaganda must not include offensive or defamatory matter. It is also forbidden to bring to the attention of the public a new element of electoral controversy at a time when political opponents do not have a chance to answer the allegations meaningfully before the end of the electoral campaign. It is further prohibited to promote and use a brand or commercial products for propaganda purposes.¹³⁰ Some of these prohibitions are vague and could lead to selective enforcement.

Electoral propaganda put forward by candidates or their supporters **must not constitute a means of pressure on voters** that is likely to alter their free choice.¹³¹ Again, it would be hard to have clarity here, in respect of what constitutes pressure.

There are also certain **time limits on election propaganda**. The electoral campaign period ends a midnight on the day before the ballot. After that, the following are prohibited –

- to distribute newsletters, circulars and other documents;
- to disseminate any message having the character of electoral propaganda to the public by any means of electronic communication;
- to send automated telephone calls to voters seeking their support for a candidate.¹³²

Campaign events including public electoral meetings, parades, processions and rallies may take place freely, but a prior written declaration addressed to the relevant State authorities for the area concerned, at least 48 hours before the event. These State authorities must provide copies of these declarations to CENI for monitoring purposes. Campaign events may not be held in places of worship, workplaces, administrative buildings or barracks. The catch is that the State authorities are empowered to prohibit, suspend or cancel a campaign event that carries a risk of "undermining public order". There is, however, a right of appeal to an electoral court in such a case.¹³³ A "risk of undermining public order" would be hard to determine, particularly in a decision that must be made in advance of the event which is considered to constitute the risk.

¹²⁸ Id, Article 92.

¹²⁹ Id, Article 95.

¹³⁰ Id, Article 93.

¹³¹ Id, Article 94.

¹³² Id, Article 96; see also Article 116.

¹³³ Id, Articles 97-99.



Political posters are prohibited during the 6-month period before the official opening of the campaign period. After the campaign opens, CENI regulates the placement of **campaign posters**, which must be far from polling stations. In each location approved for posters, there must be an equal area allocated exclusively to each party – with specific positions determined by lot. Regulations on poster size and the methods of affixing the posters will be set by regulation. It is an offence to remove, deface or obscure campaign posters. No campaign posters may be put up after the election campaign period closes. CENI has the power to enforce the rules on posters, but there is a right of appeal to an electoral court against its decisions.¹³⁴

From the publication of the official list of candidates until the opening of the official electoral campaign, ANRCM guarantees the **right of access to all radio and television services (public and private)** for all candidates and contending parties. During this period, all radio and television services must ensure fair representation of all, under comparable programming conditions. The principle of fairness must be applied to both speaking time and airtime but the principle of airtime equity “does not apply to broadcasts conveying editorial lines”. For purposes of equity in speaking time, speeches falling within the exercise of a public function are not counted¹³⁵ - which gives an obvious advantage to incumbents. The same principles of equity apply once the official election campaign period begins. **Free airtime** is allocated during this period, with slots chosen by lot. Every audiovisual media outlet must keep a record of the speaking time of political personalities and the airtime granted to each candidate and party, which is submitted to ANRCM for monitoring purposes. ANRCM has the authority to impose various sanctions for failure to comply with the rules, with a right of appeal to an electoral court. Commercial advertising for election propaganda purposes is prohibited, with the exception of soliciting donations from the public.¹³⁶

The Election Law states that the use of **new information and communication technologies** or any other **social network resources** is permitted during the electoral period, subject to compliance with the principles of plurality, equity and transparency and under the control of ANRCM.¹³⁷ However, enforcement of these principles online would surely be very difficult to achieve.

The **publication of the results of opinion polls directly or indirectly linked to the elections** is prohibited during the election campaign period and also during the period of electoral silence that begins on the day before the polling day.¹³⁸

Another interesting point relates to the **processing of personal data in the context of election campaigns**. This is not forbidden, but electoral authorities are charged to ensure that the collection of such data is lawful and fair. Any file created for political communication purposes cannot be used for any other purpose, and propaganda

¹³⁴ Id, Articles 100-109.

¹³⁵ Id, Article 110.

¹³⁶ Id, Article 111-115.

¹³⁷ Id, Article 117: “L’utilisation des nouvelles technologies de l’information et de la communication ou de toute autre ressource des réseaux sociaux est admise dans le cadre de la période électorale. Elles demeurent assujetties au respect des principes de pluralité, d’équité et de transparence, sous le contrôle de l’Autorité nationale de régulation de la communication médiatisée.”

¹³⁸ Id, Article 118. This is an offence under Article 228, punishable by a stiff fine.



files compiled for the needs of a particular electoral campaign must be destroyed at the end of the electoral period concerned.¹³⁹

There are also several offences contained in the Election Law with particular relevance for freedom of expression. These are some of the keys such offences:

- It is an offence **during the election campaign, to incite fights that have disturbed public order and safety** by means of speeches or publications, punishable by a prison sentence or a fine, or both.¹⁴⁰
- The **distribution of defamatory materials during the election campaign** by any other means, including digitally, is an offence punishable by a fine.¹⁴¹
- **Insult to authorities or institutions of the Malagasy State during an electoral campaign**, is an offence punishable by imprisonment for 6 months to 3 years and a fine, or by only one of these two penalties.¹⁴² This offence could be applied to give the ruling party an advantage by muffling criticism of its past performance.
- **Violation of any of the rules on election propaganda** is an offence, punishable by imprisonment or a fine, or both.¹⁴³
- It is an offence **to make a public statement in favour of or against a candidate or party on the polling day or the day before**, punishable by a fine.¹⁴⁴

According to Freedom House, almost 200 political parties are registered in Madagascar even though the law on political parties imposes a high financial barrier for political candidacy. Freedom House also states that political leaders “frequently use religion, ethnicity, and caste as instruments to mobilize voters”.¹⁴⁵

In the 2018 election, ANCRM was not operating effectively, which reportedly placed a burden on CENI to regulate the media during the election period on top of its other duties. Also, in the 2018 election campaign, regulatory powers did not extend to private broadcasters, which lead to significant disparities in treatment between the candidates.¹⁴⁶ Both of these problems have been remedied since then.

Freedom House reports that authorities at times decline requests for protests and rallies in the name of public security, and that several meetings of opposition parties were banned or forcefully dispersed by the police during 2022.¹⁴⁷ Indeed, in April 2023, the government banned “public meetings of a political nature” in the open air, although such meetings may still take place in closed rooms where the words spoken are not heard outside. The government claimed to be relying on a 1960 ordinance aimed at maintaining public order. In addition, Parliamentarians are to speak about the adoption of laws only at the end of each session, and only within their constituencies, and mayors and their deputies have been ordered to limit their public statements to reports on their activities. These moves have led to widespread local and international

¹³⁹ Id, Article 119.

¹⁴⁰ Id, Article 218.

¹⁴¹ Id, Article 221.

¹⁴² Id, Article 222.

¹⁴³ Id, Article 224.

¹⁴⁴ Id, Article 227.

¹⁴⁵ “[Freedom in the World 2023: Madagascar](#)”, Freedom House, sections B1-B2.

¹⁴⁶ “[Recueil de Recommandations](#)”, CENI/PADEM, 13 October 2021, page 56.

¹⁴⁷ “[Freedom in the World 2023: Madagascar](#)”, Freedom House, section E1.



criticism. Even though the rules apply to all political parties, including the ruling party, it will not concern the President and members of the government where they express themselves “in their function for the implementation of the general policy of the State”. One diplomat commented that members of the ruling party will be able to crisscross the country to campaign for the sitting President while opposition parties “will have to make do with small audiences behind closed doors”. Some opposition parties have referred to the developments as a “coup against democracy”, while the leader of the opposition party Malagasy MMM called them a move “towards dictatorship”.¹⁴⁸

¹⁴⁸ [“Madagascar Bans Public Protests Ahead of Presidential Election”](#), ICTJ, 4 April 2023; Laurence Caramel, [“A Madagascar, le président Andry Rajoelina confine l'opposition”](#), *Le Monde Afrique*, 6 April 2023.