



**STIFLING DISSENT,
IMPEDING ACCOUNTABILITY
CRIMINAL DEFAMATION
LAWS IN AFRICA**

UNDEF



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Project coordinators: PEN Sierra Leone (Allieu Kamara); PEN South Africa (Raymond Louw); PEN Uganda (Danson Kahyana and Beatrice Lamwaka); PEN Zambia (Daniel Sikazwe)

The Ghana chapter was researched and written by Professor Kwame Karikari with contributions from PEN Ghana (Frankie Asare-Donkoh and Franck Mackay Anim-Appiah)

The report was edited by Malcolm Smart, a PEN International consultant, who also contributed additional research and wrote some sections of the report.

Editors: Lianna Merner, Sarah Clarke, Romana Cacchioli

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1	EXECUTIVE SUMMARY
7	INTRODUCTION
13	LEGAL FRAMEWORK
20	CASE STUDIES
20	UGANDA
29	ZAMBIA
37	SIERRA LEONE
42	SOUTH AFRICA
47	GHANA
57	CIVIL DEFAMATION BEST PRACTICES: SOME CONSIDERATIONS
59	CONCLUSIONS AND RECOMMENDATIONS
61	ANNEX I: METHODOLOGY
61	ANNEX II: DECLARATION OF TABLE MOUNTAIN
62	ANNEX III: 169: RESOLUTION ON REPEALING CRIMINAL DEFAMATION LAWS IN AFRICA
63	ANNEX IV: PEN RESOLUTION #19: CRIMINAL DEFAMATION AND INSULT LAWS

EXECUTIVE SUMMARY

In many countries in Africa, governments continue to stifle freedom of expression, open debate, political criticism and media reporting using laws that make it a crime to say, write or publish anything that they consider defamatory or insulting. These laws are usually vague and sweepingly broad, opening them to such wide interpretation that they act as an ever-present constraint, particularly on investigative journalism and other aspects of the media's capacity to perform its public watchdog role.

The threat of criminal sanctions that the laws provide inevitably deters media investigations into and reporting of issues governments consider sensitive or embarrassing, such as high-level corruption, official malpractice or law-breaking, thereby facilitating official secrecy and undermining accountability. In many cases, where journalists, editors or publishers have refused to be cowed into self-censorship by these criminal defamation laws, they have been subject to arrest, detention, prosecution and long drawn out trials, and sometimes imprisonment for months or even years.

This report focuses on the continued retention of these laws in four African countries and assesses the impact of their repeal, over 16 years ago, in a fifth. A brief survey was also undertaken with writers across the continent on the impact of criminal defamation, libel and insult laws. In two of the focus countries, Uganda and Zambia, the authorities continue to apply the laws criminalising defamation and insult with vigour and show little sign of dispensing with them. In two others, Sierra Leone and South Africa, the laws remain on the statute book but their governments have publicly pledged to abolish them and make defamation a purely civil law matter. If and when they do so, they will be following the example set in Ghana which, in 2001, became the first country in Africa to decriminalise defamation. In this report, we review and assess the impact, both positive and negative, of decriminalisation in Ghana 16 years after the law was changed.

Many of the criminal defamation and insult laws in use in Africa today are relics of colonialism that were originally introduced principally to buttress colonial rule and repress

demands for national self-determination and independence. It might have been expected that those against whom the colonial authorities had used the criminal defamation and sedition laws would have cast such laws aside once they gained power as leaders of newly independent African states. But this did not occur. On the contrary, they retained these laws and began using them against their own critics and opponents, and to contain, constrain and undermine the press - and, latterly, the broadcast and electronic media - and the media's role as an independent watchdog of the public interest.

At the same time, government leaders throughout Africa signed up to international agreements such as the International Covenant on Civil and Political Rights (ICCPR) and later the African Charter on Human and Peoples' Rights (ACHPR) that committed them and their successors to protecting and promoting human rights. These include the right to freedom of expression - a right widely recognized not only as a cornerstone of democracy and democratic accountability but also one that is key to every individual's enjoyment of other civil and political rights as well as their economic, social and cultural rights. Freedom of expression, including the right of access to officially held and other information, is also crucial to the concept of media freedom and the media's ability to perform its vital public watchdog role.

In 2002, the African Commission on Human and Peoples' Rights (ACHPR), the body established to oversee the implementation of the African Charter by member states of the African Union, adopted a Declaration of Principles on Freedom of Expression in Africa. The Declaration urged governments to ensure that any restrictions on expression backed up by criminal sanctions were such that they served a "legitimate interest in a democratic society." Eight years later, the ACHPR specifically addressed the issue of criminal defamation. In November 2010, it adopted a resolution urging all African Union states that have them to repeal their criminal defamation and insult laws, which the ACHPR said amount to "a serious interference" with freedom of expression and impede the media's "role as a watchdog."

Recent years have seen a growing movement in Africa towards the decriminalisation of defamation supported by associations of journalists and other media professionals, press freedom groups, human rights organisations and others, including the historic 2007 Declaration of Table Mountain and the 2013 Midrand Declaration passed by the Pan-African Parliament.

These calls for repeal were given added impetus in 2014 when the African Court on Human and Peoples' Rights (ACtHPR) handed down a landmark judgment in *Konaté v Burkina Faso*, a case brought against Burkina Faso by Lohé Issa Konaté, editor of the weekly *L'Ouragan* newspaper, who the authorities had jailed for one year in 2012 on defamation, public insult and contempt charges. Ruling that his imprisonment amounted to a “disproportionate interference” with the freedom of expression rights of Konaté and other journalists, the court ruled that Konaté's imprisonment violated Burkina Faso's obligations under the African Charter and instructed the Burkina Faso authorities to amend their law to prevent the occurrence of further such violations.

Despite this key judgment by the African Court and similar findings by national courts and the calls for the decriminalisation of defamation and insult laws made by the ACHPR, governments throughout Africa continue to use these laws to protect the powerful and to evade public scrutiny and accountability for their actions.

It is high time this ceased. PEN International and PEN's Africa Centres, comprising writers, journalists and media workers across the continent, are calling on the governments of all countries in Africa that possess or retain criminal defamation or insult laws to amend those laws and allow issues of reputation to be addressed solely as a civil law matter in which the government has no role.

KEY FINDINGS:

- Just under half of the 38 writers and journalists from 22 African countries who responded to a survey on the impact of criminal defamation and insult laws, indicated that the use of criminal defamation, libel and insult laws as well as laws criminalising sedition, “false news” and contempt of court, inhibit them in practicing their professions. Due to fear of prosecution under criminal defamation and/or insult legislation 16 of the respondents have avoided writing stories because of these laws. Those that feared to write stories because of these defamation and insult laws often would avoid writing stories on topics such as corruption, crime, justice and politics.
- There has been some progress towards repeal of criminal defamation and insult laws since the Konaté judgment, for example, recent court decisions in Zimbabwe and Kenya have declared criminal defamation laws unconstitutional; however many countries still retain these laws.
- Freedom of information laws are important in that they allow the media to gain access to government-held information to allow them to verify information.
- There is a need for public awareness on the chilling effect of criminal defamation laws and the benefits of decriminalising defamation.
- Civil law protections should contain sufficient checks and balances, such as limits on financial penalties and awards, to prevent their being used to stifle freedom of expression, media plurality and diversity.
- Media owners, publishers and practitioners should at all times respect their role and responsibility to serve the public interest, including by training journalists and other media workers in ethical and professional standards and by establishing effective self-regulation mechanisms capable of speedily investigating, considering and appropriately rectifying complaints against the media.

South Africa

- In South Africa, even though criminal defamation is sparingly used, it is clear that the presence of the law on the statute book has a chilling effect on a number of those journalists who are aware of it. There are also some indications that the intimidating effects extend beyond the fear of a criminal conviction and a fine or imprisonment to include the fears of legal defense costs such a prosecution could incur for a publication. This aspect has prompted some publishers and managements to become more acutely aware of the legislation and its potential impact on the bottom line resulting in unacceptable interference by owners in editorial conduct. But, of course, the major effect of this legislation is the totally unacceptable self-censorship and other forms of censorship that it induces. Bluntly stated, it prevents the flow of information and thus censors the public's right to know. It prevents people, therefore, from being well informed about current affairs.
- The records show that only three criminal defamation cases have reached the courts in the past 20 years, while in a fourth case police investigated a journalist for criminal defamation but did not bring charges. The small number of cases bears out the view that criminal defamation charges are rarely brought in South Africa; nevertheless, the Supreme Court of Appeal (SCA) has ruled both that the criminal defamation law has not been abrogated through disuse and that it is consistent with the 1996 Constitution.
- There is now the promise of repeal in South Africa and a draft Bill was due to be presented before Parliament in May 2016; the Department of Justice later indicated in 2017 that the repeal provisions in the draft repeal bill would be incorporated in a new bill on Prohibiting Hate Crimes and Hate Speech. Journalists were told that they would be given sight of the revised Hate Crimes and Hate Speech Bill after it had been presented to the Cabinet.

Sierra Leone

- As the Sierra Leone study shows, over the years successive governments have used the Public Order Act (POA) provisions on defamation, seditious libel and false news to harass, intimidate and punish journalists and to stifle criticism and dissent. Although successful prosecutions have been rare, journalists and others have faced arrest, short term detention, and interrogation, searches of their offices and threats of severe consequences if they continue to publish "offending" stories and reports. In effect, the laws have been used by the authorities to cow journalists into silence and self-censorship, deterring investigative journalism and reporting of matters of public interest and concern.

- Not only journalists and other media practitioners have been affected – in one incident, NGO activists for example, were charged with criminal libel. The NGO activists were subsequently discharged but their case illustrates the long reach of the POA's provisions criminalising expression.
- However, there is now the promise of repeal in Sierra Leone. In 2016 the Justice Minister expressed his personal commitment to repeal of the provisions of the Public Order Act on defamation. A white paper on reform of the criminal defamation laws has been submitted to the Cabinet for discussion.

Uganda

- In Uganda, all of the journalists and writers that PEN Uganda interviewed when preparing this report attested that criminal defamation laws affected them adversely in their work, affecting the range and quality of media reporting. They said that journalists who venture to investigate or report on issues that affect the interests of the authorities or politically powerful or well-connected individuals risk being summoned for lengthy police interrogations, which appear designed to harass and interfere with their pursuit of their deadline-driven profession. With the threat of criminal prosecution for their writings and reporting dangling over them, many journalists inevitably feel obliged to exercise a degree of personal self-censorship that sees them steer away from controversial subjects such as political mismanagement, official corruption and land grabbing, which would expose them to increased risk. As a result, stories that the media should cover in the public interest are neglected and the media is unable to fulfil its key public watchdog role, vital in any democracy for holding those with power to account.
- Uganda's criminal defamation laws restrict peaceful exercise of the right to freedom of expression, inhibit political debate and the media, and are inimical to good governance and democratic accountability. In practice, they are used to muzzle the press and so protect those who wield the greatest power – the politicians, bureaucrats and business people who make up the country's political and economic elite – rendering them virtually untouchable and publicly unaccountable, while affording little or no protection to ordinary citizens.

Zambia

- Similarly, in Zambia, criminal defamation laws continue to stifle political debate, undermine the media's role as a watchdog of the public interest, and impede government transparency and accountability. In recent years, the authorities have used Section 69 of the Penal Code (defamation of the President) to prosecute journalists and editors, opposition politicians and even private citizens accused of publicly criticizing the head of state and his performance in office. Such prosecutions, in which the state invokes its full weight on behalf of its most powerful official against an ordinary citizen or other much less powerful accused, coupled with the threat of imprisonment that they entail, are clearly excessive and antipathetic to freedom of expression and open political debate, and damaging to Zambia's democracy.
- The lack of an effective access to information compounds this situation. The government recently re-committed to the early enactment of legislation giving citizens a right of access to information (ATI) held by the state that is not on the public record, raising hopes that it will rapidly develop, enact and thereafter actively implement a robust and effective ATI law. However, even the best-crafted and sturdiest ATI law will likely fail to produce such results while the authorities retain and continue to apply laws that criminalise defamation of the President and unduly restrict freedom of expression.

Ghana

- The repeal of criminal defamation in Ghana in 2001 has without doubt had an immediate and continuing positive impact, inasmuch that it removed a serious threat against journalists and others and opened the space for free speech, media inquiry and reporting to flourish. Yet, on the other hand, public respect for the media in Ghana appears to have diminished due to the failure, particularly of radio broadcasters, to adhere to basic professional and ethical standards. In fact, this stems primarily from inadequate training of journalists and a failure of appropriate broadcast regulation rather than the removal of criminal penalties for defamation. Nevertheless, it has led some to question the wisdom of the 2001 reform.
- However, events since also suggest that the reform did not go far enough, inasmuch that both Parliament and the courts now tend to resort more frequently to their criminal powers to punish or deter unfavourable comment or reporting of their actions by journalists and others. There has been an increase in civil suits for libel brought by powerful individuals, leading, in some cases, to damages payouts of such large proportions to powerful individuals as to threaten the existence of some media outlets.

RECOMMENDATIONS

PEN International and PEN African Centres make the following recommendations:

To all Member States of the African Union:

1. All States that have yet to do so should promptly abolish criminal defamation laws and ensure that adequate safeguards to protect the right to reputation are provided through civil law, while also ensuring that such safeguards do not permit the imposition of fines or damages awards so excessive as to imperil media freedom, including media diversity and plurality.
2. Thoroughly review and repeal or amend other laws that criminalise peaceful exercise of the right to freedom of expression in order to bring them into full conformity with international law, including Article 19 of the ICCPR and Article 9 of the African Charter on Human and Peoples' Rights, and taking full account of Human Rights Committee General Comment No. 34 and relevant resolutions of the African Commission on Human and Peoples' Rights, particularly its 2002 Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa and its 2010 Resolution on Repealing Criminal Laws in Africa.
3. Release promptly and unconditionally any journalists or writers detained or imprisoned on criminal defamation charges and discontinue all prosecutions on criminal defamation charges.
4. Uphold the public right to know, an essential element of freedom of expression and democratic accountability, by enforcing existing freedom of information legislation or promptly enacting an access to information law that enshrines this right, and make available appropriate financial and other resources to facilitate its effective implementation.
5. All States that have yet to do so should promptly ratify the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights that came into effect in 2004. All states that have yet to do so, including states that have ratified the Protocol, should promptly make a declaration, in accordance with Article 34 of the Protocol, accepting the competence of the Court to receive cases under article 5 (3) of this Protocol, i.e. petitions submitted by individuals and NGOs with observer status before the Commission.

To the African Commission on Human and Peoples' Rights:

1. Request all State Parties, when submitting reports on their implementation of the African Charter to the Commission, to make clear whether they retain criminal defamation laws, report on their application of such laws, and explain what steps they are taking to repeal or amend such laws in conformity with the Commission's 2010 Resolution on Repealing Criminal Laws in Africa and their obligations under international human rights law.
2. Urge all States to ensure that defamation is addressed solely as a matter of civil law within their national jurisdiction and include adequate safeguards to prevent the imposition of fines or damage awards so excessive as to imperil media freedom, including media diversity and plurality.
3. Call for the immediate, unconditional release of journalists and others who are detained or imprisoned on criminal defamation charges and discontinue all prosecutions on criminal defamation charges.
4. Recognizing the work done by the Special Rapporteur on Freedom of Expression and Access to Information in Africa to compile information on the prevalence of criminal defamation laws in Africa, urge that the Special Rapporteur continues this work, drawing on both official sources and information from civil society groups and associations, and report the findings to the Commission together with recommendations.

To the Pan-African Parliament:

1. Exercise its advisory and consultative powers to push for the full implementation of its Midrand Declaration by urging parliamentarians to ensure that in their respective countries defamation and insult laws are addressed exclusively as a matter of civil law, and adequate safeguards, such as limits on fines and damages awards, are applied to protect media diversity and plurality.
2. Make recommendations to Member States to work towards the harmonisation of Member States' laws on civil defamation.
3. Continue to encourage good governance, transparency and accountability in Member States through the decriminalisation of defamation laws throughout the continent.
4. Continue to encourage AU Member States to use the ACHPR Model Law on Access to Information in adopting or reviewing access to information laws.
5. Update the 2013 'Pan African Parliament Resolution to Protect Media Freedoms' to include the gains made in the Konaté judgment.

To other States enjoying diplomatic, trade and assistance relations with AU member states:

1. Use all appropriate opportunities, including during bilateral discussions and at multilateral forums such as the UN Human Rights Council's Universal Periodic Review, to press AU Member States that have yet to do so to abolish laws criminalising defamation, sedition and publication of "false news" and to guarantee, in practice, the right to freedom of information and access to information, and media freedom.
2. Press AU Member States to ensure that defamation is addressed exclusively as a matter of civil law, and that adequate safeguards, such as limits on fines and damages awards, are applied to protect media diversity and plurality.
3. Urge all AU Member States to immediately and unconditionally release journalists and others who are detained or imprisoned for criminal defamation, and to desist from further prosecutions for criminal defamation.

To media owners, publishers, editors, journalist organisations and practitioners across the continent:

1. Establish independent national regulatory bodies, if not already in place, to ensure:
 - The prompt independent investigation of complaints against the media, and the provision of appropriate remedies – such as published retractions and/or apologies, and financial or other compensation - whenever such complaints are upheld;
 - The training of journalists and other media practitioners in ethical and other professional standards;
2. Provide adequate legal, financial and professional support to employees facing defamation charges

To civil society groups, including PEN Centres:

1. Explore ways to educate the wider public on the chilling effect of criminal defamation laws and benefits of decriminalising defamation and continue to work in coalition with other civil society and media groups to push for the repeal of criminal defamation laws and the implementation of robust freedom of information laws

STIFLING DISSENT, IMPEDING ACCOUNTABILITY CRIMINAL DEFAMATION LAWS IN AFRICA



Photo: ACHPR

I welcome this report from PEN International and its Centres on the impact of criminal defamation laws in Africa, highlighting the voices and experiences of writers across the continent.

Criminal defamation and insult laws are nearly always used to punish legitimate criticism of powerful people, rather than protect the right to a reputation. As this report shows, the cost of these laws is significant – they stifle independent comment and political debate, deny the public the right to know about stories of national importance and deter investigative journalism. These laws are incompatible with the African Charter on Human and Peoples' Rights.

This is why, under my aegis as Special Rapporteur on Freedom of Expression and Access to Information at the African Commission on Human and Peoples' Rights, we launched a continent-wide campaign in 2012 to decriminalise defamation and similar laws that impede the full enjoyment of the right to freedom of expression such as sedition, insult laws and the publication of false news.

This campaign was given impetus by the 2014 *Konaté* judgment of the African Court on Human and Peoples' Rights, which held that imprisonment for defamation violates the right to freedom of expression guaranteed by the African Charter on Human and Peoples' Rights (ACHPR) and that criminal defamation laws should only be used in restricted circumstances. This was a landmark decision for free expression on the African continent. Since the judgment is binding, states party to the ACHPR are obligated to take practical steps, including through legislation, to give effect to the right to freedom of expression. Although across the continent there has been significant progress in the realization of freedom of expression and access to information, there is still much room for improvement in terms of implementation of judgments and we must continue to push for the repeal of laws that criminalise peaceful expression.

This report adds to the growing chorus of voices and coalition of freedom of expression organisations that have been pushing for implementation of the *Konaté* ruling across the continent.

Pansy Tlakula, Chairperson (November 2015–November 2017) and Special Rapporteur on Freedom of Expression and Access to Information, African Commission on Human and Peoples' Rights (2006–2017)

1. INTRODUCTION

In many countries in Africa, governments continue to use criminal defamation and insult laws to restrict free speech and other expression, including reporting by the press and online comment about political and other issues of public interest. Such governments claim that these laws are necessary to uphold the right of every individual to protection of their reputation from whoever might unjustly tarnish it, whether verbally, in writing or by other means of expression, thereby exposing an individual to public ridicule, opprobrium, or disrepute.

Yet, it would appear from PEN's research that, in practice, criminal defamation laws are most often invoked by state authorities not to uphold the rights of ordinary citizens but to shield those wielding the greatest power – the head of state, government ministers, senior public and judicial officials, and their business associates – from close scrutiny and public questioning of their policies, practices, and behaviours. Often, therefore, these laws act as an impediment to democratic accountability and serve the interests of the rich and powerful rather than the public interest.

The punitive criminal sanctions that these laws provide have a serious deterrent effect, which impacts particularly on the press and the broadcast and electronic media. In the states that criminalise defamation and insult, editors and journalists quickly learn that there are matters that they dare not investigate or publicly report or comment upon, and individuals that they would be unwise to criticize or lampoon, lest they expose themselves to the risk of arrest, prosecution and imprisonment.

By fencing in the media in this way, criminal defamation laws deter investigative journalism and the exposure of corruption and other wrongdoing by state officials and undermine the media's capacity to perform its acknowledged role as a critical watchdog of the public interest. They engender media self-censorship and contribute to a climate of official inviolability, secrecy and unaccountability in which corruption, arbitrary unlawfulness and human rights violations may flourish. They also have a wider impact in stifling particularly political criticism and debate, including satirical writing and depictions, and the peaceful expression of dissent.

Governments generally use their criminal defamation laws to target journalists, editors, writers and publishers who criticize their policies or actions, inquire into or report alleged abuses of power or publish information that they consider too sensitive or embarrassing for public disclosure. In many cases, journalists and their editors have been prosecuted for publishing “false news” or comments on the grounds that they “insulted” the head of state or other officials.

But these laws are not only used to keep the media in line, and to induce media self-censorship. They are also used to target writers and musicians who use satire or artistic expression to comment on political events or the country's rulers, as well as political critics, opposition activists and dissidents, human rights defenders who expose violations committed by the authorities, and others. Such individuals frequently face police harassment, arrest, detention, prosecution and trial, and public vilification by the government and its supporters. They also face penalties such as fines, years of imprisonment, closure of their publications, and being publicly labelled a criminal and saddled with a criminal record that blights their future employment prospects and their livelihood.

In 2016, for example, journalists and others faced trial on criminal charges of insulting public officials in Algeria, Burundi, Guinea, Nigeria, Swaziland and Tunisia. Others faced sedition charges in Botswana, Gambia, and Tanzania, and on charges of publishing “false” news or rumours in Egypt, South Sudan and Zimbabwe. The same year saw government authorities force the closure of media outlets in countries that included Benin, the Democratic Republic of Congo, Somalia and Sudan, among others.¹

Further, just under half of the 38 writers and journalists from 22 African countries who responded to a brief survey conducted by PEN and the University of Witwatersrand on the impact of criminal defamation and insult laws² indicated that the use of these laws inhibit them in practicing their professions. Due to fear of prosecution under criminal defamation and/or insult legislation, 16 of the respondents have avoided writing stories at some point. Those that feared to write stories because of these laws often would avoid writing stories on topics such as corruption, crime, justice and politics.

¹ For details, see relevant country reports included in Amnesty International Report 2016/2017, found at: <https://www.amnesty.org/en/documents/pol10/4800/2017/en/>

² The survey was undertaken by the Centre for Journalism and Media Studies at the University of the Witwatersrand, Johannesburg. See below: Methodology.



Angolan journalist and human rights activist Rafael Marques de Morais during an interview on 14 August 2015 in Johannesburg, South Africa. Photo: Getty Images

Rafael Marques de Morais: Criminal defamation laws in Angola

In Angola, criminal defamation laws are often used to silence critics, such as prominent journalist and human rights defender Rafael Marques de Morais. Marques de Morais has come up against these laws repeatedly over the past two decades. For example, in 1999, he became ‘closely acquainted with criminal defamation’³ after he wrote an op-ed calling the president a corrupt leader and a dictator. He was arrested and detained for 40 days, 11 of which were incommunicado and he was only charged on the day of his release. In 2005 the UN Human Rights Committee ruled that his treatment was illegal, yet the government of Angola refused to pay compensatory damages.

In May 2015, he received a six-month suspended prison sentence with a probationary period of two years. He was convicted of defaming Angolan generals in his book *Blood Diamonds: Corruption and Torture in Angola*, released in November 2011, which detailed killings and torture perpetrated by private security guards working for mining companies in Angola’s diamond fields. It also leveled responsibility against several generals who owned the mines,

for failing to stop the abuse.⁴ Speaking to a PEN International meeting in March 2016 about his experience with criminal defamation laws, he said:

“My crime was to write a book exposing corruption and consequent human rights abuses by companies co-owned by nine army generals. [...] That complaint was dismissed by the public prosecutor’s office [in Portugal, where the book was published], [but] when it came to the Angolan court case, which some have described as a “kangaroo court,” the judge imposed on me, as a condition not to incarcerate me that I recall the copies of the book, and take down all references to it from the Internet. As I am not to be bullied again, I went right ahead and had the Italian translation of the book published in Italy.”⁵

Marques de Morais continues to face judicial harassment. In May 2017 he and another journalist were charged with ‘defamation of a public authority’ and ‘outrage to a sovereign body’. The charges stem from a November 2016 article in *Maka Angola* that alleged that the attorney general acquired land illegally.⁶

3 PEN International, “Angola: End judicial harassment of journalist Rafael Marques de Morais,” 28 May 2015, <http://www.pen-international.org/newsitems/angola-end-judicial-harassment-of-journalist-rafael-marques-de-morais/>

4 PEN International, “Angola: End judicial harassment of journalist Rafael Marques de Morais,” 28 May 2015, <http://www.pen-international.org/newsitems/angola-end-judicial-harassment-of-journalist-rafael-marques-de-morais/>

5 Rafael Marques de Morais, “From Being Bullied to a Dictator’s Nightmare,” 8 March 2016, <http://www.pen-international.org/03/2016/from-being-bullied-to-a-dictators-nightmare/>

6 Amnesty International, “Angola: Human Rights Defender and journalist charged: Rafael Marques de Morais and Mariano Brás Lourenço,” 30 June 2017, <https://www.amnesty.org/en/documents/afr12/6619/2017/en/>

One respondent from Nigeria said that criminal defamation and insult laws should be repealed because they “**constrain free press, press freedom and investigative journalism**” while another from South Sudan said such laws “**create fear**” among journalists. Underscoring this, other respondents reported exercising self-censorship – “**because I was once arrested and warned not to do the type of reportage that I was embarking on,**” one writer from Zimbabwe wrote. A writer from Algeria said “**Yes, of course. These laws are like the sword of Damocles,**” when asked if these laws affected their reporting or writing at all. Another respondent from the Seychelles, however, noted that the existence of laws protecting the right to reputation has a positive effect in promoting journalistic standards, commenting: “**it forces my newspaper to research better, consult more sources and get lawyers to go over the story to ensure no legal pitfalls.**” Several respondents expressed concern about the use of anti-terror laws and others criminalising the “promotion of ethnic tensions” by some governments to curtail legitimate expression.

In many countries, the criminal defamation laws in force today are based on archaic European laws imported during the 19th and 20th centuries when virtually all countries in Africa were under colonial rule. They were introduced by the British, French and other empire-building powers essentially to stifle and suppress indigenous opposition to colonialism and the emergence of popular movements demanding national self-determination, self-government and independence. The laws made it a crime to criticize the colonial authorities and were used against those who spoke out about the injustices that the colonial system engendered, including nationalist leaders.

It might have been expected, therefore, that these oppressive laws would be consigned to the dustbin of history once the colonial regimes were replaced by the emergence of newly independent states all across Africa in the second half of the last century. But that did not happen. In country after country, once independence was achieved, those who assumed power quickly recognized the criminal defamation laws’ potency as a stick with which to beat their critics, and as a means to constrain the media and keep it under their thumb. This pattern has largely continued, although most of Africa’s countries have been independent for decades.

It is now widely recognized, however, that imprisonment is a disproportionately severe sanction for punishing those who impugn the reputation of others and one which has a “chilling effect”, both on individual exercise of the right to freedom of expression and on media freedom. Such laws, in short, run counter to the public interest and the public good.

Criminal defamation laws present a particular obstacle to the media and its ability to investigate and report on issues

“[criminal defamation and insult laws] constrain free press, press freedom and investigative journalism”

of public interest. Freedom of information laws establish a “right to know” that enables individuals and the media to gain access to government-held information that is not on the public record. Where such laws exist and are effective, they play a critical role in helping ensure official transparency and accountability.

Freedom of information laws also provide the media with a means through which to check their facts when investigating allegations – for example, when researching claims of official misbehavior or abuse they receive from purported “whistleblowers” – as well as reducing the risk of publishing information that may lead to criminal prosecution on charges of defamation or disseminating “false news.” Three of the five countries on which this report focuses – Sierra Leone, South Africa and Uganda – have enacted specific freedom of information laws. In Ghana and Zambia, such laws have been mooted but not yet enacted.

The past decades have also seen important advances in international law and jurisprudence with respect to criminal defamation. In particular, two key international treaty monitoring bodies – the Human Rights Committee (HRC), which monitors states’ implementation of the International Covenant on Civil and Political Rights (ICCPR), and the African Commission on Human and Peoples’ Rights (ACHPR), established under the African Charter on Human and Peoples’ Rights (AChHPR) – have both pronounced firmly in favour of decriminalising defamation and making protection of the right to reputation a purely civil law matter.⁷ Virtually all countries in Africa have ratified both the ICCPR and the AChHPR, binding their governments to uphold freedom of expression and the other human rights they guarantee.

There have also been major developments in international jurisprudence which have seen regional human rights courts in Europe, the Americas and, more recently, Africa establishing authoritatively that, for example, politicians and others who voluntarily enter the hurly burly of the public or political sphere must be prepared to accept a greater degree of criticism and non-physical abuse than the ordinary citizen.⁸ As well, these courts have helped establish the principles that if a) a statement is true, it cannot

⁷ Article 19, “Briefing Note on International and Comparative Defamation Standards,” London (February, 2004). <https://www.article19.org/data/files/pdfs/analysis/defamation-standards.pdf>; African Commission on Human and Peoples’ Rights, “169: Resolution on Repealing Criminal Defamation Laws in the Africa,” Banjul (November, 2010). <http://www.achpr.org/sessions/48th/resolutions/169/>

⁸ See, for example, *Lingens v Austria*, ECHR Application No. 9815/82, (8 July 1986) at para 42. <https://www.article19.org/resources.php/resource/2586/en/lingens-v.-austria.ens>

be defamatory;⁹ and b) there is little scope for restricting information that serves the public interest.¹⁰

Recent years have seen a growing movement in Africa towards the decriminalisation of defamation supported by associations of journalists and other media professionals, press freedom groups, human rights organisations and others, as reflected in the historic 2007 Declaration of Table Mountain.¹¹ Crucial support has also been provided by the ACHPR, which adopted a resolution in 2010 calling on all states in Africa to repeal their criminal defamation laws. The ACHPR's Special Rapporteur (SR) on Freedom of Expression and Access to Information, Pansy Tlakula of South Africa, has also repeatedly condemned the use of such laws to stifle dissent and has called for their abolition.¹² In 2013, the Pan-African Parliament, the legislative body of the African Union, passed the Midrand Declaration on Press Freedom in Africa and subsequently launched a campaign on "Press Freedom for Development and Governance: Need for Reform" in all five regions in Africa.¹³ Civil society coalitions, such as the Decriminalisation of Expression Campaign (DOX), have also been instrumental in pushing for repeal of criminal defamation, insult, false news and sedition laws.¹⁴

Perhaps most significantly, in 2014 the African Court of Human and Peoples' Rights (ACtHPR) issued a landmark judgment when ruling on a petition¹⁵ brought against the government of Burkina Faso by journalist Lohé Issa Konaté. He had been jailed for a year under Burkina Faso's Information Law and Penal Code on charges of defamation, public insult and contempt of officials. Delivering judgment, the court declared that the criminal sanctions imposed on Konaté – his prison sentence, fine and an order suspending publication of his newspaper for six months – amounted to "disproportionate interference" in his right to freedom of expression and that of other journalists. The court ordered that he should receive compensation and instructed the

Burkina Faso authorities to amend the law so as to bring it into compliance with Burkina Faso's obligations as a state party to the AChHPR.¹⁶ Following the court ruling, the government removed imprisonment as a penalty for criminal defamation.¹⁷

Other countries have yet to amend their laws in light of the ACtHPR's finding in the Burkina Faso case, though there has been progress in some countries. Most recently, in July 2017, the government of Liberia submitted a bill to the House of Representatives to repeal the sections of the 1978 Penal Code that criminalise defamation of the President (Section 11.11), sedition (Section 11.12) and Criminal Malevolence (Section 11.14), following advocacy by the Press Union of Liberia and other civil society groups.¹⁸ In addition, court decisions in Zimbabwe (2016) and Kenya (2017) have ruled that criminal defamation laws are unconstitutional.¹⁹

Ghana, however, decriminalised defamation more than a decade earlier, becoming the first African country to do so. It took that momentous step in 2001 amid a groundswell of popular demands for reform, including respect for human rights and media freedom. Ghana had, by then, experienced decades of repressive military rule in which the media was under state control, followed by five years under a civilian administration whose leaders had sought to mute the press and deter its exposure of corruption and other official malpractice using the country's criminal defamation laws.

This report does not attempt to comprehensively list or review the criminal defamation, insult and related laws that remain in force in countries across Africa. It focuses on countries with common law systems rather than civil law systems, examining and analysing the use of such laws, and attitudes towards them, including impact on writers, in four countries – Sierra Leone, South Africa, Uganda and Zambia.

9 South Africa Legal Centre, "Freedom of Expression: Litigating Cases of Limitations to the Exercise of Freedom of Speech and Opinion," SALC Litigation Manual Series, p. 30. <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/09/Freedom-of-Expression-Manual.pdf>

10 See, for example, *Axel Springer AG v Germany*, 2012 ECHR 227 <http://www.bailii.org/eu/cases/ECHR/2012/227.html>

11 Andrew Heslop, "The Declaration of Table Mountain," *World Association of Newspapers and News Publishers* (February, 2011). <http://www.wan-ifra.org/articles/2011/02/16/the-declaration-of-table-mountain>

12 African Commission on Human and Peoples' Rights, "169: Resolution on Repealing Criminal Defamation Laws in Africa," 2010, <http://www.achpr.org/sessions/48th/resolutions/169/>

13 Pan African Parliament, "Midrand Declaration on Press Freedom in Africa" http://www.doxafrica.org/wp-content/uploads/2014/08/midrand-declaration-on-press-freedom_en.pdf

14 The Decriminalisation of Expression Campaign (DOX) aims to rid Africa of criminal defamation, insult, false news and sedition laws. The campaign is spearheaded by the Special Rapporteur on Freedom of Expression and Access to Information in Africa along with organisations spanning the five regions of Africa: East, West, South, Central and North. <http://www.doxafrica.org/>

15 *Lohé Issa Konaté v Burkina Faso*, ACHPR Application No 004/2013, (December, 2014), <http://en.african-court.org/index.php/55-finalised-cases-details/857-app-no-004-2013-lohe-issa-konate-v-burkina-faso-details> [Lohe].

16 Lohé at para 176(8), Columbia University, "Global Freedom of Expression: Lohé Issa Konaté v The Republic of Burkina Faso," <https://globalfreedomofexpression.columbia.edu/cases/lohe-issa-konate-v-the-republic-of-burkina-faso/>

17 "A Case for Optimism: A Q&A with Nani Jansen Reventlow," Oliver Windridge, 30 August, 2016, <http://www.achprmonitor.org/a-case-for-optimism-a-qa-with-nani-jansen-reventlow/>

18 Presenting the bill, President Ellen Johnson-Sirleaf told legislators that repeal would bring the law into conformity with the guarantees of free speech and expression in Article 15 of the Liberian Constitution, international treaties to which Liberia is party and the call for the decriminalisation of defamation laws contained in the Declaration of Table Mountain. See: "Ellen Finally Submits Bill", 21 July 2017, Prince Parker, *The News*, <http://thenewslib.com/ellen-finally-submits-bill/>

19 In addition to those mentioned in the report, other countries which have taken steps towards repeal, include the following: Niger decriminalised press offences in 2010, including defamation, though reports suggest journalists have been charged with defamation under the criminal code, <https://rsf.org/en/niger>; Benin adopted a new media law in January 2015 removing imprisonment as a penalty, but retained financial penalties for insulting the president, <https://rsf.org/en/benin>; Mauritania decriminalised press offences in 2011, removing prison sentences, <https://freedomhouse.org/report/freedom-press/2015/mauritania>. However, Togo scrapped criminal sanctions for defamation and insult in August 2004 but passed a new penal code in 2015, which criminalised defamation and false news, <https://freedomhouse.org/report/freedom-press/2016/togo>

The case of Ghana is included to examine lessons learned from decriminalisation. These countries share a common heritage in that they all once were under British colonial rule and during independence inherited legislation derived from English laws enacted as far back as the early years of the 19th Century, when British society was caught in the grip of the Industrial Revolution and the stresses, strains and popular demands for reform that it fuelled.

Yet, despite this common legacy and the fact that all five states are party to international treaties such as the ICCPR and the AChHPR and have accepted to uphold the rights they guarantee, they today occupy very different positions in relation to criminal defamation.

Ghana, as indicated above, cast aside its criminal defamation laws as long ago as 2001. Without doubt, this had an immediate and continuing positive impact, inasmuch that it removed a serious threat against journalists and others and opened the space for free speech and media inquiry and reporting to flourish as never before. Yet, as detailed below, since defamation was decriminalised public respect for the media in Ghana appears to have diminished markedly due to the failure, particularly of radio broadcasters, to adhere to basic professional and ethical standards, including by unduly besmirching reputations for political or economic gain. In fact, this stems primarily from inadequate training of journalists and a failure of appropriate broadcast regulation rather than the removal of criminal penalties for defamation. Nevertheless, it has led some to question the wisdom of the 2001 reform.²⁰

However, events since also suggest that the reform did not go far enough. Parliament and the courts now tend to resort more frequently to their criminal powers to punish or deter unfavourable comment or reporting of their actions by journalists and others, and there has been an increase in civil suits for libel brought by powerful individuals, leading to damages payouts of such large proportions as to threaten the existence of some media outlets.

In Sierra Leone and South Africa, there is now promise of reform. Both countries' governments have publicly declared their commitment to abolish criminal defamation but have failed, thus far, either to publish new draft reform legislation or to submit it to their national parliaments for approval, fuelling concerns. In South Africa, the Department of Justice indicated in June 2017 that the provisions to decriminalise defamation would be incorporated in a new Prohibiting Hate Crimes and Hate Speech Bill, a copy of which would be made available to journalists once it had been submitted to Parliament.²¹

In Sierra Leone, as the chapter shows, relatively few journalists and others have been prosecuted in recent years under the criminal defamation laws but the threat the laws pose has deterred investigative reporting and led many media professionals to exercise self-censorship. This has meant that journalists keep away from subjects that the authorities may consider sensitive, undermining their sense of professional worth and self-respect.

In South Africa, defamation is generally addressed through civil law suits and criminal prosecutions have been rare, so media investigations and reporting are more constrained by the risk of having to pay out damages and the harm they may pose to reputation and continued viability, than the prospect of criminal sanctions. The authorities add to the fears of journalists, however, by threatening to invoke the criminal defamation law against them.

In Uganda and Zambia, by contrast, criminal defamation laws appear firmly entrenched and the authorities appear determined to continue applying them in order to threaten the media, stifle opposition and public debate, and prevent the public airing of information that could damage their standing or interests. As the following chapters show, in both countries journalists and others complain that the broad reach of the criminal defamation laws, and the penalties they carry, severely constrain what they feel able to investigate and report, undermining not only media freedom but also official transparency, accountability and good governance.

PEN International and the national PEN Centres that have contributed to this report unreservedly oppose the use of criminal defamation and related laws and call for their prompt abolition. Such laws impose disproportionate penalties and have a chilling effect that is injurious not only to freedom of expression but to the protection and enjoyment of other human rights. They also facilitate corruption and other wrongdoing and abuse by the politically powerful by shielding them from scrutiny, enabling them to evade accountability to those they claim to represent. The prosecutorial powers of the state should not be invoked to protect reputations, particularly the reputations of the most powerful; reputations should be protected solely by reference to civil law and to relevant mechanisms of mediation and redress. These remedies should be as available and effective for the protection of the reputations of ordinary citizens as they are for those occupying senior positions within the state.

Consequently, PEN International and PEN's African Centres are jointly calling for governments across Africa to take immediate steps to repeal laws criminalising defamation, insult and related offenses such as those on sedition and disseminating "false news", and provide for protection of the right to reputation solely under the civil law and appropriate mechanisms of mediation and resolution. Civil law protections should contain sufficient checks and balances, such as limits on financial penalties and awards, to prevent their being used to stifle freedom of expression, media plurality, and diversity.

Media owners, publishers and practitioners should at all times respect their role and responsibility to serve the public interest, including by training journalists and other media workers in ethical and professional standards and by establishing effective self-regulation mechanisms capable of speedily investigating, considering, and appropriately rectifying complaints against the media.

20 Kelly / Warner International Defamation Law Database, "Defamation Laws in Ghana," <http://kellywarnerlaw.com/ghana-defamation-laws/>.

21 A spokesperson in the Ministry of Justice told a member of PEN South Africa that the criminal defamation repeal legislation would be included in the new Prohibiting Hate Crimes and Hate Speech bill, which is being processed.

ROADMAP TO DECRIMINALISATION

Prior to Government Support:

1. Prepare evidence base demonstrating why criminal defamation is a problem and set the argument for repeal.
2. Campaign for repeal of criminal defamation laws, through popular advocacy and coalition building. Championing of the cause by associations of journalists, other media professionals, press freedom groups, human rights organisations and others may be of assistance.
3. International community, African human rights bodies and rights organisations should use all appropriate opportunities to press states that have not abolished laws criminalising defamation to do so.
4. If plausible in the country, start legal challenge, allowing for a court ruling that criminal sanctions amount to disproportionate interference in the right to freedom of expression, and forcing government to bring the law into compliance with the country's Constitution.

Once Government Support Gained:

5. Once commitment made, civil society and media should work with lawmakers in drafting of appropriate new laws to ensure robust legislative framework.
6. Repeal existing legal provisions that criminalise sedition or defamation.
7. Thoroughly review and amend other laws criminalising exercise of the right to freedom of expression (if existing), to bring them into full conformity with international law (ie anti-terrorism acts, contempt of court or parliament laws, national security acts).
8. Release promptly and unconditionally anyone detained or imprisoned on criminal defamation charges, and drop all prosecutions on such charges.
9. Ensure that any replacement legislation is compatible with international human rights law and in no way unduly restricts freedom of expression.
10. Ensure that truth is available as a complete defense to proposed civil defamation legislation.
11. Promote and give effect to the public's right to know by strengthening Access to Information acts, if in existence, or draft Access to Information legislation, and ensure that mechanisms and resources are made available to enable implementation.
12. Amend Constitution (or ratify international protocols on human rights) to guarantee the right of every citizen to access information held by the state.
13. Media sector should implement self-regulation, including independent investigation and resolution of complaints against the media relating to the right to reputation, including through mediation and use of the rights of reply, retraction and apology.
14. Ensure that regulatory bodies charged with upholding high journalistic standards are able to effectively provide remedies, and have 'teeth' in order to maintain public confidence.
15. Train journalists and other media workers in ethical and other professional standards.
16. Resist any calls for re-criminalisation of defamation.
17. Employers should provide adequate legal, financial and professional support to employees facing civil defamation charges.

2. LEGAL FRAMEWORK

2.1 Freedom of expression under international law

The right to freedom of expression has been clearly established under international law for almost 70 years and elaborated in a series of international treaties and other standards, most notably:

Universal Declaration of Human Rights (UDHR): the foundation of modern international human rights law, the UDHR was adopted by the UN General Assembly on 10 December 1948.²² All member states of the UN, as parties to the UN Charter, subscribe to the rights set out in the UDHR. Article 19 of the UDHR states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

International Covenant on Civil and Political Rights (ICCPR): adopted by the UN General Assembly in 1966, this international treaty came into force in 1976.²³ It further defined and elaborated the rights set out in the UDHR²⁴ and is one of the most widely ratified international treaties.²⁵ Article 19 of the ICCPR states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of

all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Paragraph 3 sets out the only permissible grounds on which states may limit freedom of expression, including – under (a) – the grounds that provide the basis for laws against defamation. In addition, under its Article 20, the ICCPR requires states actively to prohibit by law expression that constitutes “propaganda for war” and so-called hate speech – that is “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”²⁶

African Charter on Human and Peoples’ Rights (AChHPR): this regional human rights treaty²⁷ was adopted unanimously by the Assembly of Heads of State and Government of the Organization of African Unity (OAU) – forerunner of the AU – in 1981 and entered into force on 21 October 1986.²⁸ By September 2017 the AChHPR had been ratified by every country in Africa except South Sudan.

22 Universal Declaration of Human Rights, <http://www.un.org/en/universal-declaration-human-rights/>

23 International Covenant on Civil and Political Rights (ICCPR); Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

24 As its title indicates, the ICCPR is concerned with civil and political rights. It forms part of the International Bill of Human Rights together with the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the two Optional Protocols to the ICCPR and the Optional Protocol to the ICESCR.

25 As of September 2017, 169 states had ratified the ICCPR, including all African Union (AU) states except Comoros, which has signed but not ratified the treaty, and South Sudan. See: United Nations Treaty Collection. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

26 UN Office of the High Commissioner, “International Covenant on Civil and Political Rights,” <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>. Other treaties also require states party to them to prohibit by law certain extreme forms of expression, such as the International Convention on the Elimination of Racial Discrimination, Article 4 (a) (race-based violence), and the Convention on the Prevention and Punishment of the Crime of Genocide, Article III (c) (expression supporting genocide). Such laws, however, must not exceed the permissible grounds for restricting freedom of expression set out under Article 19 (3) of the ICCPR.

27 The right to freedom of expression is also protected under other regional human rights: under Article 10 of the European Convention on Human Rights (ECHR), which took effect in 1953 and to which all member states of the Council of Europe are party; and under Article 13 of the American Convention on Human Rights (ACHR), which took effect in 1978. The regional monitoring bodies and courts established under these treaties have proved influential in interpreting the application of treaty rights, including freedom of expression and media freedom.

28 Subsequently, the OAU declared that 21 October be marked annually as an African Day of Human Rights; Organization of African Unity (OAU), “African Charter on Human and Peoples’ Rights (“Banjul Charter”),” 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), <http://www.refworld.org/docid/3ae6b3630.html>.

Article 9 of the AChHPR²⁹ enshrines the right of all individuals to freedom of expression, including the right to receive information, stating:

1. *Every individual shall have the right to receive information.*
2. *Every individual shall have the right to express and disseminate his opinions within the law.*

Once the AChHPR had come into force, the OAU established the **African Commission on Human and Peoples' Rights** (ACHPR) in 1987.³⁰ In 1988, the OAU adopted a Protocol to the AChHPR providing for the establishment of an **African Court on Human and Peoples' Rights** (ACtHPR), which entered into force in 2004.³¹ The AU decided that the ACtHPR should merge with the African Court of Justice, once the latter is established, but that the ACtHPR should commence operations in the interim and in January 2006 elected its first 11 judges for six-year terms.³²

2.2 Freedom of expression and defamation

As ICCPR Article 19 makes clear, exercise of the right to freedom of expression “carries with it special duties and responsibilities” and “may therefore be subject to certain restrictions,” while stipulating that any such restrictions must be “provided by law” and be “necessary” to meet only the purposes specified – namely, “respect for the rights or reputations of others” or “for the protection of national security, public order (*ordre public*), or of public health or morals.”³³

For the most part, laws concerning defamation rely on the first specified purpose, respect for the rights or reputations of others, to justify their existence. However some related laws such as those concerning offences of seditious libel and the dissemination or publication of “false news”, are sometimes justified by states as being necessary to protect national security or public order, with the result that government critics sometimes face prosecution for alleged speech or other expression offences under a range of different but overlapping criminal charges.

In practice, governments around the world have used defamation and related laws to restrict freedom of expression and thus stifle public debate, deter or suppress criticism, and evade accountability. Typically, the authorities in many states have invoked these laws to protect the politically powerful

– for example, government leaders and officials engaged in corrupt practices which they wish to conceal from the public – rather than to ensure “respect for the rights and reputations” of ordinary citizens.

Defamation and insult laws are generally vague and broadly-framed, giving them a “catch all” aspect that, when combined with criminal sanctions – possible imprisonment plus a criminal record damaging to an individual’s future employment prospects – serves as a formidable deterrent and curb on free speech.

Unsurprisingly, given this background, the HRC and the ACHPR, as well as other treaty monitoring bodies and international and national courts, have had to address the issue of intersection of different human rights – notably, freedom of expression and the right to protection of reputation or national security. They have established principles and criteria to assist particularly states and courts to determine when restrictions on expression are legitimate and permissible or when they amount to an impermissible restraint on the right to free expression.

HRC General Comment No. 34

Article 28 of the ICCPR established the **Human Rights Committee** (HRC) to monitor states’ implementation of the treaty and act as the authoritative interpreter of the ICCPR’s provisions, which it has done by issuing a series of General Comments further clarifying various articles of the ICCPR. In July 2011, the HRC adopted General Comment No. 34, which provides authoritative guidance to states that are party to the ICCPR on how to apply Article 19 rights to freedom of opinion and expression, which are “essential for any society” and “indispensable conditions for the full development” of any person.” According to the General Comment, “a free, uncensored and unhindered press or other media is essential” for the enjoyment of these and other rights and constitutes “one of the cornerstones of a democratic society.”³⁴

With regard to insult and defamation laws, the General Comment stipulates that these should not provide more severe penalties based solely on the identity of the person impugned, and makes clear that politicians and senior officials must tolerate greater criticism than ordinary citizens and not receive greater protection because of their position:

“the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties[...]

29 African Charter on Human and Peoples’ Rights, Article 9, <http://www.refworld.org/docid/3ae6b3630.html>.

30 The African Commission, based in the Banjul, the Gambian capital, comprises 11 members of different nationalities who are elected by states party to the ACHPR for renewable six-year terms, <http://www.achpr.org/about>

31 The African Commission on Human and Peoples’ Rights, “Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights,” <http://www.achpr.org/instruments/court-establishment/#1>.

32 By September 2017, 24 member states of the African Union had ratified the Protocol recognizing the jurisdiction of the ACtHPR, 25 others had signed but not ratified, and five had neither signed nor ratified. The ratifying states include Ghana, South Africa and Uganda; the signatory states include Sierra Leone and Zambia. See: African Commission on Human and Peoples’ Rights, “Ratification Table,” <http://www.achpr.org/instruments/court-establishment/ratification/>. Some primarily political and economic agreements also contain human rights provisions: for example, the Revised Treaty of the Economic Community of West African States (ECOWAS) of 24 July 1993, to which 15 states (including Ghana and Sierra Leone) are party, requires that they “promote and foster effective dissemination of information” and “ensure respect for the rights of journalists.”

33 UN Office of the High Commissioner, “International Covenant on Civil and Political Rights,” paragraph 3, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

34 United Nations Human Rights Committee, “General comment no. 34”, at para 13. <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

*[...] all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.*³⁵

The General Comment says defamation laws “must be crafted with care” to comply with Article 19 (3), they must “not serve, in practice, to stifle freedom of expression,” and penal defamation laws should include truth as a defence and not be applied to expression that is not, by its nature, capable of verification.³⁶ The General Comment urges states not to prohibit or penalize untrue statements published in error, without malice, and says that the “public interest” should be recognized as a defence. States should avoid prescribing “excessively punitive” measures and penalties, apply criminal law only in “the most serious of cases,” consider “the decriminalisation of defamation,” and recognize that “imprisonment is never an appropriate penalty.”³⁷

UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

The United Nations Commission on Human Rights established a Special Rapporteur (UN SR) on the promotion and protection of the right to freedom of opinion and expression in 1993,³⁸ mandating the UN SR to compile information on, and take action in response to violations of these rights, particularly those of “journalists or other professionals in the field of information,” including by undertaking “fact-finding country visits.”³⁹

In his 2010 report to the Human Rights Council, the UN SR expressed support for “all efforts” to decriminalise defamation and make civil liability proceedings the “sole form of redress” for damage to reputation. He also cautioned against excessive civil penalties that undermine freedom of expression and said that any awards should be “strictly proportionate” to the harm actually caused and that other remedies, such as “apology, rectification and clarification” should also be considered. The UN SR said criminal defamation laws should not be used to protect the state, national symbols or political ideologies

as “international human rights law protects individuals and groups of people, not abstract notions or institutions that are subject to scrutiny, comment or criticism.”⁴⁰

Noting that states “frequently limit or restrict freedom of expression arbitrarily, sometimes by recourse to criminal legislation, in order to silence dissent or criticism,” the UN SR listed several principles for use in determining whether any particular restriction on freedom of expression is legitimate under international law and standards.⁴¹ These include that the restriction must be provided in advance by law, law that is “accessible, concrete, clear and unambiguous” and that is “compatible with international human rights law”.⁴² This means that the measure must not be a restriction that is “arbitrary or unreasonable” or “used as a means of political censorship or of silencing criticism of public officials or public policies.”

Such laws, the UN SR asserted, must also make clear what remedies are available in cases where restrictions have been applied illegally or abusively and that mechanisms for challenging these restrictions “must include a prompt, comprehensive and efficient judicial review [...] by an independent court or tribunal.” Further, any restrictions on freedom of expression must be “necessary”, which means that the restriction must:

- be based on one of the grounds for limitations set out in the ICCPR;
- address a “pressing public or social need” that must be met to prevent the violation of another right that is protected to a greater extent;
- pursue a legitimate aim (such as respect for the reputation of others);
- be proportionate to that legitimate aim and be “no more restrictive than is required” to achieve the desired purpose (with the burden of demonstrating this falling on the state imposing the restriction)⁴³

35 Ibid at para 38.

36 Ibid at para 47.

37 See UN Human Rights Committee, “General comment No.34,” 12 September 2011, CCPR/C/GC/34. The General comment also says it is “impermissible” for states to charge a person with criminal defamation but not bring them to trial “expeditiously” due to the “chilling effect” that this will have on the freedom of expression of the defendant and others.

38 The UN SR’s mandate has since been renewed at three-yearly intervals, most recently in March 2017. UNOHC, <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>

39 The UN SR has so far undertaken visits to six countries in Africa: Malawi, 1994; Sudan, 1999; Tunisia, 1999; Cote d’Ivoire, 2004, Equatorial Guinea, 2007; Algeria, 2011. Reports of these visits can be accessed at <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>. In March 2017, the UN SR had outstanding requests to visit to nine countries in Africa: Angola, Eritrea, Ethiopia, Liberia, Nigeria, Rwanda, Swaziland, Uganda, and Zimbabwe.

40 Frank La Rue, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,” United Nations General Assembly, Fourteenth Session, (April 2010) at paras 83 and 84. <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.pdf>.

41 Frank La Rue, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,” United Nations General Assembly, Fourteenth Session. (April 2010) at para 75. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/130/49/PDF/G1013049.pdf?OpenElement>

42 Frank La Rue, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,” at para 79, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/130/49/PDF/G1013049.pdf?OpenElement>

43 Frank La Rue, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,” at para 79, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/130/49/PDF/G1013049.pdf?OpenElement>

Declaration of Principles on Freedom of Expression in Africa

In 2002, the ACHPR adopted a Declaration of Principles on Freedom of Expression in Africa.⁴⁴ This declaration provides the most comprehensive guidance from an AU body to date to states that are party to the AChHPR on their implementation of the rights to freedom of expression and access to information.

The Declaration reaffirms Article 9 of the AChHPR and “the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms”. It also stressed the “key role” of the media and other means of communication in “ensuring” freedom of expression, “promoting the free flow of information and ideas” and “in assisting people to make informed decisions and in facilitating and strengthening democracy.”⁴⁵ It stipulated that no-one should be subject to “arbitrary interference” with their freedom of expression and that restrictions on the right must be “provided by law, serve a legitimate interest and be necessary in a democratic society.”⁴⁶

The Declaration addresses defamation under Principle XII on “Protecting Reputations,” where it urges states to “ensure” that their laws against defamation comply with three specific standards. These are that: i) no-one can be “found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances”; (ii) that ““public figures” are “required to tolerate a greater degree of criticism”; and (iii) that any sanctions that the laws prescribe may “never be so severe as to inhibit the right to freedom of expression, including by others.”⁴⁷

Principle XII also provides that privacy laws may “not inhibit the dissemination of information of public interest,” while Principle XIII on “Criminal Measures” urges states to “review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.”⁴⁸

Principle IV on “Freedom of Information” confirms that public bodies hold information “not for themselves but as custodians of the public good” and that “everyone has a right to access this information” subject only to “clearly defined rules” that are “established by law”. It must also conform to several principles that the Declaration

lists, including that public bodies must “actively [...] publish important information of significant public interest” and that no-one should face sanctions for releasing information about wrongdoing or various other matters “in good faith” unless such sanctions “serve a legitimate interest” and are “necessary in a democratic society.”⁴⁹

ACHPR Resolution on Repealing Criminal Defamation Laws in Africa

In November 2010, the ACHPR adopted a resolution⁵⁰ calling on all states that retain their criminal defamation and insult laws to repeal them. The resolution described such laws as “a serious interference with freedom of expression” that “impedes the role of the media as a watchdog” and prevents journalists and other media practitioners from practicing their profession “without fear and in good faith.” The resolution also expressed concern about “deteriorating press freedom” in parts of Africa, particularly restrictive laws denying public access to information, and arrests, assaults and attacks on journalists “due to statements or materials published against government officials.”⁵¹

The resolution commended states that have no criminal defamation or insult laws or that had “completely repealed” them. It urged all other states party to the AChHPR “to repeal criminal defamation laws or insult laws which impede freedom of speech” and to adhere to the freedom of expression provisions of that treaty, the 2002 Declaration of Principles of Freedom of Expression in Africa and other regional and international human rights instruments. The resolution also urged journalists and other media practitioners “to respect the principles of ethical journalism and standards in gathering, reporting, and interpreting accurate information, so as to avoid restriction to freedom of expression, and to guide against risk of prosecution.”⁵²

Special Rapporteur on Freedom of Expression and Access to Information in Africa

The ACHPR established a Special Rapporteur (SR) on Freedom of Expression⁵³ in 2004 (subsequently renaming the position in 2007 to include specific reference to access to information) and mandated the SR to analyse member states’ “national media legislation, policies and practice” and “monitor their compliance with freedom of expression standards” and advise them accordingly. As well, the

44 African Commission on Human and Peoples’ Rights, “Declaration of Principles on Freedom of Expression in Africa,” 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia. <http://www.achpr.org/sessions/32nd/resolutions/62/>

45 Ibid.

46 Ibid.

47 Ibid, Principle XII.

48 Ibid, Principle XII and Principle XIII.

49 African Commission on Human and Peoples’ Rights, “Declaration of Principles on Freedom of Expression in Africa,” 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia. At part IV, para 1. <http://www.achpr.org/sessions/32nd/resolutions/62/>

50 African Commission on Human and Peoples’ Rights, “169: Resolution on Repealing Criminal Defamation Laws in Africa,” <http://www.achpr.org/sessions/48th/resolutions/169/>.

51 Ibid.

52 Ibid.

53 Faith Pansy Tlakula of South Africa has been the SR of the ACHPR since 2006; she was most recently reappointed for two years in November 2015 when she was also elected as Chairperson of the ACHPR.

ACHPR mandated the SR to undertake country missions⁵⁴ and other actions to promote freedom of expression in Africa; to investigate situations where “massive violations” of freedom of expression were reported and make recommendations on these to the ACHPR; to make “public interventions” in response to violations of freedom of expression; and to record and report on such violations in regular reports to the ACHPR.

The Special Rapporteur has repeatedly urged governments to reform their criminal defamation and insult laws, and has criticized the use of sedition, libel, and insult laws, stating in July 2013 that: “Criminal defamation laws are nearly always used to punish legitimate criticism of powerful people, rather than protect the right to a reputation.”⁵⁵

Findings by other authoritative sources

Numerous other statements and declarations calling for the repeal of criminal defamation laws have been made by intergovernmental organisations (IGOs),⁵⁶ such as the UN Human Rights Council, the Inter-American Commission on Human Rights and the Council of Europe, and by non-governmental organisations (NGOs) such as the World Association of Newspapers and News Publishers (WAN), and the media freedom group ARTICLE 19.

Notable contributions include a 2016 Council of Europe study of European Court of Human Rights case law;⁵⁷ the 2007 “Declaration of Table Mountain”⁵⁸ adopted by WAN and the World Editors Forum, which described criminal insult and defamation laws as “the greatest scourge of press freedom” in Africa; and ARTICLE 19’s revised Principles on Freedom of Expression and Protection of Reputation, published in 2016.⁵⁹

2.3 Jurisprudence and case law in Africa

African Court on Human and Peoples’ Rights (ACtHPR)

In December 2014, the ACtHPR handed down a landmark judgment on criminal defamation in the case *Lohé Issa Konaté v. Burkina Faso*, ruling that the Burkina Faso authorities had violated a journalist’s right to freedom of expression as guaranteed by the ACHPR when they imprisoned him on criminal defamation charges. The case arose from the prosecution of Lohé Issa Konaté, editor of the weekly *L’Ouragan* newspaper. The Burkina Faso authorities prosecuted Konaté under provisions of the country’s Information Code and Penal Code⁶⁰ after *L’Ouragan* published three articles alleging wrongdoing by public officials. Those implicated included the chief state prosecutor, who initiated criminal proceedings against Konaté and Roland Ouédraogo, resulting in their prosecution.

Konaté was sentenced to one year in prison, fined and ordered to pay damages by the Ouagadougou High Court after it convicted him on charges of defamation, public insult and contempt in 2012. The High Court also ordered *L’Ouragan* to suspend publication for six months. Konaté applied to the ACtHPR on the ground his right to freedom of expression under ACHPR Article 9, ICCPR Article 19 and Article 66 (2) of the Revised ECOWAS Treaty had been violated.⁶¹

In its judgment,⁶² the ACtHPR determined that the restrictions on freedom of expression applied in *Konaté v Burkina Faso* met two out of three important tests: they were “provided by law”; and they pursued a legitimate objective. However, the ACtHPR ruled that the restrictions did not meet the third key criterion, which required them to be a “proportionate means” to attain the desired objective. Citing key provisions of the ACHPR’s Declaration of Principles, including that “sanctions

54 During country visits to Angola and Swaziland in 2016, the SR criticized their retention and use of laws criminalising defamation and their lack of effective access to information legislation and procedures, and called for legal and other reforms to enhance freedom of expression. For Angola, see: <http://www.achpr.org/press/2016/10/d320/>; for Swaziland, see: <http://www.achpr.org/press/2016/03/d291/>

55 The UN SR and the SR of the ACHPR have made several joint declarations with their counterparts from other regions, the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS) and the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE) in recent years: most recently, in March 2017, they issued a Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, which called for the abolition of criminal defamation laws as “unduly restrictive” in favour of civil law remedies that include defences of “truth” and “fair comment,” <http://www.osce.org/fom/302796>, p. 3. Committee to Protect Journalists, “A bid to rid Africa of criminal defamation, sedition laws”, 12 July 2013, <https://cpj.org/blog/2013/07/a-bid-to-rid-africa-of-criminal-defamation-seditio.php>

56 For example, in 2003 the Commonwealth Secretariat published “Best Practice” guidance on freedom of expression “as a resource for governments, national human rights institutions as well as civil society” in states belonging to the Commonwealth of Nations. The guidance urged Commonwealth states – 19 African countries are members of the Commonwealth of Nations - to ensure that their defamation laws comply with their international human rights obligations and to consider decriminalising defamation and making protection of the right to reputation a civil law matter. See: http://www.oecd-ilibrary.org/commonwealth/social-issues-migration-health/freedom-of-expression-association-and-assembly/freedom-of-expression-specific-issues_9781848597860-4-en

57 Tarlach McGonagle, “Freedom of expression and defamation. A study of the case law of the European Court of Human Rights,” Council of Europe, September 2016, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ac95b>

58 Andrew Heslop, “The Declaration of Table Mountain,” World Association of Newspapers and News Publishers, February 2011, <http://www.wan-frica.org/articles/2011/02/16/the-declaration-of-table-mountain>

59 Article 19, “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation,” 2nd ed. second edition, 2016, <https://www.article19.org/resources.php/resource/38641/en/defining-defamation:-principles-on-freedom-of-expression-and-protection-of-reputation>

60 Articles 109, 110 and 111 of the Information Code of 30 December 1993 and Article 178 of the Penal Code of 13 November 1996. During proceedings, lawyers representing the Burkina Faso government told the African Court that the Information and Penal Code provisions relating to freedom of expression and of the media press had been formulated “virtually in the same words as the French Law of 29 July 1881 on press freedom.”

61 In order for a case to be admissible to the Court, it is a requirement to exhaust domestic remedies; Konaté, however, argued that the Cour de Cassation was ineffective and would provide insufficient remedy, and that the Constitutional Council was an unavailable remedy.

62 *Lohé Issa Konaté v Burkina Faso*, ACHPR Application No 004/2013 (December, 2014), <http://en.african-court.org/index.php/55-finalised-cases-details/857-app-no-004-2013-lohe-issa-konate-v-burkina-faso-details>

should never be so severe as to interfere with the exercise of the right to freedom of expression,” and of HRC General comment No. 34, the ACtHPR ruled that the prison sentence imposed on Konaté amounted to a “disproportionate interference” in his exercise of freedom of expression and the rights of journalists.⁶³ In June 2016, the ACtHPR also instructed the Burkina Faso government to expunge Konaté’s criminal record and to pay him compensation totaling 35,000 CFA (\$70,000 US) for loss of income and the “moral damage” caused to him and his family by his prosecution and imprisonment.⁶⁴

In reaching this judgment, the African Court also considered the function of the person whose rights the Burkina Faso authorities sought to protect when they prosecuted Konaté, notably whether the person was “a public figure or not,” stating that “freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate concerning public figures.”⁶⁵ The ACtHPR noted a previous finding by the ACHPR that “people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether.”⁶⁶

The ACtHPR also made reference in its judgment to similar findings in landmark freedom of expression-related cases heard from other jurisdictions, including decisions of the European Court of Human Rights and the Inter-American Court of Human Rights. The ACtHPR also ruled that Burkina Faso should amend its laws to comply with the right to freedom of expression under the ACHPR.⁶⁷

The ACtHPR judgment was accompanied by a minority dissenting opinion by four of the ten judges. They held that criminal defamation laws are never permissible and that “the state’s duty to enforce collective security, morality and common interest” can never “justify the criminalization of expression of speech by way of criminal defamation laws of any kind, whether punishable by incarceration or not. Access to civil action, civil sanction together with specifically defined crimes for safeguarding national security, public peace and the common interest should be sufficient.”⁶⁸

Lohé Issa Konaté vs Burkina Faso

Pansy Tlakula, the ACHPR SR on Freedom of Expression and Access to Information in Africa, welcomed the ACtHPR’s 2014 judgment in the Konaté case as a landmark ruling that should “change the free expression landscape” in Africa and “give impetus” to Africa-wide campaigning for the decriminalisation of defamation and laws on insult and “false news”.⁶⁹

Reflecting on his experiences, Konaté told PEN International that despite the African Court’s ruling in his case, his conviction and imprisonment by a Burkina Faso court in 2012 had been disastrous for him and his newspaper, *L’Ouragan*. The newspaper’s suspension meant that its staff lost their jobs, while he served 12 months in prison and was then barred from returning to his work as a journalist for an additional six months. After that, it took half a year more before *L’Ouragan* could again become a weekly publication, and during that period it incurred serious financial losses.

The repercussions Konaté and his newspaper suffered underscore the deterrent effect of criminal defamation laws and the risks faced by journalists and editors prepared to report on issues that governments consider sensitive or damaging. Konaté stated:

“In Burkina Faso, we accepted to sacrifice ourselves for freedom of expression and press freedom. Some have lost their lives, like Norbert Zongo;⁷⁰ others have been through the torments of imprisonment, like us. It is without a doubt due to a part of our sacrifices that today laws have been changed so a journalist will not be jailed on defamation charges anymore.”⁷¹

63 Lohé at paras 125,138 and para 164.

64 See [http://en.african-court.org/images/Cases/Ruling%20on%20Reparation/Konate%20Judgement%20on%20Reparation%20\(English\).pdf](http://en.african-court.org/images/Cases/Ruling%20on%20Reparation/Konate%20Judgement%20on%20Reparation%20(English).pdf); Lohé at para 176(8).

65 Lohé at para 155.

66 *Media Rights Agenda, Constitutional Rights Project v Nigeria*, ACHPR Communication no. 105/93-128/94-152/96 at para 74.

67 Lohé.

68 Lohé, dissenting opinion on page 51 at para 4, http://en.african-court.org/images/Cases/Dissenting-Separate%20Opinions/Joint_Separate_Opinion_of_Judges_Sophia_A._B._AKUFFO_Bernard_M._NGOEPE_and_Duncan__TAMBALA.pdf

69 PEN International, “African Court: Imprisonment for Defamation Violates Freedom of Expression,” London, December 2014, <http://www.pen-international.org/newsitems/african-court-imprisonment-for-defamation-violates-freedom-of-expression/?print=print>

70 A human rights activist and investigative journalist who founded and edited *L’Indépendant*, a Ouagadougou-based newspaper, Zongo was murdered together with his brother and two others, in December 1998. Those responsible for the murders have not been brought to justice.

71 Interview via email with Konaté, 19 March 2017.

Decisions of national courts

Courts in at least two countries in Africa have declared criminal defamation laws unconstitutional and invalid since early 2016.

Kenya: On 6 February 2017, the High Court of Kenya declared the criminal defamation provision of Kenya's Penal Code, Section 194, incompatible with Kenya's 2010 Constitution and, thus, unconstitutional.⁷² This judgment, against which the Kenyan government lodged an appeal,⁷³ was the first such ruling by a court in East Africa that criminal defamation violates the right to freedom of expression. Delivering judgment, Justice JM Mativo declared that the "chilling effect of criminalising defamation is exacerbated by the maximum punishment of two years imprisonment impossible for any contravention of section 194" of the Penal Code. The judge said he considered this "clearly excessive and patently disproportionate for the purpose of suppressing objectionable or opprobrious statements. The accomplishment of that objective certainly cannot countenance the spectra of imprisonment as a measure that is reasonably justifiable in a democratic society."⁷⁴

The court also held that a penalty of imprisonment was not "reasonably justifiable in a democratic society" and that civil remedies were available that afforded sufficient redress against injury to a person's reputation.

According to one expert commentary,⁷⁵ the Kenya judgment went further than the finding of the ACtHPR in *Lohé Issa Konaté v. Burkina Faso* that imprisonment should only be used as a last resort, as when there are exceptional circumstances such as hate speech or incitement that seriously threatens the enjoyment of other human rights. Instead, the Kenya High Court ruled that "any [emphasis added] continued enforcement of criminal defamation laws" by the government would violate "the fundamental and constitutionally guaranteed right to the freedom of expression."⁷⁶

In his ruling, Justice Mativo said it had been expected that the country's laws would be amended following the adoption of a new Constitution in 2010 to ensure their compatibility with that Constitution, yet seven years later this had still to be done.⁷⁷

The case arose from the indictment of two people on criminal defamation charges after they published allegedly defamatory statements on their Facebook page, entitled "Buyer beware-Kenya." The two individuals then challenged the criminal defamation provision of the Penal Code, section 194, before the Constitutional and Human Rights division of the High Court, arguing that the provision was unconstitutional and violated the right to freedom of expression.

Zimbabwe: On 3 February 2016, a full bench of nine judges sitting in Zimbabwe's Constitutional Court ruled unanimously that criminal defamation is unconstitutional, invalidating Section 96 of the country's Criminal Law and Codification Act.⁷⁸ This provision had punished the publication of defamatory content with up to two years in prison. The court ruled that it violated provisions of Zimbabwe's Constitution, adopted in 2013, which protect the rights to free expression, access to information and freedom of the press.

The case arose from the prosecution of the editor and a journalist at *The Standard* newspaper who were charged with criminal defamation following a complaint by a businessman about a report on alleged non-payment of workers at a hospital that he owned. The two journalists challenged their prosecution, arguing that Section 96 was unconstitutional.

The ruling confirmed a previous decision of the Constitutional Court, delivered in 2014, that invalidated criminal defamation under Zimbabwe's previous Constitution.⁷⁹

72 In *Jacqueline Okuta & Anor v. AG & Others, Petition No. 397 of 2016*.

73 At time of writing, the appeal was still pending.

74 *Jacqueline Okuta & Anor v. AG & Others, Petition No. 397 of 2016*, at page 13.

75 Nani Jansen Reventlow and Catherine Anite, "Kenyan Court Knocks Down Criminal Defamation, Safeguards Freedom of Expression," Inform's Blog, February, 2017, <https://inform.wordpress.com/2017/02/10/kenyan-court-knocks-down-criminal-defamation-safeguards-freedom-of-expression-nani-jansen-reventlow-and-catherine-anite/>

76 Ibid.

77 *Jacqueline Okuta & Anor v. AG & Others, Petition No. 397 of 2016*, page 13.

78 Daniel Nemukuyu, "Concourt Outlaws Criminal Defamation," *The Herald*, February 2016, <http://www.herald.co.zw/concourt-outlaws-criminal-defamation/>

79 *The Insider*, "Criminal Defamation is unconstitutional – full judgement," June 13, 2014, <https://www.insiderzim.com/criminal-defamation-is-unconstitutional-full-judgment/>

3. CASE STUDIES

The five country case studies below reflect different attitudes to criminal defamation law currently prevailing in Africa. During the colonial era, all five countries were under British rule and at independence inherited a legal system of laws based on the English legal system, including criminal defamation and sedition laws that were conceived during times of popular protest in the United Kingdom. These laws were later exported by the British to Africa to counter the growth of nationalism and popular demands for an end to colonial rule.

The first two studies focus on Uganda and Zambia, two countries where the use of criminal defamation laws appears firmly entrenched, despite the calls for decriminalisation made by the ACHPR, as well as other international institutions. The studies survey the laws in force in each country and their application in practice, citing key cases, and assesses the impact of criminal defamation on freedom of expression and the media.

In Sierra Leone and South Africa, the subjects of the third and fourth case studies, the process of decriminalising defamation is now underway – at least, according to official policy. Both countries’ governments have publicly committed to making defamation solely a civil law matter but they have yet to adopt the legislation necessary to make this happen, creating a sense of limbo and uncertainty.

The final case study concerns Ghana, which in 2001 became the first state in Africa to decriminalise defamation. It reviews the conditions that prevailed before decriminalisation, the circumstances that brought about that reform in 2001, and examines the impact of decriminalisation in the years since on the exercise of freedom of expression and public perceptions of the media.

3.1 Uganda

“When a journalist is dragged to court over defamation cases, he/she will fear to write sensitive stories. This has happened to me. This means that the powerful people can do whatever they wish to do, without worrying about journalists, who are afraid of them. As journalists we are the eyes and mouths of the public. When we fear to report about sensitive issues, nobody will report about these events, and the public’s life will be left helpless.”⁸⁰

Uganda’s 1995 Constitution guarantees freedom of speech and media freedom but defamation remains criminalised under vague and broadly-framed provisions of the Penal Code Act, enacted in 1950 when Uganda remained under British colonial rule.⁸¹ The British used the Penal Code provisions criminalising defamation and sedition to suppress opposition to colonial rule but once Uganda became independent in 1962, the new authorities retained them to use against their critics and opponents.

Successive governments since independence have continued to use these laws to stifle public debate, criticism and dissent, and to deter the media from pursuing investigative journalism and exposing high level corruption or other wrongdoing. Journalists, writers and others who fall foul of these laws face arrest, intimidatory police questioning, protracted prosecutions, possible imprisonment and a criminal record that may blight their future employment and destroy their livelihood.

In practice, Uganda’s criminal defamation laws are used to protect those who exercise the greatest power politically and economically, such as senior state officials and business leaders, from unwanted scrutiny or criticism of their financial and other dealings rather than ordinary citizens whose reputations are besmirched. Because prosecutions under these laws are undertaken in the name of the state, the full force of state authority is invoked on behalf of those who claim to have been defamed and against those they accuse of defaming them.

80 Madinah Nalwanga, 2 November 2016.

81 Uganda Penal Code Act (Chapter 120), s. 180. http://www.wipo.int/wipolex/en/text.jsp?file_id=170005

Up to now, the government has given little concrete commitment to decriminalise criminal defamation despite the calls by the ACHPR and the HRC for states to make defamation a civil, not criminal, law matter.⁸² In 2010, however, Uganda's Constitutional Court ruled unanimously that the Penal Code provisions criminalising sedition violated freedom of speech and media guarantees contained in the 2005 Constitution, effectively sweeping these provisions from the statute book. The judgment immediately removed the threat of imprisonment facing more than a dozen people, including journalists, then facing trial on sedition charges.⁸³

The Constitution guarantees every citizen's right to access government-held information, and a law to give effect to this guarantee was enacted in 2005.⁸⁴ However, the implementing regulations necessary to make the new law operable were not issued until 2011 and the access to information regime remains largely ineffective.

BACKGROUND

Uganda was under British colonial rule from the 1890s until it achieved independence on 9 October 1962. According to one historian, during their rule, the British colonial authorities sought to maintain and protect "the exclusiveness and privilege" of their power "through the use of legislative, administrative and strong-arm measures," including by enacting criminal defamation, sedition and other laws "to control and monitor the power of the media."⁸⁵ Under these laws, editors, journalists and others who criticized or opposed colonial rule faced arrest, trial and imprisonment, as well as fines and other penalties such as suspension or banning of publications.

After independence, the government of Prime Minister (later President) Milton Obote began deploying the same Penal Code provisions against its critics and passed new laws to control the media and curtail its independence. They included the Television Licensing Act and the Deportation Ordinance in 1963, the Press Censorship and Correction Ordinance and the Official Secrets Act in 1964, the Emergency Powers Act of 1966, and the Public Order and Security Act of 1967.⁸⁶

In 1971, Idi Amin Dada overthrew Obote's government inaugurating a period of grossly repressive and abusive rule

and years of armed conflict in which freedom of expression and other rights were routinely violated. In 1986, Yoweri Museveni's National Resistance Movement (NRM) won power by force of arms. The NRM restored stability and improved human rights. It has held power ever since, with Museveni repeatedly re-elected as Uganda's President. Several laws that threaten freedom of expression were also introduced under Museveni (see below).⁸⁷

Despite legal restrictions, Uganda has had a vibrant media since the 1990s. Numerous privately-owned radio and television stations and independent newspapers operate alongside and in competition with state radio and TV channels and newspapers but media reporting is severely constrained and self-censorship is rife. This is due to the threat posed to editors and journalists by the Penal Code provisions criminalising defamation and other factors, such as the ineffectiveness of an access to information law enacted in 2005 and measures the authorities take – particularly in the run up to presidential and parliamentary elections – to deny their critics and opponents a platform.⁸⁸

Prior to the February 2016 elections that saw Museveni re-elected for a fifth successive five-year term as President, the authorities closed at least one media outlet for providing an opposition candidate a platform.⁸⁹ The same period saw the official telecommunications regulator impose a five-day ban on all social media networks for unspecified "security reasons", and security officials assaulted journalists with impunity.⁹⁰

After the election, the authorities banned all live media reporting of a "defiance campaign" launched by the main political opposition party⁹¹ and failed to hold the security forces accountable for unlawfully assaulting and beating journalists and others.

The media's ability to perform its key public watchdog role has also been hampered by other factors, including inadequate training of journalists; a failure by some media to adhere to accepted ethical and professional standards; and pressure exerted and inducements offered by powerful political and economic forces that aim to co-opt or neutralise the media in pursuit of their policies or interests.

82 The Uganda Law Reform Commission proposed to repeal the provisions on criminal defamation contained in the Uganda Penal Code Act Cap 120. See African Commission on Human and Peoples Rights, "Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010 – 2012)," November 2015, http://www.achpr.org/files/sessions/57th/conc-obs/5-2010-2012/concluding_observations_5th_state_report_uganda.pdf

83 Constitutional Court of Uganda, *Andrew Mujuni Mwenda & Anor v Attorney General*, [2010] UGCC 5. <https://globalfreedomofexpression.columbia.edu/cases/mwenda-v-attorney-general/>

84 Access to Information Act (ATIA), 2005; Peter Veit, "Improving Freedom of Information in Uganda," World Resources Institute, May 2013, <http://www.wri.org/blog/2013/05/improving-freedom-information-uganda>

85 Michael Kakooza, "Reality Check: Revisiting the Media Freedom Debate at Uganda's Independence Golden Jubilee," Kampala, Konrad Adenauer-Stiftung and Uganda's Medoa Development Foundation, 2012, p. 11.

86 Ibid at p. 49.

87 Democracy Web, "Freedom of Expression: Country Studies – Uganda," <http://democracyweb.org/freedom-of-expression-uganda>

88 For example, see BBC News, "Uganda Election: Facebook and Whatsapp blocked," February 2016, <http://www.bbc.co.uk/news/world-africa-35601220>

89 Jo Leinen, "Election observation delegation to the presidential and parliamentary elections in Uganda," European Parliament, February 2016. p. 10. http://www.europarl.europa.eu/intcoop/election_observation/missions/2014-2019/uganda-2016-02-16.pdf

90 Jo Leinen, http://www.europarl.europa.eu/intcoop/election_observation/missions/2014-2019/uganda-2016-02-16.pdf

91 Richard Kavuma, "Uganda: Museveni defies opposition's 'defiance' campaign to begin 5th term," May 2016, <http://hetnieuwe.viceversaonline.nl/dossier/uganda-museveni-defies-oppositions-defiance-campaign-to-begin-5th-term/>

LEGAL FRAMEWORK

International and constitutional law

The right to freedom of expression is enshrined in Uganda's Constitution and in international human rights treaties to which Uganda is party. As a result, the Ugandan government is under an obligation to protect the right.

Article 29(1)(a) of the Constitution guarantees "freedom of speech and expression which shall include freedom of the press and other media." Adopted on 8 October 1995, the Constitution is the supreme law of Uganda.⁹²

Uganda is also obligated to protect and promote freedom of expression as a party to both the ICCPR and the AChHPR. Uganda is also a member of the East African Community and party to the Treaty Establishing the East African Community (TEEAC)⁹³, whose "fundamental principles" include "the recognition, promotion and protection of human and peoples' rights" in accordance with the AChHPR,⁹⁴ and is subject to the jurisdiction of the East African Court of Justice (EACJ).

In September 2017, the EACJ was still considering an application⁹⁵ to declare Uganda's criminal defamation law incompatible with the TEEAC's fundamental principles.⁹⁶

Laws criminalising peaceful expression and their application

The Penal Code Act of 1950 contained a number of provisions criminalising peaceful expression, including:

- Articles 39 and 40, which made it a crime punishable by up to seven years of imprisonment to act, speak or publish any information with "seditious intention," defined as any act, words or publication that the authorities deemed was intended to "bring into hatred or contempt or to excite disaffection" against Uganda's President, government or judiciary

The law targeted not only the alleged authors of the material deemed seditious but all those who were associated with it, including printers, publishers, sellers, distributors and purchasers, and was truly draconian in effect. However, it is now no longer possible for the authorities to bring prosecutions under Articles 39 and 40.

Andrew Mujuni Mwenda & Anor v Attorney General⁹⁷

In August 2010, a five-judge panel of the Uganda Constitutional Court unanimously declared the sedition law unconstitutional, and therefore null and void. The court ruled that Penal Code Articles 39 and 40 violated the free speech and freedom of the press guarantees set out in Section 29 of the Ugandan Constitution. The Constitutional Court made its ruling in response to a petition lodged several years earlier by journalist Andrew Mwenda after the authorities charged him with sedition for criticizing Uganda's president and government following the death of Sudanese Vice-President John Garang in a plane crash in July 2005. The Constitutional Court ruling reportedly invalidated sedition charges that were pending against 10 other journalists as well as Mwenda and five politicians.⁹⁸

Those against whom charges were dropped following the Constitutional Court ruling included Timothy Kalyegira, a journalist for the *Uganda Record*, who the authorities charged with sedition for writing an article about the killing of more than 70 people in suicide bomb attacks in July 2010 in Kampala. The attacks (for which the Somalia-based Islamist armed group Al-Shabaab claimed responsibility) targeted people who were attending a public screening of the FIFA World Cup final. The authorities accused Timothy Kalyegira of insinuating that the government had carried out the lethal bomb attacks as a way of diverting public attention from pressing national issues but the charges were dropped after the Constitutional Court declared Articles 39 and 40 of the Penal Code unconstitutional.⁹⁹

92 CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995. http://www.parliament.go.ug/images/stories/constitution/Constitution_of_Uganda_1995.pdf

93 The Treaty was adopted in 1999 and took effect in 2000.

94 Article 6(d), Treaty for the Establishment of the East African Community. See: http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf

95 Based on a petition submitted in December 2014 by journalist Richard Ssemuusi: see below. East African Court of Justice. Application No. 4 of 2015, <http://eacj.org/wp-content/uploads/2016/07/App1.-No.4-of-2015.pdf>

96 In 2016, in a case involving Burundi, the EACJ concluded that freedom of expression and the press fell within the TEEAC's principles, declaring that "democracy must of necessity include adherence to press freedom" and that a "free press goes hand in hand with the principles of accountability and transparency." See: <https://inform.wordpress.com/2015/05/21/case-law-burundi-journalists-union-v-attorney-general-of-burundi-a-positive-judgment-in-the-midst-of-a-crisis-jonathan-mccully/>

97 Andrew Mwenda and another v. Attorney General, [2010] UGCC 5, <https://www.ulii.org/node/15858>

98 Dwyer Arce, "Uganda court overturns anti-sedition law," *Jurist*, August 2010. <http://www.jurist.org/paperchase/2010/08/uganda-court-overturns-law-against-sedition.php>

99 Committee to Protect Journalists, "Uganda strikes down criminal sedition," 26 August 2010, <https://cpj.org/2010/08/in-uganda-cpj-welcomes-ruling-that-strikes-down-cr.php>

- Article 50, which makes it a crime punishable by imprisonment for up to two years to publish “any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace.” The provision allows for a defence of truth only if an accused can show that, before publication, they took such “measures” to verify the statement, rumour or report as to make it reasonable for them to believe that it was true.
- Article 53, which makes it a crime to “degrade, revile or expose” foreign leaders “to hatred or contempt” through publication, speech or other action with intent to “disturb peace and friendship” between their country and Uganda. Anyone convicted under this article faces up to two years in prison.
- Articles 179-186, which set out the law on criminal defamation. Article 179 defines libel as the unlawful publication of any “defamatory matter” with intent to defame another person, while Article 180 defines “defamatory matter” as that likely to injure a person’s reputation by exposing them “to hatred, contempt or ridicule.” The article protects the reputation of the dead as well as the living, although no prosecutions for alleged defamation of people who are deceased can go ahead without the approval of the Director of Public Prosecutions.

Articles 179 - 186 were used to prosecute two *Sunday Mirror* journalists, senior reporter, Angelo Izama, and editor, Henry Ochieng, in connection with an article published in December 2009 that drew similarities between the Ugandan government under President Museveni and the former regime of Ferdinand Marcos in the Philippines. The two journalists were eventually acquitted in December 2012, by which time they had spent almost three years facing trial and the threat of imprisonment for their peaceful criticism of the government.¹⁰⁰

Another notable case saw the authorities arrest four journalists and charge them with criminal defamation in August 2015. All four - Madinah Nalwanga and Patrick Tumwesigye of the *Vision Group*, and Benon Tugumisirize and Ronald Nahabwe of the *Red Pepper* newspaper - were accused of criminally defaming two Kampala businessmen in stories about a land ownership dispute. They were granted bail but it was set at two million Ugandan shillings (around 600 USD) each; the *Vision Group* met this for their journalists but the *Red Pepper* journalists spent several days in detention at Luzira Prison before their bail was paid. Trial proceedings against the four journalists, and a fifth person who had acted as their source of information, continued for almost a year before Kampala’s chief magistrate acquitted them of all charges in March 2017. The fifth accused, however, was convicted; he was found to have provided the journalists with false information concerning the two businessmen with whom he was in dispute which they subsequently published.¹⁰¹

In October 2014, a magistrate in Kalangala, Central region, convicted radio journalist Ronald Ssemuusi of criminally defaming a local politician in a 2011 report about the alleged theft of solar panels donated by the African Development Bank, and sentenced him to pay a fine of one million Ugandan shillings or go to prison for a year. Ssemuusi died soon after his conviction but prior to his death he submitted a petition to the EACJ challenging Uganda’s criminal defamation laws on the ground of their incompatibility with the TEEAC’s Fundamental and Operational Principles, notably “the recognition, promotion and protection of human and people’s rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”¹⁰² As of September 2017, the EACJ had yet to rule on the case.¹⁰³

Ronald Ssemuusi

In 2011, Ssemuusi, a Ugandan journalist, aired a report through the Central Broadcasting Service. The report alleged that about 40 solar panels donated by the African Development Bank to Kalangala district had gone missing, and implicated a former district chairman. In 2014, the Kalangala magistrate convicted Ssemuusi of criminal defamation under Section 179 and 180 of the Penal Code for reporting allegations of theft by an official. Ssemuusi was taken through a trial of over three years, during which time he lost his job and he was subsequently convicted.

According to Human Rights Network for Journalists–Uganda (HRNJ), the case was very devastating to Ssemuusi and he soon thereafter passed away.

In describing the chilling effect of such laws, Kenneth Ntende of HRNJ said: “For example, Ronald Ssemuusi refrained from publishing any further stories concerning the theft of solar panels in Kalangala. This was to the detriment of the general community of Kalangala District. These solar panels were intended to pump clean water for the benefit of the general district but this offence was used to deter the media from investigating and informing society about this story.”¹⁰⁴

100 Human Rights Network for Journalists, “Court dismisses libel case against two Ugandan journalists,” December 2012, <https://hrnjuganda.org/?p=1748>

101 The Observer, “Uganda: Red Pepper journalist reprimanded for criminal libel,” All Africa, June 2016, <http://allafrica.com/stories/201606230807.html>; Human Rights Network for Journalists – Uganda, “Court acquits journalists of defamation charges,” 16 March 2017, <https://hrnjuganda.org/?p=3370>

102 Article 6(d) of the East African Community Treaty, http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf

103 In June 2016 a judgment recognized that the applicants were allowed to act as *amicus curae* <http://eacj.org/wp-content/uploads/2016/07/Ap-pl.-No.4-of-2015.pdf>

104 Speech delivered by Kenneth Ntende, HRNJ – Uganda, at PEN Uganda’s Free the Word Event at Kyambogo University, Thursday 16 March 2017, on file with PEN International.



Ronald Ssemuusi (centre, being assisted) shortly after his conviction and as he was awaiting sentencing. Photo: Emmanuel Magambo, HRNJ-Uganda

OTHER LAWS AND STATE ACTIONS THREATENING MEDIA FREEDOM

Other laws that impact the media and curtail media freedom and independence include, but are not limited to:

- **Uganda Communications Act of 2013:** The Uganda Communications Act of 2013 consolidated and harmonised the **Electronic Media Act** of 1996, and the Uganda Communications Act, and established a regulatory authority for the communications sector, the Uganda Communications Commission.¹⁰⁵ The UCC has the power to block access to websites and other media platforms. Various incidents have raised concerns that the UCC does not follow due process, and oversteps its mandate.¹⁰⁶
- the **Interception of Communications Act** of 2010. The broad nature of the act raises concerns about restrictions on the right to privacy enshrined in Article 27(2) of the 1995 Constitution and international human rights law¹⁰⁷ and treaties including the ICCPR.¹⁰⁸
- the **Computer Misuse Act** of 2011, Section 24 (2) (a) of which makes it an offence – “Cyber harassment” – to use a computer to make “any request, suggestion or proposal which is obscene, lewd, lascivious or indecent.” Section 25, Offensive Communication, similarly prohibits the use of electronic means to disturb or attempt to disturb the “peace, quiet or right of privacy of any person with no purpose of legitimate communication”. The penalty is a fine and/or imprisonment up to one year. The vague provisions of the Act have the potential to threaten freedom of expression. In April 2017, the authorities charged Dr Stella Nyanzi, a leading human rights defender and social activist, under this act for posting messages on Facebook deemed offensive to President Museveni and his wife, Janet Museveni, the Minister of Education.¹⁰⁹

¹⁰⁵ Human Rights Watch, “Keep the People Uninformed” Pre-election Threats to Free Expression and Association in Uganda, 10 January 2016, <https://www.hrw.org/report/2016/01/10/keep-people-uninformed/pre-election-threats-free-expression-and-association-uganda>

¹⁰⁶ See for example, a recent case in June 2017: Human Rights Network for Journalists – Uganda, “UCC’s action on radio Hoima unwarranted”, 20 June 2017, <https://hrnjuganda.org/?p=3618>; during the 2016 elections, Uganda 2016/2017, Amnesty International, <https://www.amnesty.org/en/countries/africa/uganda/report-uganda/>

¹⁰⁷ See, for example, UDHR Article 12 of the UDHR, ICCPR Article 17. Uganda is also party to the UN Convention on the Rights of the Child, Article 16 of which also protects the right to privacy, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which does likewise in its Article 14.

¹⁰⁸ There are also concerns that these sweeping provisions for surveillance will force journalists to disclose sources, a negative precedent in the quest for media rights, see for example HRNJ – Uganda, https://hrnjuganda.org/?page_id=1159 ; UPR Report Privacy International, “The Right to Privacy in Uganda,” 2016, https://www.privacyinternational.org/sites/default/files/uganda_upr2016.pdf

¹⁰⁹ See PETITION TO: UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION, In the Matter of Stella Nyanzi, Citizens of the Republic of Uganda v. Government of the Republic of Uganda, <http://chapterfouruganda.com/sites/default/files/downloads/Nyanzi-UNWGAD-Petition-April-24-2017-Public.pdf>; Human Rights Network Journalist-Uganda, “Analysis of the Computer Misuse Act 2011,” p. 8, https://hrnjuganda.org/?wpfb_dl=38.

The authorities also continue to put pressure on radio stations, particularly, not to host and provide a platform to opposition politicians and other government critics, particularly during election campaign periods. Those broadcasters who do so face police raids on their radio stations, arrests and interrogations, and sometimes dismissal from their jobs under the pretext of maintaining law and order.

In March 2010, for example, police in Lira in Uganda's Northern Region arrested Patrick Ronex Akena and Joe Orech, two journalists and presenters on the local *Voice of Lira* radio station after they aired an interview with Dr. Olara Otunnu, leader of the Uganda People's Congress (UPC) opposition party. Otunnu accused the NRM government of sole responsibility for the 20-year armed conflict in northern Uganda.¹¹⁰ Subsequently, the Broadcasting Council instructed *Voice of Lira's* management to suspend the two journalists. Later the same year, journalist James Kasirivu was suspended from his job at *Edigito Radio* in Mbarara, Western Region, after he reported on an opinion poll that suggested that Dr. Kizza Besigye, president of the opposition Forum for Democratic Change (FDC), would defeat President Museveni in the February 2011 elections.¹¹¹

The authorities' clampdown during the run-up to the 2011 elections also saw police arrest the chief executive and editor of the Kampala-based *Summit Business Review* magazine after it published an unflattering cartoon depiction of President Museveni on its cover,¹¹² as well as the denial of airtime to opposition candidates by radio stations owned by prominent members of the ruling NRM party.¹¹³ In 2013, the police raided the offices of two newspapers, *Daily Monitor* and *Red Pepper*.¹¹⁴

During the 2016 presidential elections, freedom of expression was restricted, with blocking of internet services on several occasions,¹¹⁵ including on election day by the Uganda Communications Commission, on the basis of alleged 'security reasons'.¹¹⁶

ACCESS TO INFORMATION

Article 41 of Uganda's 1995 Constitution guarantees to every citizen "a right of access to information" in the possession of the state and its organs and agencies except where its disclosure "is likely to prejudice" state security or sovereignty or interfere with any person's right to privacy.¹¹⁷

This right was given legal effect with the July 2005 passage by Parliament of the Access to Information Act (ATIA), which took effect on April 20, 2006. However, the implementing regulations required to make the ATIA operable were introduced only in 2011. In 2013, a report commissioned by the World Bank said the ATIA's effectiveness continued to be hampered by several factors, including weaknesses and delays in the judicial system; the judiciary's lack of technical capacity to adequately address information access issues; procedural complexities; inadequate guidance and wide discretion in implementation allowed to information officers; and the retention of "archaic and inconsistent laws," such as the Official Secrets Act of 1964, that "pose major challenges to the ATIA."¹¹⁸

IMPACT OF CRIMINAL DEFAMATION

All of the journalists and writers that PEN Uganda interviewed¹¹⁹ when preparing this report attested that the criminal defamation laws have a chilling effect on the range and quality of media reporting in the country.¹²⁰ They said that journalists who venture to investigate or report on issues that affect the interests of the authorities, politically powerful or well-connected individuals, risk being summoned by the police for lengthy interrogations that appear designed to disrupt their pursuit of professional deadlines and harass and demoralize them by leaving them in prolonged uncertainty as to whether they are to face criminal prosecution.

Lawrence Karanzi, a journalist working for the *Mama FM* radio station, lived under constant fear of being prosecuted after police summoned him for questioning about a story that he had broadcast. He said:

110 Human Rights Network for Journalists, "Uganda-UPR Report," <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/UG/HRNJ-Uganda-HumanRightsNetworkJournalists-eng.pdf>

111 See: Freedom House, "Uganda: Freedom of the Press," 2014. <https://www.justice.gov/sites/default/files/eoir/legacy/2014/11/24/Uganda.pdf>

112 Magazine editors held over Museveni cartoon', *The Monitor*, 12 January 2011, <http://www.monitor.co.ug/News/National/688334-1088164-b5earbz/index.html>

113 Human Rights Network for Journalists, "Thirty-four IFEX members urge President Museveni to respect press freedom in lead-up to general elections," February 2011, <http://hrnjuganda.blogspot.co.uk/2011/02/thirty-four-ifex-members-urge-president.html>

114 ACME, "Media house closure enters day 3 as Red Pepper prints 'freedom issue'," 22 May 2013, <https://acme-ug.org/2013/05/22/media-house-closure-enters-day-3-as-red-pepper-prints-freedom-issue/>

115 CPJ, "Uganda blocks social media and mobile phone services during voting," 18 February 2016, <https://cpj.org/2016/02/uganda-blocks-social-media-and-mobile-phone-servic.php>

116 Human Rights Watch, 2016 World Report, Uganda, <https://www.hrw.org/world-report/2017/country-chapters/uganda#cea955>

117 Constitution of the Republic of Uganda, 1995. Article 41(1). http://www.statehouse.go.ug/sites/default/files/attachments/Constitution_1995.pdf

118 Anupama Dokeniya. 'Implementing Right to Information, A case study of Uganda'. *World Bank Group*. 2013 <https://openknowledge.worldbank.org/bitstream/handle/10986/22527/RighttoInformationImplementation.pdf;sequence=1>; <http://www.freedominfo.org/2013/04/uganda-access-law-faces-many-challenges-report-says/>

119 PEN Uganda interviewed seven writers.

120 According to HRNJ – Uganda, they have documented over 19 cases of criminal libel.

“From my experience, I have discovered that these [criminal defamation] laws are meant to waste someone and put him on the tenterhooks: it is now five years since I was summoned to the Criminal Investigations Department (CID) headquarters over a story that ran on Mama FM. I was told to go back to my work; the security people said they would contact me when they want further information. This puts you in a terrible situation: you live in fear that you can be summoned any time.”¹²¹

With the threat of criminal prosecution for their writings and reporting dangling over them, many journalists told PEN Uganda they inevitably feel obliged to exercise a degree of personal self-censorship that sees them steer away from controversial subjects such as political mismanagement, official corruption and land grabbing, which would expose them to increased risk. As a result, stories that the media should cover in the public interest are neglected and the media is unable to fulfil its key public watchdog role, vital in any democracy for holding those with power to account. According to Lawrence Karanzi:

“Because you fear that you may be construed as entering a no-go area, you restrain yourself from writing or speaking about certain things. This means that your clients do not get the entire truth.”¹²²

New Vision journalist Madinah Nalwanga, one of four journalists acquitted of criminal defamation in March 2017, also stressed the intimidating effects of such prosecutions, to which she was directly exposed for more than a year and a half after she and her colleagues were charged in August 2015:

“When a journalist is dragged to court over defamation cases, he/she will fear to write sensitive stories. This has happened to me. This means that the powerful people can do whatever they wish to do, without worrying about journalists, who are afraid of them. As journalists we are the eyes and mouths of the public. When we fear to report about sensitive issues, nobody will report about these events, and the public’s life will be left helpless.”¹²³



Ms Madinah Nalwanga. Photo: Nakisanze Segawa

Madinah Nalwanga said that many other journalists had told her that they refused to cover sensitive topics for fear that they could end up in a similar situation and because they did not want to go through what she was going through. The prosecution against her caused her to lose her zeal for her journalistic work, Nalwanga said. Previously, if she was called “to the field to report an event” she “would go running, even if it were deep in the night,” but once the criminal defamation charges were laid against her she suffered a loss of “vigour and morale”. She told PEN Uganda:

“I no longer feel like going for hard stories: I go for soft ones where I know I will not get in trouble. These days, I no longer do investigative journalism as I was doing. While before this case I used to listen to every source and follow the leads they gave me, these days I send them away: I tell the sources that I am no longer interested in the stories they want to tell me. I even sometimes switch off my phone in order to avoid being called for stories. I also fear big people these days. Mention a rich man or security agent and I run away. My investigative spirit is more or less dead.”¹²⁴

Daniel Kalinaki, Ugandan bureau chief of *The East African* newspaper and former investigative editor at the *Daily Monitor*, where he specialised on corruption issues and was several times questioned by police on account of his reporting, also commented on the deterrent aspect of criminal defamation laws. He termed them “a millstone around the necks of investigative journalists,” adding:

“Faced with the prospect of publishing an imperfect, best obtainable version of the truth and possibly going to jail, many journalists will play it safe and abandon stories that really ought to be told.”¹²⁵

121 PEN Uganda, interview with Lawrence Karanzi, 4 September, 2016.

122 PEN Uganda, interview with Lawrence Karanzi, 4 September 2016.

123 PEN Uganda, interview with Madinah Nalwanga, 2 November 2016.

124 Ibid.

125 PEN Uganda, interview with Daniel Kalinaki, 5 July 2016.

Journalists who had faced criminal defamation charges said they had found them psychologically burdensome in several respects. First, the process had been a mentally fatiguing one, involving hours of police questioning followed by trial proceedings that had preoccupied them for many months or even years before they reached the outcome. Secondly, their families had been exposed to months or years of anxiety because of the possibility that they, their families' breadwinners, might be sent to prison or face other repercussions that would damage their standing, income and way of life. Thirdly, they pointed to the strain they had faced in going through the trial process and in dealing with the sense of public opprobrium that frequently surrounds defendants charged with criminal offences and facing possible prison sentences. For example, Ronald Nahabwe, one of the three journalists charged in the same case as Madinah Nalwanga in 2015 and acquitted in March 2017, said:

"I lost credibility as a reporter, because some sections of the public believe that what I wrote was not true. This is because when I got out of prison,¹²⁶ it was published in the newspaper I used to work with that I was no longer an employee of the company, which portrayed me as an unprofessional journalist..."¹²⁷

As well, some of those interviewed said that they felt obliged to avoid sensitive issues that could lead them into more trouble with the authorities after they were charged with criminal defamation but this made them feel guilty in the sense that they were abdicating from their professional duties and responsibilities as servants of the public interest. For example, Karanzi commented:

"[Avoiding to write/speak about sensitive issues] makes you feel haunted because you have denied your audience some information. You feel guilty that you have not been accountable to your audience and to the tax payer."¹²⁸

According to Daniel Kalinaki:

"[Criminal defamation laws] act like a hand around the necks of those who seek to speak truth to power. They ensure that the public hear no evil, see no evil. They propagate impunity and make leaders unaccountable to those they lead. They ensure that journalism fails in its cardinal responsibility: to give citizens the information they need to be free and make informed choices."¹²⁹

The journalists interviewed by PEN Uganda all wished to see the prompt abolition of criminal defamation. They pointed to the legal challenge by journalist Andrew Mwenda, which led to the Constitutional Court declaring the criminal law of sedition invalid, as a possible model for combating criminal defamation. They noted, however, that such constitutional challenges are costly to mount, as they must be pursued through the hierarchy of ordinary and appeal courts, and long drawn out, taking between two and five years to conclude.¹³⁰ In bringing his constitutional challenge, Andrew Mwenda had received crucial support from *The Daily Monitor*, whose legal representative, James Nangwala, argued the case before the courts.

Those interviewed said that journalists should take care to research their stories thoroughly before publication so as to be better able to mount an effective defence should they face charges. Responsible journalism based on solid research was one of the best ways, the interviewees said, to combat accusations of criminal defamation from the government and others who sought to portray themselves as wronged parties. Moreover, journalists who could show that they had thoroughly researched the matters about which they wrote were likely to be seen more positively by the public as individuals of high moral standing who were committed to publishing authentic news.

Interviewees felt that the public generally did not realise that the threat of prosecution facing journalists under the criminal defamation laws meant that they were deprived of information about a range of issues of public interest that the press dared not report. Generally, this led the public to disparage journalists who faced criminal defamation charges and suspect them of writing articles in return for bribes or to impugn people who had refused to pay them bribes. Madinah Nalwanga observed, "[w]hen you are prosecuted, the same public you are trying to help calls you a bad reporter, one who reports lies or one who tarnishes people's names."¹³¹

Some interviewees observed that criminal defamation charges are generally levelled against individual journalists rather than the media companies that published their stories although these usually include changes made by editors and sub-editors pre-publication. They expressed the need for media companies to accept greater responsibility for what they publish, particularly as they generally have greater financial resources than journalists and employ lawyers to advise and represent them. Yet, in some cases journalists facing criminal defamation charges have been blamed by their media companies for causing them to incur legal costs or have been sacked and left to organize their own legal defence.

126 He and Benon Tugumisirize, the other *Red Pepper* journalist, spent six days in detention following their arrest before their release on bail.

127 PEN Uganda, interview with Ronald Nahabwe, 5 September 2016.

128 PEN Uganda, interview with Lawrence Karanzi, 4 September 2016.

129 PEN Uganda, interview with Daniel Kalinaki, 5 July 2016.

130 PEN Uganda, various interviews with journalists, carried out between September and December 2016.

131 PEN Uganda, interview with Madinah Nalwanga, 2 November 2016.

CONCLUSIONS AND RECOMMENDATIONS

Uganda's criminal defamation laws restrict peaceful exercise of the right to freedom of expression, inhibit political debate and the media, and are inimical to good governance and democratic accountability. In practice, they are used to muzzle the press and so protect those who wield the greatest power – the politicians, bureaucrats and business people who make up the country's political and economic elite – rendering them virtually untouchable and publicly unaccountable, while affording little or no protection to ordinary citizens.

Decriminalising defamation would assuredly serve the public interest by freeing journalists to investigate and report on key political issues and personalities without the constant threat of criminal prosecution. This would enable the media to act as a more effective public watchdog and so help ensure greater government accountability, ultimately enhancing democracy.

PEN International and PEN Uganda urge the government to promptly take the following steps:

- Repeal Penal Code articles 39 and 40 on sedition which the Constitutional Court ruled in 2010 breached the Constitution;
- Repeal the Penal Code provisions criminalising defamation and the publication of false news, specifically articles 50, 53 and 179-186;
- Ensure that truth is available as a complete defence to defamation;
- Amend other laws that infringe on the exercise of the right to freedom of expression including the 2010 **Interception of Communications Act** and the 2011 **Computer Misuse Act** to ensure their full conformity with Uganda's obligations under the African Charter and the ICCPR;
- Immediately and unconditionally release anyone detained or imprisoned on criminal defamation charges and drop all prosecutions on such charges;
- Ensure the UCC upholds due process rights at all stages;

- Promote and give effect to the public's right to know by strengthening the ATIA and making available the financial and other resources and training necessary for its effective implementation;
- Thoroughly investigate and prosecute violations against journalists; and
- Train law enforcement officers on freedom of expression.

PEN International and PEN Uganda urge media owners, publishers, editors, journalist associations and practitioners to:

- Support, strengthen and comply with the code of ethics promulgated by the Independent Media Council
- Train journalists and other media workers in ethical and other professional standards;
- Provide adequate legal, financial and professional support to employees facing criminal defamation charges

3.2 Zambia

“They decided that we should be arrested. So they took our finger prints. They took mugshots of us like criminals for defaming the president.”¹³²

Since Zambia’s independence in 1964, successive governments have used colonial-era laws criminalising defamation, “seditious intent” and the publication of “false” news to restrict expression, stifle dissent, and harass and imprison political opponents, critics and journalists. They have also used the laws to deter investigative reporting by the media and impede its exposure of corruption and other matters that the authorities consider sensitive or damaging.

According to editors and journalists interviewed by PEN Zambia, these laws and other government actions targeting critical media, have created a pervasive climate of media self-censorship. By obstructing the free flow of information, restricting peaceful expression and hindering accountability they also weaken Zambia’s democracy and hamper its development.

The Zambian government currently shows no sign of amending or repealing the Penal Code provisions criminalising defamation despite calls for reform from international human rights institutions, such as the Human Rights Council (HRC), ACHPR, and civil society groups. In December 2014, however, a High Court ruling declared the false news provisions of the Penal Code unconstitutional, thereby rendering them invalid.¹³³

The media’s ability to act as a public watchdog is also constrained by the absence of a law giving the public and media a right to access government-held information. Successive governments have publicly committed to enacting an access to information law, including earlier in 2017, but no such law yet exists.

BACKGROUND

As detailed below, Zambian law criminalises defamation of the President and defines a range of other speech and publication offences that significantly inhibit public debate, media reporting and government accountability. As well, the President is empowered to ban publications and the government has legal powers to imprison anyone who possesses, reproduces or distributes any publication that they declare to be seditious.

These laws are to a large extent a remnant of Zambia’s colonial past – for example, the Penal Code (Chapter 87 of the Laws of Zambia), which criminalises defamation of the President and others, was originally enacted in 1937, 27 years before Zambia’s independence. The colonial authorities used the Penal Code provisions against the emergent national independence movement¹³⁴ whose leaders, after independence in 1964, retained them for use against their own critics. Since independence, they have been used to target writers and journalists, as well as critics and opponents of the government, who have been arrested and subjected to harassing police investigations, drawn out criminal prosecutions, and in some cases imprisoned.

In 2007, the HRC expressed concern that the authorities were using the criminal defamation and false news provisions of the Penal Code as “harassment and censorship techniques” against journalists. In the “concluding observations” issued after it reviewed Zambia’s implementation of its ICCPR treaty obligations, the HRC urged the government to remove those laws and “find other means to ensure accountability of the press” that comply with the ICCPR, “in particular, the right to freedom of expression.”¹³⁵ Three years later, the ACHPR SR urged the government to amend the Penal Code’s contempt of court provisions after the authorities used them to prosecute editors of *The Post* newspaper for publishing an article criticizing the prosecution of another of the newspaper’s journalists on an obscenity charge.¹³⁶

LEGAL FRAMEWORK

International and constitutional law

The right to freedom of expression is enshrined in Zambia’s Constitution and in international human rights treaties to which Zambia is party and which impose obligations that the government is legally bound to uphold.

Article 20 (1) of the Constitution, which was adopted in 1996 and is the supreme law of Zambia, enshrines the right to freedom of expression – defining it as “the freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.”

Article 20 (2) protects “freedom of the press.” Both rights may be restricted only when doing so is “reasonably required in the interests of defence” or other specified purposes such as public safety, public morality or health or to protect “the reputations, rights and freedoms” of others.¹³⁷

¹³² Muskoha Funga, 9 August 2016.

¹³³ Media Legal Defence Initiative, “Marshal Muchende on getting Zambia’s “false news” law struck down,” October 2014, <http://www.mediadefence.org/news/marshal-muchende-getting-zambias-false-news-law-struck-down>

¹³⁴ Eustus Nkandu in “Report on Laws Inimical to Media Freedom in Zambia,” 2014.

¹³⁵ CCPR/C/ZMB/CO/3, “Concluding observations of the Human Rights Committee,” 90th session, 9-27 July 2007. Human Rights Committee. <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhynoSelYmvUgDObrK0B0ZyWN0FBdt3QH5%2BPyqXw3X-HwTRt7gts5iLd88iuSxclIhP%2FGm4x1ZRKV95OJMgR9TzjTHfvuAumTHMw889cvW5y71G>

¹³⁶ Adv. Faith Pansy Tlakula (Ms), *African Commission on Human and Peoples’ Rights*, “Special Rapporteur on Freedom of Expression and Access to Information,” November 2010, <http://www.achpr.org/sessions/48th/intersession-activity-reports/freedom-of-expression/>

¹³⁷ Constitution of Zambia preamble As amended by Act No. 18 of 1996, art 20, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/26620/90492/F735047973/ZMB26620.pdf>

The government of Zambia is also obligated to protect and promote the right to freedom of expression as a party to key international human rights treaties, particularly the ICCPR and the AChHPR.

Zambia is also a member of the Southern African Development Community (SADC). Article 4 of the SADC treaty states that human rights, democracy and the rule of law are guiding principles for member states.¹³⁸

Laws criminalising peaceful expression and their application

Zambia's Penal Code and several other laws contain provisions that criminalise the peaceful exercise of the right to freedom of expression and have a chilling effect on political discourse and media freedom. They include the following:

Defamation of the President – Section 69 of the Penal Code provides for the protection of the President's reputation and the dignity of his office by making it an offence punishable by up to three years of imprisonment to publish “any defamatory or insulting matter, whether by writing, print, word of mouth or in any other matter . . . with intent to bring the President into hatred, ridicule or contempt.”¹³⁹ The provision fails to define the terms “defamatory” and “insulting” thereby opening them to wide interpretation and application so as to punish and deter peaceful criticism of the President.

In recent years, the authorities have used Section 69 to prosecute journalists and editors, opposition politicians and even private citizens accused of publicly criticizing the head of state and his performance in office. Such prosecutions, in which the state invokes its full weight on behalf of its most powerful official against an ordinary citizen or other much less powerful accused, coupled with the threat of imprisonment that they entail, are clearly excessive and antipathetic to freedom of expression and open political debate, and damaging to Zambia's democracy.

Recent cases include the following:

- **Patrick Mubanga**, a district culture officer in Kasama, Northern Province, was convicted on 15 May 2015 of defaming then-President Michael Sata in comments he expressed in March 2015. The magistrate who convicted him sentenced him to three months of imprisonment with hard labour as a deterrent to others.¹⁴⁰
- **Fred M'membe**, editor of *The Post*, and Wynter Kabimba, leader of the opposition Rainbow Party, were charged with defamation of former President Rupiah Banda in February 2015 for articles commenting on a corruption trial. Months later, the charges were dropped after Banda withdrew his complaint.¹⁴¹
- **Frank Bwalya**, then-leader of the Alliance for a Better Zambia (ABZ) opposition party (and now deputy spokesperson for the ruling Patriotic Front [PF]), was charged in 2014 with defaming President Sata by describing him as “chumbu mushololwa,” a Bemba term for a sweet potato that breaks when bent, indicating a person who rejects advice, during a radio interview.¹⁴²
- **Sanford Mwale**, a businessman, received a suspended sentence of six months imprisonment with hard labour on 16 September 2013 after a Lusaka magistrate convicted him of defaming President Sata.¹⁴³
- **Peter Mwete**, a resident of Kalomo District, Southern Province, was sentenced to six months imprisonment on 6 August 2012 after a local magistrate convicted him of defaming President Sata.¹⁴⁴
- **Darius Mukuka**, a driver from Chifuba Township, Ndola, was sentenced to 18 months imprisonment with hard labour after Ndola's chief magistrate convicted him of defaming President Rupiah Banda. Mukuka was said to have accused the President of “lying to the people” and “failing to govern” while drinking in a bar; he was later released under a Presidential pardon.¹⁴⁵

138 The Consolidated Treaty of the Southern African Development Community, https://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf

139 The Penal Code act chapter 87 of the Laws of Zambia, Section 69, <http://www.parliament.gov.zm/sites/default/files/documents/acts/Penal%20Code%20Act.pdf>

140 *Zambian Watchdog*, “Draconian and barbaric; man jailed for defaming Sata,” May 2012, www.zambianwatchdog.com/draconian-and-barbaric-man-jailed-for-defaming-sata/

141 U.S. Department of State, “Country Reports on Human Rights Practices for 2015, Zambia,” <https://www.state.gov/documents/organization/252955.pdf>

142 Kashmira Gander, “Zambian politician Frank Bwalya charged with defamation for calling President Sata a potato,” *Independent*, January 2014 <http://www.independent.co.uk/news/world/africa/zambian-politician-frank-bwalya-charged-with-defamation-for-calling-president-sata-a-potato-9044459.html>

143 “Report on freedom of expression in Zambia,” 2014, https://gc21.giz.de/ibt/var/app/wp381P/2230/wp-content/uploads/2015/01/Zambia_Report_FOE.pdf

144 *Ibid.*

145 *Lusaka Times*, “Pardoned Mukuka hails RB,” May 2010, <https://www.lusakatimes.com/2010/05/26/pardoned-mukuka-hails-rb/>

Defamation – Chapter XVIII of the Penal Code, including Sections 191-198, set out the law on criminal defamation. Section 191 defines “libel” as a misdemeanour offence that arises from the unlawful publication “by print, writing, painting, effigy, or by any means otherwise than solely by gestures, spoken words, or other sounds” of “any defamatory matter concerning another person” with intent to defame that person.

Section 192 defines “defamatory matter” as that which is likely “to injure the reputation” of any person by exposing them to “hatred, contempt or ridicule” or “to damage any person in his profession or trade by an injury to his reputation.” The provision criminalises defamation of the dead as well as the living, but prosecutions for alleged defamation of people who are deceased must be authorized by the Director of Public Prosecutions (DPP).

Section 194 and 195 exempts a matter that is “true” and whose publication was “for the public benefit” as well as defamatory matter that is “absolutely privileged,” such as material published by the President, Cabinet, National Assembly or by government ministers. Information or opinions published “in good faith” in various circumstances – for example, regarding the conduct of a judicial or other official in their public capacity or their personal character “so far as it appears in such conduct” – is treated as privileged and does not constitute an offence, but only so long as it is not deemed “untrue,” in which case its author must be able to show he took “reasonable care” to verify it prior to publication.¹⁴⁶

Publication of False News – Section 67 of the Penal Code makes it an offence punishable by imprisonment for three years, to publish “whether orally, in writing or otherwise any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace” while “knowing or having reason to believe” that it is false. The provision specifies that it “shall be no defence” for a person charged under Section 67 to claim that he “did not know or . . . have reason to believe” that what he published was false unless he can prove that he took “reasonable measures” to verify its accuracy before publishing it.¹⁴⁷

In June 2014, the authorities used Section 67 against Richard Hijijika and George Chombela, two members of the opposition United Party for National Development (UPND),¹⁴⁸ charging them with disseminating false news by distributing pre-election leaflets suggesting that President Michael Sata, then aged 76 and rumoured to be in poor health, might soon die.¹⁴⁹

On 4 December 2014, however, the High Court of Zambia declared Section 67 unconstitutional when ruling on a case in which it had been used to prosecute Richard Sakala and Simon Mwanza, two *Daily Nation* journalists, and a third man, on charges of publishing “false information with intent to cause public alarm” in connection with an article on police recruitment methods.¹⁵⁰ The High Court declared that Section 67 violated Article 20(3) of the Constitution because it did not pass the test of being “reasonably justifiable in a democratic society,” rendering it unconstitutional.¹⁵¹

Obscenity – Section 177 of the Penal Code criminalises the production, possession, import, export and conveyance of writings, drawings or other materials, such as films, and the public exhibition or performance of anything “tending to corrupt morals.” The penalties include a fine and imprisonment for up to five years.¹⁵²

Seditious Publication and Intention – Section 57 of the Penal Code makes it a criminal offence for anyone to possess, print, publish, sell, offer for sale, distribute or reproduce any “seditious publication”- defined as “a publication containing any word, sign or visible presentation expressive of a seditious intention.” The penalties for those convicted under Section 57 are imprisonment for two years or a fine if they are first offenders and five years’ imprisonment for repeat offenders. Prosecutions must be authorized by the DPP.¹⁵³ Section 60 of the Penal Code defines “seditious intention” in broad and vague terms that give the authorities wide discretion to interfere with, or prevent, many activities fundamental to a healthy, functioning democracy. For example, the definition covers any acts or expression that the authorities decide are intended “to excite disaffection” against the government or the administration of justice or “to raise discontent or disaffection” or “to promote feelings of ill will or hostility” between or within different communities.

In January 2011, the authorities used these provisions against a journalist and a radio station manager in connection with their reporting about a secessionist movement in Western Province, charging Mwala Kalaluka of *The Post* newspaper with seditious intention and charging Nyambe Muyumbana, assistant manager of *Radio Lyambai* in Mongu with “seditious publication.”¹⁵⁴

Prohibited publications - Section 53 of the Penal Code gives the President “absolute discretion” to ban any publication or series of publications that he considers “contrary to the public interest,” while Section 54 provides a two year prison term for anyone convicted of importing, publishing

146 CHAPTER XVIII, Sections 191-198, <http://www.parliament.gov.zm/sites/default/files/documents/acts/Penal%20Code%20Act.pdf>

147 Section 67, Penal Code, <http://www.parliament.gov.zm/sites/default/files/documents/acts/Penal%20Code%20Act.pdf>. In December 2014, however, a High Court ruling declared the false news provisions of the Penal Code unconstitutional, thereby rendering them invalid.

148 Sapa AFP, “Zambian opposition activists charged over President Michael Sata health rumors,” *Sowetan Life*, June 2014, <http://www.sowetanlive.co.za/news/2014/06/26/zambian-opposition-activists-charged-over-president-michael-sata-health-rumours>

149 President Sata died in October 2014 after travelling to London for medical treatment. Rumours of his ill-health had circulated for months, fuelled by his increasing absence from the public stage.

150 Freedom House, “Freedom in the world 2015 – Zambia,” http://www.ecoi.net/local_link/302410/439294_de.html

151 Media Institute of South Africa, “High Court Rules Seditious Intent Unconstitutional,” December 2014, <http://misa.org/media-centre/press-releases/misa-zambia-statement-high-court-rules-seditious-intent-unconstitutional/>

152 Section 177, Penal Code, <http://www.parliament.gov.zm/sites/default/files/documents/acts/Penal%20Code%20Act.pdf>

153 Zambia Penal Code, Section 57 and 60.

154 Freedom House, “Freedom of the Press – Zambia,” 2012, <https://freedomhouse.org/report/freedom-press/2012/zambia>

or otherwise disseminating prohibited publications, in full or part, and a one year prison term or fine for possession.¹⁵⁵

Other Penal Code Provisions: the Penal Code contains a raft of other provisions that criminalise peaceful expression and serve to deter media reporting and public criticism. However, these provisions are rarely, if ever, used to bring prosecutions. They include Section 71, which criminalises the publication of anything seen as exposing a foreign leader to “hatred or contempt” with intent to “disturb peace and friendship” between Zambia and that leader’s country; Section 70, which makes it a crime punishable by up to two years in prison to say, write or publish anything deemed to show “hatred, ridicule or contempt” against a person or group because of their “race, tribe, place of origin or colour.”¹⁵⁶

Penal Code provisions that have been used as a basis for prosecutions, albeit rarely, include Section 116(1), covering contempt of court, and Section 177(1), covering “obscene” writings and images or “any other object tending to corrupt morals.”¹⁵⁷

In 2009, reportedly acting at the behest of President Rupiah Banda, the authorities used the latter to prosecute Chansa Kabwela, news editor of *The Post* for sending photographs to the Health Minister and other officials to highlight the impact of a nurses’ strike. The photographs showed a woman giving birth in a street, unattended by medical staff, to a child that died. Although *The Post* did not publish the photographs, the authorities charged Kabwela with “distributing obscene photos likely to corrupt public morals” for which the penalty is imprisonment for up to five years and a fine.¹⁵⁸

They then resorted to Section 116(1) to prosecute *The Post*’s editor-in-chief and deputy managing editor, Fred M’membe and Sam Mujuda, on contempt of court charges after *The Post* published an article that described Kabwela’s prosecution as a “comedy of errors.”¹⁵⁹ The cases caused an outcry in Zambia and internationally; this probably helped to ensure that neither journalist went to prison. M’membe did, however, spend several days in detention following his arrest and the three journalists remained under threat of imprisonment for several weeks.

Other laws impacting on peaceful expression: In addition to the Penal Code, several other laws contain provisions that criminalise peaceful exercise of the right to freedom of expression, including:

State Security Act (No. 36 of 1969) - This act is primarily concerned with national security issues, including espionage, sabotage and other offences against state security. However, Section 4 of the act makes it an offence to communicate “any” information relating to Zambia’s “defence or security” to anyone not authorized to receive it, under penalty of 15 to 25 years’ imprisonment, thereby imposing a blanket restriction on the publication of information about matters such as the deployment of Zambian troops and police.¹⁶⁰

In its Country Report on Human Rights Practices for 2015, the United States Department of State (DOS) reported that the Zambian government “remained sensitive to media criticism and indirectly censored publications or penalized publishers.” The DOS report cited as an example the authorities’ arrest of *The Post* editor-in chief Fred M’membe and journalist Mukosha Funga for allegedly breaching the State Security Act by publishing a letter from the state Anti-Corruption Commission to President Lungu informing him that it was investigating corruption allegations against one of his political advisors.¹⁶¹

In its 2016 report, the DOS again criticized the Zambian authorities’ use of national security legislation to restrict media reporting, citing as examples their January 2015 warning to *The Post* that a report on alleged election rigging would be treated as a breach of national security and the later suspension of three private media licenses by the Independent Broadcasting Authority (IBA) on unspecified national security grounds.¹⁶²

Anti-Terrorism Act (No. 21 of 2007): Section 9 of the Anti-Terrorism Act makes it an offence punishable by between 10 and 20 years of imprisonment for anyone to collect, possess or transmit, including through the internet, any information “of a kind likely to be useful” to someone engaged in or planning an act of terrorism.

National Assembly (Powers and Privileges) Act: Section 19 of this act makes it an offence punishable by up to three months of imprisonment to show “disrespect in speech or manner” to the Speaker of the National Assembly or to commit “any other act of intentional disrespect to or with reference to the proceedings of the Assembly.”¹⁶³

Printed Publications Act: Section 5 of this act requires all newspapers to obtain official registration prior to publication. It defines newspapers in broad terms as periodical

155 Zambia Penal Code, Sections 53 and 54.

156 Zambia Penal Code, Sections 70 and 71. Prosecutions under Section 70 must be authorized by the Director of Public Prosecutions (DPP).

157 Zambia Penal Code, Sections 116 (1) and 177 (1).

158 In November 2009, a Lusaka magistrate acquitted Kabwela, ruling that her prosecutors had failed to prove that the photographs that she sent to the Minister of Health and others were “obscene.” International Press Institute, “Court throws out Chansa Kabwela obscenity case,” IFEX (November 2009). https://www.ifex.org/zambia/2009/11/17/kabwela_vindicated/

159 Reporters without Borders, “Newspaper editor freed after three days in prison,” June 2010, <https://rsf.org/en/news/newspaper-editor-freed-after-three-days-prison>

160 The State Security Act, *Republic of Zambia*. <http://www.parliament.gov.zm/sites/default/files/documents/acts/State%20Security%20Act.pdf>

161 United States Department of State, “Country Reports on Human Rights Practices 2015 – Zambia,” <https://www.state.gov/documents/organization/252955.pdf>

162 United States Department of State, “Country Reports on Human Rights Practices 2016 – Zambia,” <https://www.state.gov/documents/organization/265528.pdf>

163 National Assembly (Powers and Privileges) Act, section 19, [http://www.parliament.gov.zm/sites/default/files/documents/acts/National%20Assembly%20\(Powers%20and%20Privileges\)%20Act.pdf](http://www.parliament.gov.zm/sites/default/files/documents/acts/National%20Assembly%20(Powers%20and%20Privileges)%20Act.pdf)

publications published monthly or less for public sale or dissemination. The penalty for failure to comply is a fine.¹⁶⁴

Access to Information

Zambia's 1991 Constitution does not contain any provision specifically on the right to access information but this right has been read into Article 20 (1) of the Constitution setting out the right to freedom of expression, which defines that right to include the "freedom to receive and impart information without interference." Moreover, Article 20 (2) of the Constitution uses the same language as Article 19 of the ICCPR in defining the "freedom to seek, receive and impart information and ideas of all kinds" regardless of frontiers and through any medium as an intrinsic element of the right to freedom of expression.

Access to Information (ATI) legislation is important because it enables citizens to access information held by public officials which is not proactively released, and thereby to participate in the democratic process in a deliberative matter. This in turn helps to hold public officials accountable.

Successive Zambian governments have publicly committed to enacting an access to information law for at least 15 years without, as yet, delivering. In 2002, the government of President Levy Mwanawasa withdrew a proposed access to information law that it had tabled before parliament, citing vague security considerations. Since then, successive administrations have announced several times that they plan to introduce legislation giving citizens the right to access information held on their behalf by the public authorities but without submitting any drafts to Parliament in November 2011.

The then-Minister of Information, Broadcasting and Tourism in the newly elected PF government of President Michael Sata, Given Lubinda, told participants at a World Bank-convened conference in Lusaka that the Sata administration "was committed to not only enacting a Freedom of Information Bill but also to implementing it." And, he added, such a law was needed to "help to change the culture of secrecy that currently characterises Zambian public institutions and would contribute to transparency, democracy and national development."¹⁶⁵ The Sata government failed to honour this commitment, however, just as the authorities have also failed to honour renewed pledges to introduce ATI legislation made in 2012 and 2015.¹⁶⁶

The most recent such commitment was made in February 2017, again by Given Lubinda, this time in his capacity as Minister of Justice in President Edward Lungu's

administration. Lubinda told a television interviewer that his ministry was then "actively" working on a proposal for an ATI law in preparation for its submission to the Cabinet.¹⁶⁷ However, he did not disclose details of the draft law, nor give any timetable for its enactment. The government had not published the draft law or released details of its proposed terms by September 2017.¹⁶⁸

Impact of criminal defamation

A review of the information gathered during this report, including interviews with journalists, makes it clear that the laws criminalising defamation have had a profoundly negative impact on freedom of political debate in Zambia and on the fight against corruption.¹⁶⁹ The laws have inhibited legitimate criticism of the government and undermined the media's role as a watchdog of the public interest by deterring investigative journalism and the exposure of information that the authorities wish to conceal. Successive governments have used these laws to target writers, journalists, political opponents and ordinary citizens who express dissent, subjecting them to arrest, detention and prosecution, with the social and professional stigma and threat to their livelihood that this entails.

Unsurprisingly, the threat posed by the criminal defamation laws has led many media publishers, editors and journalists to "play safe" and exercise self-censorship rather than report or comment on issues the authorities wish to keep out of the public domain, such as high-level corruption or alleged misuse of public funds. This is detrimental to the media because it compromises professional standards, including independence and objectivity in reporting. By preventing the disclosure of information to which the public should have access, media self-censorship also works against the broader public interest and hinders the public's ability to hold the government to account.

Several writers interviewed by PEN Zambia spoke to the need to change criminal defamation laws, in favour of civil defamation laws, which are adequate to protect against reputation. According to Chris Chirwa, researcher and editor, civil defamation laws should be used **"because there you have a way of explaining yourself [...] you can even offer an apology. But with criminal defamation we don't have that chance at all [to issue an apology]"**¹⁷⁰

One writer, Malama Katulwende, Zambian novelist, said that these laws should be challenged, at the same time that writers should also take responsibility for accuracy in their writing:

164 Mandatory requirements such as these may in some instances restrict freedom of expression, See 'Report on freedom of expression in Zambia', 2014 https://gc21.giz.de/ibt/var/app/wp381P/2230/wp-content/uploads/2015/01/Zambia_Report_FOE.pdf

165 Richard Lee, Open Society Initiative for Southern Africa, "Freedom of information bill for Zambia?" November 2011, <http://www.osisa.org/media-and-ict/zambia/freedom-information-bill-zambia>

166 Various Authors, Africa Freedom of Information Centre, "State of right to information in Africa," September 2015, <http://www.africafoicentre.org/index.php/resources/reports-publications/173-state-of-rti-in-africa-report-2015/file>

167 Lusaka Times, "Government is still keen on delivering the Access to Information Bill-Given Lubinda," February 2017, <https://www.lusakatimes.com/2017/02/09/government-still-keen-delivering-access-information-bill-given-lubinda/>

168 MISA Zambia, "Zambia moves forward with Access to Information bill," 15 February 2017, https://www.ifex.org/zambia/2017/02/15/ati_bill/

169 PEN Zambia interviewed ten writers, six of whom are featured in the report; Transparency International ranks Zambia 87th out of 176 states in its Corruption Perceptions Index 2016, with a score of 38 out of 100 on its scale of perceived level of public sector corruption, which ranks countries from 0, highly corrupt, to 100, very clean. See: <https://www.transparency.org/country/ZMB>

170 PEN Zambia interview with Chris Chirwa, September 2016.

“I think we should do things simultaneously. First of all the bad laws, archaic laws, those that are injurious to our freedom of expression, assembly, association, should be gotten rid of. And then at the same time, we have to work within the limited space or spaces that we have to push for change, to engage the government.... If they are involved in things that are not in line with the constitution, in line with their mandate. I think we should strongly speak against that. We should not insult. We should not defame. Because when you defame and insult you are taking other people’s liberties and freedoms, away from them; because they also have rights. They should enjoy those rights. So we should know our boundaries as writers. Much as we can write, other people should also enjoy their liberties and their freedoms.”¹⁷¹



Mukosha Funga (L) and Joan Chirwa (R), the day they were arrested. Photo: Salim Dawood.

Mukosha Funga and Joan Chirwa

Mukosha Funga, a young journalist from *The Post*, Zambia’s leading newspaper, (now closed), that has historically been critical of successive Zambian governments since its inception in 1990, and Joan Chirwa, her editor, were charged with defamation of the President in March 2016. They were charged a year after they published comments in which Eric Chanda, leader of the Fourth Revolution opposition political party, claimed that President Lungu had visited the Mfuwe tourist enclave in the South Luangwa National Park to drink alcohol and play pool with his friends. Chanda was also charged.

According to Funga, the police began investigating charges against her and the others but it was not until a year later that she was summoned to a police station for questioning. She went together with Joan Chirwa and was asked “when did you get this story? How was it written?”

They were then taken to a cell, told to remove their shoes and earrings but released after about an hour when their lawyers showed up.

Both Mukosha Funga and Joan Chirwa found the process leading up to their being charged very stressful, leaving them anxious and uncertain. They were initially questioned on a Friday and then arrested on the following Monday, when Eric Chanda was also charged. Mukosha Funga said:

“They decided that we should be arrested. So they took our finger prints. They took mugshots of us like criminals for defaming the president.”

When interviewed for this report, Mukosha Funga still did not know what would be the outcome of the case and remained under a threat of imprisonment if convicted. A magistrate had adjourned the case as the Director of Public Prosecutions had yet to authorize the prosecution or to explain the delay. The delay in the case was also inconveniencing. Funga said:

“This is the third month. We haven’t yet taken plea. They say instructions haven’t yet been gotten from the Director of Public Prosecutions to continue... you keep on going to court. You leave a lot of things that you are supposed to be doing; a lot of work that you should be working on. And then you just abandon all that and keep appearing in court when there’s no progress.”¹⁷²

However, both journalists said they were used to the risks posed in their line of work and charges such as this did not keep them from working.

Pilato, popular musician

Police arrested the popular musician Pilato (real name Fumba Chama) in June 2015 and initially charged him with defaming President Edgar Lungu in a Chinyanja language song that he had written. Entitled “A Lungu Abwera,”¹⁷³ the song was based on an earlier popular recording by Nashil Pitchen Kazembe called “A Phiri Anabwera”.

The lyrics of Pilato’s song, which implied that Lungu drank whisky heavily and had no plan for governing the country when he became President in January 2015 following the death of President Sata three months earlier, were deemed by the authorities to constitute defamation of the President. Pilato’s lyrics told of President Lungu’s journey from representing a slum area of Lusaka to State House, the official residence of the President, and suggested that he was unprepared to address current problems such as rising prices of essential commodities and student protests to which the authorities responded by closing universities and launching a police crackdown.

Pilato had previously released a song during Michael Sata’s Presidency lamenting his failure to implement promises made during and following his election. Pilato had then been threatened by state agents but no defamation or other charges had been filed against him. After releasing his new song about President Lungu, however, Pilato fled from his home in Ndola and went into hiding in Lusaka, where the police found and arrested him. After first charging him with defamation of the President they changed this to a charge of conduct likely to cause a breach of the peace, and released Pilato. His prosecution was then dropped.

171 PEN Zambia interview with Malama Katulwende, 20 August 2016.

172 PEN Zambia interview with Mukosha Funga and Joan Chirwa, 9 August 2016.

173 Pilato - Alungu Anabwela' Youtube. https://www.youtube.com/results?search_query=a+Lungu+anabwela+pilato

Pilato has experienced various problems with the authorities on account of his “socially conscious music.” He has gone into hiding on several occasions for fear of state officials; his house has been broken into several times; and members of his family and friends have been subjected to harassment, threats and even beatings by state agents, according to Pilato.

Pilato said that following his arrest in connection with the song about President Lungu, his public performances were severely curtailed, down from a high of around 12 to only one or two per month with some concerts cancelled on the day. Pilato told PEN Zambia:

“Under normal circumstances I would have shows on Friday, Saturday and Sunday. But after that story [about his arrest for the song about President Lungu], I get one or two shows a month. It’s not because I don’t have good music. My music plays in night clubs and private radio stations but whenever my show adverts and banners are displayed, there are special police, special forces that go to those business houses and warn the organizers and sponsors that ‘if Pilato performs here, you will be in trouble.’”

He said that at some of his concerts there were more police present than patrons while some concert organizers had listed songs that he should not perform to avoid the cancellation of his concerts. It had become his “reality” to arrive for a performance and be told by the promoter, “Sorry, Pilato, the show has been cancelled. We have been warned that if you perform here they [the authorities] are going to revoke our business/trading license.” He added, “It’s a bit sober now and I am worried. I don’t know what they [the authorities] are planning.”¹⁷⁴

At the same time, Pilato has not let this stop him from speaking out. He said:

“All this doesn’t break me...I know what they want... They want me to be quiet. They want me to ignore social injustices [...] I cannot do that consciously.”

Roy Clarke, columnist

In 2004, Zambian Home Affairs Minister Ronnie Shikapwasha issued a deportation order against Roy Clarke, a British national and columnist of *The Post* newspaper, ordering him to leave the country, where he had been resident for over 40 years, within 24 hours. This occurred after Clarke wrote a satirical article for his regular *Spectator* column in *The Post* newspaper that mocked President Levy Mwanawasa and members of his government for their lavish lifestyle at a time of rising poverty among Zambians. Clarke went into hiding and lodged a legal challenge against his deportation order, which the High Court quashed, ruling it unconstitutional and unreasonable. The court asserted Roy Clarke’s right to write satirical articles. The government appealed against the High Court ruling; in 2008 the Supreme Court dismissed the government’s appeal and ruled that the deportation order against Roy Clarke was “disproportionate.”¹⁷⁵ He remained in Zambia.

In his article, entitled “Mfuwe” in reference to a main wildlife centre and tourist attraction in eastern Zambia, Clarke used animal metaphors to refer to President Mwanawasa and other members of the government (without naming them). The piece satirized the then-President as “King Elephant Muwelewele” and his ministers and officials as baboons and other animals. According to Clarke:

“What happened was I wrote a piece, typically; it was some sort of allegory about animals in a game park who were being ruled over by a rather irrational bad-tempered elephant. More in the sort of Animal Farm style; although that wasn’t my usual style. And the then-President Mwanawasa . . . read the story and saw himself in the elephant. And of course as you will recall he was extraordinarily hot tempered and bad tempered. So he got into a rage rather like an elephant does. An elephant in a rage is a terrible thing. So the next thing I found was a deportation order against me.”¹⁷⁶

Although Clarke’s article was clearly a satirical piece, the Home Affairs Minister took the view that Clarke had used racist language and issued an order for his deportation. Clarke then went into hiding but continued to write while seeking judicial review of his deportation order. He said: “I never stopped all through the three months when I was waiting for the judgment. I produced further pieces. Clarke added:

“There was no charge against me. I took the government to court for judicial review of their decision to deport me. I was never charged with anything.”

The authorities’ action against Roy Clarke was widely publicized in Zambia and abroad,¹⁷⁷ prompting expressions of concern and international pressure on the government.¹⁷⁸

174 PEN Zambia interview with Pilato, 16 July 2016.

175 *Attorney-General v Clarke* (2008) AHRLR 259 (ZaSC 2008), *Centre for Human Rights*, <http://www.chr.up.ac.za/index.php/browse-by-subject/500-zambia-attorney-general-v-clarke-2008-ahrlr-zasc-2008-.html>

176 PEN Zambia interview with Roy Clarke, July 2016.

177 Emma Brockes, “The insult,” *The Guardian*, January 2004. <https://www.theguardian.com/media/2004/jan/07/pressandpublishing.g2>

178 PEN Zambia interview with Roy Clarke, July 2016.

Media self-censorship

Media self-censorship is always detrimental but especially so in states where state-owned institutions dominate much of the media landscape. In Zambia, the state – in effect the government in power – controls two daily newspapers, the *Times of Zambia* and the *Zambia Daily Mail*, as well as the national radio and television network,¹⁷⁹ and the official news and information agency.¹⁸⁰

Brian Hatyoka, the Livingstone Bureau Chief of the government-owned *Times of Zambia* who is also president of the Livingstone Press Club, an association of media institutions and individuals in Zambia's southernmost city, said when interviewed for this report that Zambia's defamation laws force journalists to exercise self-censorship. Attesting to this, he said:

"I have had certain stories that I wanted to pursue but when I looked at the consequences, looked at the laws surrounding that particular story, I ended up giving up. There are a lot of stories that you just give up. And you know us the media we set the agenda. We know what is important for the public. And you find that you have seen that there is a story here worth investigating but you cannot do it because you'll be on the other side of the law.

"We have done a lot of censorship. Most of us are censoring ourselves. We cannot write further. And testimonies have been there where our members actually have been censoring themselves. Because you cannot go further [...]; there is a law that is working against you. And you know the law enforcement agents; they'll look at the law. And most of these laws are found in chapter 87 of the Penal Code. A lot of these laws they don't work in favour of freedom of expression and freedom of the media. So we tend to ignore certain stories looking at these laws that are surrounding this aspect where we are supposed to write freely, follow up a story freely."¹⁸¹

Inhibiting democratic debate and accountability

Zambia's laws criminalising the exercise of the right to freedom of expression particularly target "political speech" – that is, speech and other expression that one media specialist has termed "relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about."¹⁸²

For any democratic system to work effectively and contribute to good government citizens must have access to reliable and accurate information from a multiplicity of sources and be able to freely exchange information and ideas and form and express opinions, and be able to make reasoned choices during elections and at other times.

When writers, journalists and ordinary citizens are unable to express themselves freely and criticize the executive powers of the state without threat of harassment, arrest, criminal prosecution and imprisonment, the system of democratic debate and accountability is inevitably compromised and weakened.

Hampering the fight against corruption

Zambia's criminal defamation laws, especially the Penal Code provision on defamation of the president, are used to deter criticism of the executive and its actions under threat of imprisonment. This means inevitably that journalists or others – such as "whistle blowers" – who learn of corruption or other misdeeds or malpractice by officials, place themselves at risk if they divulge this information. In essence, therefore, the criminal defamation laws are not merely retrogressive so far as the fight against corruption is concerned but may have the effect of fomenting and facilitating corruption. Moreover, the absence of robust access to information legislation which requires state authorities to disclose information that they hold ostensibly on the public's behalf, likely exacerbates this.

As Chris Chirwa, researcher and editor pointed out:

"[...] to access some of the information you need the provision of the access to information which we don't have here; so from that point of view you can't. [...] We need a country where laws allow access of information; allow freedom of expression"¹⁸³

CONCLUSIONS AND RECOMMENDATIONS

As this report shows, Zambia's criminal defamation laws continue to stifle political debate, undermine the media's role as a watchdog of the public interest, and impede government transparency and accountability. The lack of an effective access to information compounds this situation. The laws also breach Zambia's obligations as a party to international human rights treaties, particularly the ICCPR and the AChHPR. Consequently, reforms are urgently needed, in line with the recommendations listed below.

The government recently re-committed to the early enactment of legislation giving citizens a right of access to information held by the state that is not proactively released, raising hopes that it will rapidly develop, enact and thereafter actively implement a robust and effective ATI law. Such laws elsewhere have played a key role in enabling citizens to participate more fully in the democratic process in a deliberative manner and hold public officials accountable, thereby increasing government transparency and accountability.

However, even the best-crafted and sturdiest ATI law will likely fail to produce such results while the authorities retain and continue to apply laws that criminalise defamation

179 Zambia National Broadcasting Corporation (ZNBC) http://www.mibs.gov.zm/?q=zambia_national_broadcasting_corporation

180 Zambia News and Information Service (ZANIS) <http://www.zanis.com.zm/>

181 PEN Zambia interview with Brian Hatyoka, 7 August 2016.

182 Analysis of Dewey's idea of Communication in Carl Bybee: Can Democracy Survive in the Post-factual Age? A Return to Lipmann Dewey Debate about the Politics of News – Journalism and Mass communication Monograph 1, 27 -56, 1999.

183 PEN Zambia interview with Chris Chirwa, September 2016.

of the President and others, and unduly restrict freedom of expression. The government should urgently repeal these laws in conformity with Zambia's obligations under the ICCPR and the AChHPR or abolish them, and ensure that defamation is addressed as a matter of civil, rather than criminal, law, while incorporating safeguards – such as, truth and public interest defences and by limiting the level of fines or damages that can be imposed – to prevent the law from “chilling” free expression.

In particular, PEN International and PEN Zambia urge the government to:

- Repeal the Penal Code provisions on Criminal Defamation (section 192), Defamation of the President (section 69), Prohibited publications (section 53), Seditious Publication and Intention (section 57), and Obscenity (section 177), and fully recognize by law the principle that public figures must tolerate a greater degree of criticism than ordinary citizens;
- Ensure that truth is available as a complete defence to defamation;
- Drop all prosecutions on such charges;
- Amend the law on contempt of court [section 116 (1)] to bring it in line with international standards on freedom of expression;
- Amend the State Security Act, the Anti-Terrorism, and National Assembly Act to comply with international standards on freedom of expression;
- Amend the Constitution to specifically guarantee the right of every citizen to access information held by the state and promptly enact a comprehensive access to information law, ensuring that adequate mechanisms and resources are made available to enable its effective implementation.

PEN International and PEN Zambia urge media owners, publishers, editors, journalist associations and practitioners to establish and implement effective mechanisms and systems to deliver:

- Media self-regulation, including independent investigation and resolution of complaints against the media relating to the right to reputation, including through mediation and use of the rights of reply, retraction and apology, perhaps through reviving and effectively operationalizing the Zambia Media Council formed in 2012;

- Training of journalists and other media workers in ethical and other professional standards;
- Provision of adequate legal, financial and professional support to employees facing criminal defamation charges.

3.3 Sierra Leone

“The minister got annoyed and he contacted the CID. . . it seems like the law is simply being used as a way of punishing journalists who publish something that somebody in power does not like.”¹⁸⁴

Sierra Leone's government has committed to repeal the provisions of the Public Order Act (POA), which criminalise any speech, writing or other expression found to be defamatory or to constitute seditious libel or “false news,” but has yet to do so. These provisions of the POA, which was enacted in 1965, four years after Sierra Leone achieved independence from British rule, to “consolidate and amend existing public order legislation,”¹⁸⁵ has had a profoundly negative effect on freedom of expression and continues to undermine media freedom. They have been used to stifle political and social debate and to deter investigative journalism and media reporting of high-level corruption and other issues that the authorities consider too sensitive or embarrassing for public disclosure, undermining transparency and official accountability. Although few prosecutions have been recorded, the authorities have used the POA's provisions to arrest, briefly detain and harass journalists and others, thereby contributing to a climate of self-censorship that weakens the media and harms the public interest.

In June 2015, Minister of Justice Joseph F. Kamara told the Sierra Leone Journalists' Association (SLAJ) that since 2011, 35 reported incidents of violations of freedom of expression had been recorded, including five arbitrary arrests and detentions under the POA's provisions criminalising defamation, seditious libel and the publication of false news.¹⁸⁶

The Justice Minister has also pledged to repeal these POA provisions which, he said, were “not only affecting journalists but all citizens” because the media had become “more responsible” and had “surpassed all expectations.” He expressed his personal commitment to repeal “because it is bad law” and said that President Ernest Bai Koroma, in office since 2007, had committed to abolish it.¹⁸⁷ In a similar vein, the Deputy Minister of Information and Communication, Cornelius Deveaux, announced in May 2016 that the government was

184 Dr Julius Spencer, former Minister and owner of Premier News

185 Public Order Act (No. 46 of 1965). http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=28567&p_country=SLE&p_count=166; The POA replaced various British laws dating from the first decades of the 19th Century, the period of the Napoleonic Wars and their immediate aftermath, that the British colonial administration had applied to Sierra Leone. These included the Libel Act (also known as Fox's Act) of 1792, the United Kingdom Seditious Meetings Act of 1817, and the Criminal Libel Act 1819.

186 Speech by Minister of Justice Joseph F. Kamara, addressing journalists in Bo, June 2015, on file with PEN Sierra Leone.

187 Speech by Minister of Justice Joseph F. Kamara, addressing journalists in Bo, June 2015, on file with PEN Sierra Leone.

“engaged in discussions with relevant stakeholders towards the repeal of certain sections of the 1965 Public Order Act that criminalise libel.”¹⁸⁸

In December 2016, a stakeholders meeting hosted by PEN Sierra Leone was informed that a white paper on reform of the criminal defamation laws had been submitted to the Cabinet for discussion and approval prior to submitting proposals to Parliament. The Sierra Leone Association of Journalists (SLAJ), meanwhile, continued to advocate repeal of the criminal provisions, holding that the right to reputation can be adequately protected under civil law.

On 3 May 2017, the Deputy Minister of Information and Communication announced at an event marking World Press Freedom Day that the draft law was still with the Cabinet Secretariat for consideration.¹⁸⁹

Sierra Leone adopted a law giving every citizen a right to access officially held information in 2013 and subsequently appointed a commission to oversee its implementation and monitor compliance by public authorities; as of yet, however, the act has had limited effect in assisting the media to perform its public watchdog role and in increasing government transparency and accountability.

BACKGROUND

Although it was enacted after Sierra Leone became independent from British rule, the POA’s criminal defamation provisions are based on English laws dating back to the second decade of the 19th Century – laws which today find no parallel in British national law. They continue to set the legal limits within which the media has to operate although they clearly appear to run counter – in both spirit and letter – to the freedom of expression and media freedom guarantees contained in the 1991 Constitution. They also breach Sierra Leone’s obligations as a party to international human rights treaties, particularly the ICCPR and the AChHPR.

Sierra Leone’s media, which comprises a mix of state and privately-owned, mostly radio, broadcasters and dozens of daily and weekly newspapers, has also been regulated by an Independent Media Commission (IMC), since the passage of the Independent Media Commission Act in 2000. The IMC, whose members are appointed by the President on the recommendation of the SLAJ, oversees the operation of the media and is empowered to consider complaints against the media – for example, as an alternative to action under the POA – although complainants can also use the courts to pursue their claims. If the IMC agrees that a defamation complaint is valid, it can impose a fine and require the offending publication to publish an apology and retraction. The IMC has frequently imposed fines for alleged media violations of the 2000 IMC Act and the 2007

Media Code of Practice. In 2015, for example, the IMC was reported to have suspended the *Monologue* radio programme hosted by David Tam-Baryoh (see below) in August of that year and subsequently ordered him to pay a fine.¹⁹⁰

LEGAL FRAMEWORK

International and constitutional law

Section 25 of Sierra Leone’s 1991 Constitution enshrines the right of every person to unhindered “enjoyment of his freedom of expression,” including the freedom “to hold opinions and to receive and impart ideas and information without interference” and the “freedom to own, establish and operate any medium for the dissemination of information, ideas and opinions.” Section 11 enshrines the right to media freedom, stating “[t]he press, radio and television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Constitution and highlight the responsibility and accountability of the Government to the people.” However, the Constitution also empowers the authorities to make laws in the name of public defense or the protection of public order, public safety or morality that can be used to restrict expression.¹⁹¹

Sierra Leone is also bound to uphold freedom of expression by international human rights treaties to which it is party, particularly the ICCPR and the African Charter on Human and Peoples’ Rights. Sierra Leone is also party to the Revised Treaty of the Economic Community of West African States (ECOWAS), which requires that states ‘promote and foster effective dissemination of information’; and ‘ensure respect for the rights of journalists.’

Laws criminalising freedom of expression and their application

The principal law restricting peaceful expression is the POA, which criminalises defamation, seditious libel and the dissemination of “false news”.¹⁹² This gives the authorities wide powers to punish and deter political and other criticism or dissent and the disclosure of embarrassing or otherwise sensitive information that the government wishes to withhold from the public domain.

Section 26 defines the criminal offence of libel as “maliciously” publishing “any defamatory matter” while “knowing” it “to be false”, and imposes a penalty of up to three years’ imprisonment and/or to a fine up to one thousand leones. Section 27 prescribes lower penalties – up to two years of imprisonment and/or a reduced fine – for defamatory libel, which has the same definition as libel except for the requirement that its author knew it “to be false”. Section 28 makes clear that alleged defamatory statements

188 Round Table Discussions organized by the Ministry of Information and Communication on repeal of Criminal Libel on 19th May 2016; Ahmed Sahid Nasralla, “World Press Freedom Day 2016,” *Concord Times* May 2016, <http://slconcordtimes.com/world-press-freedom-day-2016/>

189 ‘Tremendous improvement in Sierra Leone media environment’ – Deputy Information Minister, 4 May 2017, *CocoRioko*, <http://cocorioko.net/tremendous-improvement-in-sierra-leone-media-environment-deputy-information-minister/>

190 Abdul Thomas, “David Tam Baryoh in political hot water again with government,” *Sierra Leone Telegraph*, August 2015, <http://www.thesierraleonetelgraph.com/?p=10224>

191 Constitution of Sierra Leone, <http://www.sierra-leone.org/Laws/constitution1991.pdf>. 25(2)(a)(i)

192 Sierra Leone Public Order Act (1965), PART V – DEFAMATORY AND SEDITIONS LIBEL

are presumed to be false; it allows for a defence of “truth” only if an accused can prove that publication was “for the public benefit,” and first asserts in writing that their statement was true and met the “public benefit” criterion. If an accused faces several charges based on one statement, however, or their libel is deemed “general”, Section 28 requires that they are found guilty unless they are able to prove that their statement was true in every respect, while providing that a failure to do so can be seen as aggravating the crime.

“Defamatory matter” is defined in very broad terms to include anything that is published that the authorities deem “likely to expose” a person, whether alive or dead, “to public hatred, contempt or ridicule” or “to damage him in his trade, business, profession, calling, or office.” Publication includes by spoken word or by “any sign or object” whether “directly or by insinuation or irony.”¹⁹³

Section 32 deals with “false news,” making it a crime punishable by up to one year in prison and/or a fine to publish “any false statement, rumour or report which is likely to cause fear or alarm, to the public or to disturb the public peace.” The same penalty is provided if the “false statement, rumour or report” is one deemed “likely to injure the credit or reputation” of Sierra Leone or the government; if it is deemed to have been “calculated to bring into disrepute” any public official “in the discharge of his duties”, the penalty rises to up to two years’ imprisonment and a fine. The provision stipulates that failure to know that a statement or report was false is no defence unless an accused can prove that s/he took “reasonable measures” to verify it before publication.

Section 33 makes it a crime to commit seditious libel, which is broadly defined to encompass any act, attempted act, speech, writing or publication made with “seditious intention,” which is also very broadly defined to include anything that might be deemed to “bring into hatred or contempt or to excite disaffection against” the government or the justice system or “to raise discontent or disaffection” or “to encourage or promote feelings of ill-will and hostility” within Sierra Leone. The penalty for a first offence is up to three years’ imprisonment, a fine, or both; repeat offenders face up to seven years in prison. Prosecutions must be authorized by the Attorney General. Section 36 (2) empowers the government to prohibit publication of a newspaper for up to six months for publishing “defamatory, seditious or false matter.”

As one commentator has pointed out:

“Truth is only relevant to the extent that the defendant is alleging that the publication was for the public benefit. Consequently an accurate but critical comment from a newspaper may trigger prosecution under the statute if the Government believes that the statement is likely to disturb the peace, seriously affect the defamed person’s reputation or bring into hatred or contempt

or excite disaffection with the Government. The Act therefore creates in essence two offences; seditious libel and defamatory libel, either of which can land a defendant in jail if found guilty of the offence.”¹⁹⁴

Most recently, the POA provisions have been used against people who posted comments on social media. In February 2015, for example, police arrested Mahmoud Tim Kargbo and charged him with forwarding a message on WhatsApp that they considered defamed President Koroma. He was held for 52 days and eventually discharged five months later.¹⁹⁵

Other legal provisions also restrict and criminalise peaceful exercise of the right to freedom of expression. For example, the law on Contempt of Parliament (Section 95 of the 1991 Constitution) gives the Parliamentary Contempt Committee power to arraign and custodially sanction journalists and others deemed to have affronted parliamentary dignity in their writings – for example through satire. It serves also to deter journalists and editors from investigating issues that could arouse the displeasure of parliamentarians.

Access to information

President Koroma signed The Right to Access Information Act (Act No. 2 of 2013), into law on 31 October 2013, two days after its approval by Parliament, making good on promises that his and former governments had made over a period of some 10 years. Article 2 of the Act declares that every person “has the right to access information” held under the control of a public authority as well as information held or controlled by private bodies if it “is necessary for the enforcement or protection of any right.” Article 30 provided for the establishment of a Right of Access to Information Commission (RAIC) to oversee implementation of the Act, monitor and report on compliance by public authorities, make recommendations and provide training. The RAIC commenced operations in March 2015 but appears to lack sufficient resources to function effectively.¹⁹⁶

Impact of criminal defamation laws

Over the years successive government have used the POA provisions on defamation, seditious libel and false news to harass, intimidate and punish journalists and to stifle criticism and dissent. Although successful prosecutions have been rare, journalists and others have faced arrest, detention, interrogation, searches of their offices and threats of severe consequences if they continue to publish “offending” stories and reports. In effect, it appears from PEN’s research that the laws have been used by the authorities to cow journalists into silence and self-censorship, deterring investigative journalism and reporting of matters of public interest and concern.

193 Sierra Leone Public Order Act (1965), section 37.

194 Maurice Garber, “Sierra Leone: The Public Order Act 1965: Is It Inconsistent With the Constitution?” *AllAfrica* June 2005, <http://allafrica.com/stories/200506131014.html>

195 Vickie Remoe, “Sierra Leone: Man on trial for WhatsApp message about President Koroma,” *Switsalone* April 2015, http://www.switsalone.com/21609_sierra-leone-man-on-trial-for-whatsapp-message-about-president-koroma/

196 “Lack of political will to implement the Right to Access Information Law in Sierra Leone,” 2 October 2016, *The Sierra Leone Telegraph*, <http://www.thesierraleonetelegraph.com/?p=13802>

David Tam-Baryoh; Jonathan Leigh and Bai Bai Sesay; Julius Spencer and Alusine Sesay: three illustrative cases

Dr David Tam-Baryoh, a Freetown-based human rights activist and radio presenter with more than 20 years' experience in print and electronic media journalism, was detained and harassed, because of his weekly Saturday night Monologue current affairs talk show. The show's willingness to tackle corruption and other sensitive issues, such as government accountability and transparency and human rights abuses, and its criticism of senior public and other figures, has earned the show a degree of cult status. But this has also brought it into conflict with the authorities, who have forced it off the air several times despite its popularity.



David Tam-Baryoh.
Photo: Private

According to Tam-Baryoh:

“There have been times when I have had problems with the IMC, with Cabinet, with the President of the Republic of Sierra Leone, and with the police. So in the course of my 24 years I have had problems with these authorities with frequent accusations of public incitement or [breaches of] libel laws in relation to my work. Interestingly I have never been convicted for violating any of these laws. My own issues have always been the arbitrary use of power by authorities when they feel that they cannot control me.”

In January 2014, police Criminal Investigations Department (CID) officers arrested Tam-Baryoh and detained him for several hours after the Minister for Transport and Aviation complained about a message Tam-Baryoh had sent him asking if it was true that the Minister had threatened to “deal with” Tam-Baryoh and shut down his radio station. The Minister was alleged to have made this threat after Tam-Baryoh contacted him previously asking for his response to allegations that he, the Minister, had approved the purchase of 100 buses at a cost of US \$12 million without seeking parliamentary approval. Tam-Baryoh was released without charge.

Police detained Tam Baryoh again in November 2014, when armed men surrounded his office he was arrested without a warrant. The head of CID said that the President had ordered his arrest and detention; he was held for 11 days during which officers asked him to issue an apology to the President. His passport was also seized and returned to him only 14 months later. Tam-Baryoh encountered further difficulties with the authorities in August 2015, when the Information and Communication Minister instructed the IMC to suspend his Monologue programme for 60 days. The IMC did so without investigating but Tam-Baryoh successfully challenged the order in court.¹⁹⁷

According to Tam-Baryoh, the authorities arrested and detained him in 2014 because they took exception to a radio broadcast he had done about corruption, transparency, and accountability in which he cautioned the government about its use of international funds sent to Sierra Leone to combat the Ebola virus in view of the level of corruption surrounding the management of the funds and concerns about corruption expressed by the official Audit Service.¹⁹⁸ Tam-Baryoh said that President Koroma instructed the CID to arrest him and detain him until the President agreed to his release.

Tam-Baryoh commented:

“As a media practitioner in Sierra Leone, I think there is a lot of arbitrary use of power because in all the cases I have been involved in, I have never been convicted and I have never been found wanting professionally. I just see that they used power arbitrarily to try to silence me. I think if a journalist aggrieves an individual, that individual has the right to sue that journalist to court but to make everything criminal including free speech and free association is bad.”¹⁹⁹

Jonathan Leigh and Bai Bai Sesay, respectively managing editor and editor of the Independent Observer, were arrested by CID officers on 18 October 2013, the day after their newspaper published an editorial about friction between the President and Vice-President of Sierra Leone which said President Ernest Bai Koroma was “regarded as an elephant, but he behaves like a rat and should be treated like one.”

The two journalists were detained for over two weeks before they were released on bail on 4 November after a preliminary hearing in the Freetown Magistrate’s Court. They were charged with 26 separate counts, including conspiracy to commit seditious libel, distribution of seditious publications, and reproduction of seditious defamatory libel, and were sent for trial before the Freetown High Court. However, the prosecution withdrew all but one of the charges during the course of the six-month trial process, which concluded in March 2014, after the defendants complied with a prosecution request, made at the preliminary hearing, that they issue an apology and retraction.

The two journalists entered guilty pleas to the remaining charge, conspiracy to commit libel against President Koroma, but the trial judge declined to impose prison sentences and discharged the two journalists with a “cautionary warning” that ‘truth’ is not a defence against libel under Sierra Leonean law and that anyone relying on ‘truth’ as a defence must be able to prove beyond reasonable doubt that publication is in the public interest.²⁰⁰

197 Amnesty International Urgent Action, “DAVID TAM BARYOH FREED ON BAIL”, 20 November 2014; “David Tam Baryoh in political hot water again with government,” *The Sierra Leone Telegraph*, 28 August 2015, <http://www.thesierraleonetelegraph.com/?p=10224>

198 PEN Sierra Leone interview with David Tam Baryoh 6 July 2016; Amnesty International Urgent Action, “DAVID TAM BARYOH FREED ON BAIL”, 20 November 2014

199 PEN Sierra Leone interview with David Tam Baryoh, 6 July 2016.

200 PEN Sierra Leone, interview with Jonathan Leigh and Bai Bai Sesay 1 July 2016; RSF, “Two journalists discharged in return for guilty plea on one count,” 12 March 2014, <https://rsf.org/en/news/two-journalists-discharged-return-guilty-plea-one-count>

Dr Julius Spencer, a former Minister of Information and Broadcasting who owns Premier News, and its editor, **Alusine Sesay**, were called in for questioning by CID officers in early 2015 after the newspaper reported that World Bank funding earmarked for developing an international telecommunications gateway had been diverted for other purposes by the Minister of Information and Communications. They were released without charges but their questioning seemed intended to have a “chilling” effect, according to Spencer:

“The minister got annoyed and he contacted the CID [. . .] it seems like the law is simply being used as a way of punishing journalists who publish something that somebody in power does not like.”

Sesay said CID officers warned him and Spencer against continuing to report on the issue and they felt obliged to comply rather than incur further problems with the authorities, although this discouraged investigative journalism and the exposure of information about corruption and other matters that the government sought to keep secret from the public.

Spencer first fell foul of the criminal defamation law in 1993 when his newspaper, *The New Breed*, repeated allegations of government corruption that had already been published abroad.²⁰¹ He was arrested and, together with four others, including the newspaper’s editor, Donald John, was charged with seditious publication and libel. Their trial was repeatedly postponed before Spencer, John and two other defendants were convicted and fined in August 1995 after almost two years in which they were either detained or on bail, causing their newspaper to close. He told PEN Sierra Leone:

“We were imprisoned/detained for two years. We went in and out of prison. Finally, we were found guilty, made to pay the fines and then freed. The impact of that was that first, the newspaper was shut down and never published again since that day. Also the General Manager of the printing entity that printed the newspapers was charged alongside us and then the printing press eventually shut down.”²⁰²

Not only journalists and other media practitioners have been affected. While conducting research for this report,²⁰³ PEN Sierra Leone obtained information about a 2015 case in the Port Loko area in which NGO activists were charged with criminal libel after they published allegations that a Member of Parliament planned to unduly influence a paramount chieftaincy election. The NGO activists were subsequently discharged but their case illustrates the long reach of the POA’s provisions criminalising expression.²⁰⁴

Arthur Pratt, a documentary journalist who produces video documentary on social issues and manages We Own TV said that he lives in constant fear of the defamation laws

when writing and filming and “this fear affects you badly.” He said the law deters even historical documentation and recounted a case in which the makers of a social change documentary entitled “Tribal war: Mende versus Temne” were arrested and detained for two weeks in 2014, accused by the authorities of inciting tribal hatred. Yet, although it depicted social tensions between Sierra Leone’s two most predominant ethnic groups, the film sought to promote peace and reconciliation. The film makers were released uncharged after the National Film Council intervened on their behalf but their experience reportedly made other film makers more wary when deciding what scripts to turn into films.²⁰⁵

The journalists interviewed for this report unanimously expressed the view that the POA’s criminal defamation provisions undermine the practice of journalism by inducing media self-censorship and deterring investigative reporting and the public exposure of corruption, human rights violations, and other injustice by the state and other powerful entities.

Several interviewees also pointed out that anyone convicted of fraud under the POA’s criminal defamation provisions would acquire a criminal record that would render them ineligible to stand for election as a Member of Parliament (MP) or appointment as a government minister or an MP. Some felt too that women were reluctant to pursue careers in journalism for fear that this might place them at greater risk of arrest and imprisonment. Interviewees suggested also that the POA’s provisions discourage investment in the media due to the burden of liability they place on publishers, printers, distributors, sellers and importers of seditious publications, who face up to three years of imprisonment, a fine or both for a first offence.

CONCLUSIONS AND RECOMMENDATIONS

As this chapter shows, the criminal defamation laws have long had a severely detrimental effect as they have stifled political debate, undermined media freedom and hindered government transparency and accountability, facilitating corruption and other problems.

The government’s stated commitment to abolish criminal defamation is much to be welcomed, therefore, and it should now move rapidly to translate that commitment into practice by quickly seeking parliamentary enactment of a law repealing the criminal libel, sedition and false news provisions of the POA and any other laws that restrict peaceful exercise of the right to freedom of expression. Protection of the right to reputation should be achieved using exclusively civil law in addition to appropriate mediation mechanisms and truth should always be a complete defence to allegations of defamation.

201 Sulakshana Gupta, “When the law failed journalism”, 26 June 2009, New Internationalist, <https://newint.org/taxonomy/term/7920>

202 PEN Sierra Leone, interview with Dr Julius Spencer, 8 July 2016.

203 PEN Sierra Leone carried out interviews with 12 writers, including a human rights lawyer, journalists, a playwright and musician.

204 PEN Sierra Leone, interview with Mr. Issac Massaquoi, Senior Lecturer at the Mass Communications Department at Fourah Bay College, University of Sierra Leone.

205 PEN Sierra Leone, interview with Arthur Pratt, 15 July 2016.

PEN International and PEN Sierra Leone urge the government to:

- Promptly implement its commitment to abolish criminal defamation by repealing the POA provisions criminalising defamation, sedition and the publication of false news, specifically sections 26, 27, 28, 32 and 33, to ensure their full conformity with Sierra Leone's obligations under the African Charter and the ICCPR;
- Ensure that truth is available as a complete defence to proposed civil defamation legislation;
- Promote and give effect to the public's right to know by making available the financial and other resources and training necessary to enable the effective operation and implementation of the Right to Access Information Act.

PEN International and PEN Sierra Leone urge media owners, publishers, editors, journalist associations and practitioners to:

- Train journalists and other media workers in ethical and other professional standards;
- Provide adequate legal, financial and professional support to employees facing criminal defamation charges

PEN International and PEN Sierra Leone urge the IMC to:

- Uphold its independent and effective role as regulator
- Ensure that the imposition of fines for defamation are capped and proportionate to the harm inflicted
- Ensure that journalists are guaranteed access to the full range of defences to defamation as outlined in the best practices section (see below).

3.4 South Africa

“A growing democracy needs to be nourished by the principles of free speech and the free circulation of ideas and information. Criminal defamation detracts from these freedoms. No responsible citizen and journalist should be inhibited or have the shackles of criminal sanction looming over him or her.”²⁰⁶

South African law, the roots of which are found in Roman Dutch and English common law, has long made provision for defamation to be prosecuted as a criminal offence. However, recorded prosecutions have been extremely rare – the last 20 years have seen only three defamation prosecutions go before the courts and the use of the law to investigate one journalist against whom no charges were brought.

Despite this, South Africa has seen significant campaigning

for the repeal of criminal defamation legislation by advocates of media freedom, human rights activists and others.

The South African government committed to take such action in 2015. In September 2015, Minister in the Presidency Jeff Radebe announced that the ruling African National Congress (ANC) would “spearhead legislation through parliament to eliminate criminal defamation from our common law, thereby developing our common law beneficially and securing a victory for the building of a strong and vibrant democracy underpinned by a sound legal foundation.”²⁰⁷ The government undertook to bring new legislation to abolish criminal defamation during the 2016 parliamentary session and made provision for this in the Judicial Matters Amendment Bill, 2016, providing in Clause 45 sub-section (1) that “the common law relating to the crime of defamation is hereby repealed.” The Bill stipulated that any criminal defamation proceedings in progress at the time of repeal should be allowed to continue to their conclusion and that the repeal of criminal defamation would not affect civil liability actions based on defamation under common law.²⁰⁸

The government said that it expected to lay the Bill before Parliament in May 2016 but it failed to do so, saying that the Minister of Justice had questioned aspects of it and suggesting that it did not have the full approval of the ANC leadership. In October 2016, the authorities published another draft law for consultation, the Bill for the Prevention and Combating of Hate Crimes and Hate Speech, whose broad terms have been widely seen as threatening to freedom of expression and as potentially having as restrictive an effect on free speech and media freedom as the law on criminal defamation.

The Department of Justice indicated in June 2017 that a clause providing for the repeal of criminal defamation would be included in the Bill. The clause would be made available to the media after it had been submitted to the Cabinet. Journalists are waiting for that to happen.²⁰⁹

An access to information law was enacted in 2000 to give effect to the 1996 Constitutional provision giving all citizens a right of access to information held by both public and private bodies in South Africa. This has proved only partially effective in practice due to limitations within the law, low levels of official compliance and other factors.

BACKGROUND

As detailed below, defamation has been a criminal offence under South African law since the time of Dutch and British rule, remaining extant throughout the period of white minority rule and apartheid that ended in 1994 with the accession to power of the government of President Nelson Mandela. Since then, archaic criminal defamation legislation has remained on the statute book but continued to be rarely used to bring prosecutions. As stated above, only three court cases

206 Minister in the Presidency, Jeff Radebe, addressing a 2015 workshop convened by the ANC Legal Research Group, <https://mg.co.za/article/2015-09-23-the-case-against-criminal-defamation>

207 See Dario Milo, “The case against criminal defamation,” *Mail & Guardian*, September 2015, <https://mg.co.za/article/2015-09-23-the-case-against-criminal-defamation>; full speech on file with PEN International

208 Judicial Matters Amendment Bill, 2016, https://juta.co.za/law/media/filestore/2016/04/Draft_Judicial_Matters_Amendment_Bill_2016.pdf

209 A spokesperson in the Ministry of Justice told a member of PEN South Africa that the criminal defamation repeal legislation would be included in the new Prohibiting Hate Crimes and Hate Speech bill, which is being processed.

have been recorded in the past 20 years and only four others in the preceding five decades.²¹⁰

Yet, as the government has openly recognized, the continued existence of the criminal defamation law is inimical to South Africa's democratic development and principles of good governance.

The government's welcome announcement in September 2015 followed several years of campaigning for the repeal of criminal defamation and "insult" laws by media freedom groups and others and calls for reform by authoritative bodies and institutions. Stand out developments included the adoption of the Declaration of Table Mountain by participants at the 2007 World Newspaper Congress in Cape Town.²¹¹ Subsequently, the Declaration, which a South African editor had drafted and which was supported by a survey of criminal defamation and insult laws in 26 African countries, was used by the World Association of Newspapers and News Publishers (WAN-IFRA) as the basis for a three-year long Africa-wide campaign for the repeal of such laws and other freedom of expression restrictions seen as obstacles to the development of independent media in Africa.

In South Africa, this campaign was supported by a range of media professionals and organisations, including the South African National Editors' Forum, the Institute for the Advancement of Journalism and the Media Institute of Southern Africa, as well as newspapers and civil society organisations such as the Freedom of Expression Institute (FXI). The Declaration also received the support of distinguished individuals, including Nobel Peace Prize Laureate Archbishop Desmond Tutu.²¹²

The Declaration of Table Mountain also helped galvanize action by the ACHPR and its Special Rapporteur on Freedom of Expression and Access to Information, Pansy Tlakula of South Africa (see above).

The first indication that the South African government had decided to abolish criminal defamation came in September 2015 when Minister in the Presidency Jeff Radebe addressed a workshop convened by the ruling ANC's Legal Research Group. Speaking in his capacity as head of policy for the ANC and with reference to South Africa, Radebe observed:

"A growing democracy needs to be nourished by the principles of free speech and the free circulation of ideas and information. Criminal defamation detracts from these freedoms. No responsible citizen and journalist should be inhibited or have the shackles of criminal sanction looming over him or her."

He said that the ANC considered criminal defamation "unconstitutional and inimical" to democratic development" and that it was high time that criminal defamation was "eradicated" from South African law. Radebe announced that the government would bring a bill for the abolition of criminal defamation before parliament in 2016.²¹³

Subsequently, the government published the Judicial Matters Amendment Bill, 2016, Clause 45 sub-section (1) of which states that "the common law relating to the crime of defamation is hereby repealed" subject to two qualifications: first, that any criminal defamation proceedings in progress at the time of repeal should continue to their conclusion and, secondly, that the repeal of criminal defamation should not affect civil liability actions for defamation under common law. Clause 8 of the Bill would repeal Section 107 of the Criminal Procedure Act concerning legal procedures relating to a person charged with defamation, and thus remove what would otherwise become an anomaly once criminal defamation is repealed.²¹⁴

The Bill specifically recognized the "chilling effect" of criminal defamation and insult laws, particularly on journalists, and referred to the ACHPR's 2010 resolution declaring such laws "a serious interference with freedom of expression" and statements by other authoritative bodies calling for the abolition of criminal defamation.

The government said that it would submit the Bill to Parliament in May 2016 but it failed to do so. Lawyers who questioned the delay were informed that the Minister of Justice had questioned aspects of the Bill, but without being given details. In October 2016, however, the government published another expression-related bill for public consultation, the Prevention and Combating of Hate Crimes and Hate Speech Bill. This aims to criminalise hate speech and other crimes but is so broadly-framed as to raise concerns that it could restrict legitimate criticism and other expression and have as "chilling" an effect on public debate and media reporting as the criminal defamation and insult laws.²¹⁵ South Africa, the Department of Justice indicated in June 2017 that the provisions to decriminalise defamation would be incorporated in a new Prohibiting Hate Crimes and Hate Speech Bill, a copy of which would be made available to journalists once it had been submitted to Parliament.

LEGAL FRAMEWORK

International and constitutional law

South Africa's 1996 Constitution, which came into effect on 4 February 1997 and is the country's supreme law, guarantees the right to freedom of expression under Article 16.²¹⁶ The Article defines freedom of expression as including

210 Information provided by Dario Milo, senior partner at Webber Wentzel Bowens, attorneys, Johannesburg.

211 See Appendix for the full text of the Declaration; Andrew Heslop, "The Declaration of Table Mountain," *World Association of Newspapers and News Publishers*, February 2011, <http://www.wan-ifra.org/articles/2011/02/16/the-declaration-of-table-mountain>

212 "Archbishop Desmond Tutu Endorses Declaration of Table Mountain," *World Association of Newspapers and News Publishers*, July 2010, <http://www.wan-ifra.org/articles/2010/07/09/archbishop-desmond-tutu-endorses-declaration-of-table-mountain>

213 See Dario Milo, "The case against criminal defamation," *Mail & Guardian*, September 2015, <https://mg.co.za/article/2015-09-23-the-case-against-criminal-defamation>; full speech on file with PEN International.

214 Judicial Matters Amendment Bill, 2016, Clause 45 sub-section (1); <http://www.justice.gov.za/legislation/bills/2016-JMA-BILL.pdf>

215 Prevention and Combating of Hate Crimes and Hate Speech Bill, <http://www.justice.gov.za/legislation/bills/2016-HateCrimes-HateSpeechBill.pdf>; Raymond Louw, "Hate speech bill is so menacing and wide it will curb our freedom severely," *Business Day*, <https://www.businesslive.co.za/bd/opinion/2016-12-12-hate-speech-bill-is-so-menacing-and-wide-it-will-curb-our-freedom-severely/>

216 Constitution of the Republic of South Africa, 1996 - Chapter 2: Bill of Rights, Article 16. <http://www.gov.za/documents/constitution/chapter-2-bill-rights#16>

“freedom of the press and other media” as well as the “freedom to receive or impart information or ideas” and freedom of “artistic creativity,” academic freedom and freedom of scientific research.

South Africa is also required to uphold the right to freedom of expression under international law, notably as a party to both the ICCPR and the African Charter on Human and Peoples’ Rights. South Africa is also a member of the Southern African Development Community (SADC). Article 4 of the SADC treaty states that human rights, democracy and the rule of law are guiding principles for member states.²¹⁷

Criminal defamation law and its application

Under the common law, defamation is regarded as a crime for which the punishment is a fine or a term of imprisonment and the person defamed may also claim money by way of damages. In *The Newspaperman’s Guide to the Law*, Kelsey William Stuart provided the following definition of defamation as the legal basis for criminal defamation charges in South African courts:

“Defamation is committed when, with intent to injure, objectively regarded, matter is published of and concerning a person which tends to lower him in the estimation of the general body of right-thinking men, or which causes him to be shunned, or avoided or which exposes him to hatred, contempt or ridicule.”²¹⁸

The records show that only three criminal defamation cases have reached the courts in the past 20 years, while in a fourth case (see below) police investigated a journalist for criminal defamation but did not bring charges. The small number of cases bears out the view that criminal defamation charges are rarely brought in South Africa; nevertheless, the Supreme Court of Appeal (SCA) has ruled both that the criminal defamation law has not been abrogated through disuse and that it is consistent with the 1996 Constitution.²¹⁹

The two most recent cases to reach the courts were the following:

In 2009, journalist **Cecil Motsepe** was charged with criminal defamation for publishing an article in 2008, when he worked for *The Sowetan* newspaper, which accused a magistrate of imposing a heavier sentence on a black man than he had imposed on a white woman for the same offence.²²⁰

Motsepe’s article was based on incorrect information and the magistrate laid a charge of criminal defamation against him and began a civil suit for defamation. Motsepe was convicted

of criminal defamation and sentenced to pay a R10,000 fine or serve 10 months in prison, wholly suspended for five years, on certain conditions. Motsepe appealed his conviction and two judges of the Pretoria High Court overturned it, ruling that the prosecution had failed to show beyond a reasonable doubt that Motsepe had acted with intent to defame the magistrate, but specifically rejected arguments that the crime of defamation was unconstitutional.

Luzuko Kerr Hoho, a researcher employed by the Eastern Cape Legislature, was accused of having compiled/produced and/or published leaflets in which he accused certain members of the legislature, namely the Premier of the Eastern Cape and the National Minister of Safety and Security of embezzlement, corruption, bribery and fraud.²²¹

The Bisho High Court in 2005 convicted Hoho on 22 charges of criminal defamation and sentenced him to three years’ imprisonment, suspended for five years, and three years’ correctional supervision. Hoho appealed his conviction which was heard by the Supreme Court of Appeal (SCA) in 2008.²²²

The SCA in HoHo considered two legal questions: whether the crime of defamation remained extant or had been abrogated by disuse; and if it did remain extant, whether it accorded with the 1996 Constitution. On the first question, the SCA acknowledged that the “doctrine that law may be abrogated by disuse” is well established under South African law and based on the notion of tacit repeal “through disuse by silent consent of the whole community”.²²³

The court then considered the absence of reported convictions, the existence of unsuccessful prosecutions, relevant legislation and various academic writings compiled by the South African Law Commission, which had recommended that “the legal position regarding defamation be left unchanged”. In light of these, the court came to the conclusion that the crime of defamation had not been abrogated by disuse.²²⁴

Before considering the constitutionality of the crime of defamation, the court defined that crime as: “the unlawful and intentional publication of matter concerning another which tends to injure his reputation.”²²⁵ The SCA held, notably, that a degree of seriousness was not an element of the crime but voiced the opinion that prosecutors would take account of this factor when deciding whether to bring charges for criminal defamation²²⁶ and an expectation that courts would address any prosecutions for non-serious defamation in sentencing.

On the question of the law’s consonance with the Constitution, the SCA ruled that the State would have to prove all of the

217 The Consolidated Treaty of the Southern African Development Community, https://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf

218 Kelsey William Stuart, “The Newspaperman’s Guide to the Law,” D&S Publishers, 4th ed. (1986).

219 *Hoho v The State* (493/05) [2008] ZASCA 98 <http://www.saflii.org/za/cases/ZASCA/2008/98.html>

220 *Motsepe v S* (A 816/2013) [2014]. <http://www.saflii.org/za/cases/ZAGPPHC/2014/1016.html>; “The timely demise of criminal defamation law,” Dario Milo, 4 October 2015, <http://blogs.webberwentzel.com/2015/10/the-timely-demise-of-criminal-defamation-law/>

221 *Hoho v The State* (493/05) [2008] ZASCA 98, <http://www.saflii.org/za/cases/ZASCA/2008/98.html>

222 *Hoho v The State* (493/05) [2008] ZASCA 98 <http://www.saflii.org/za/cases/ZASCA/2008/98.html>

223 *Hoho v The State* at para 9.

224 *Hoho v The State* at para 15.

225 *Hoho v The State* at para 16.

226 *Hoho v The State* at para 36.

elements of the crime beyond reasonable doubt, including unlawfulness and intention (which are presumed to be present in civil defamation), in accordance with the accused's right to remain silent and be presumed innocent until proven guilty. Only when the state had done this, would the onus of proof shift to the accused to justify the alleged defamation. The court held that the law aimed to protect reputation and the right to dignity and, therefore, amounted to a legitimate restriction of the right to freedom of expression, and that it was reasonable and justifiable because the requirements for succeeding in criminal defamation cases were far more onerous than in civil defamation. Criminal defamation was, therefore, found not to be inconsistent with the Constitution.

More recently, in 2015 Tom Nkosi, a journalist with *Ziwaphi*, a community-based newspaper in Mpumalanga, reported that police summoned him for questioning about possible criminal defamation charges after *Ziwaphi* published a report on the alleged involvement of a senior politician in a planned break-in and theft of sensitive information about crime. Nkosi sought and received assistance from the Freedom of Expression Institute (FXI) and the police dropped the case.²²⁷

Very few criminal defamation cases were recorded during the second half of the 20th Century; details of the courts' findings in these cases were as follows:²²⁸

In *State v Gibson* 1979 (4) SA 115 (D &CLD), the court held that when considering what reasonable steps a newspaper should take to avoid publishing irresponsibly or indeed recklessly, it must be borne in mind that a daily or weekly newspaper has considerations of time, space and quick digestibility of news by its readers, and that its readers will be aware of and recognize this fact, the newspaper therefore cannot be regarded as "the final oracle of truth."

The court held too that Attorney-Generals should be wary of instituting prosecutions for contempt of court that could have the effect of stifling healthy and legitimate criticism and must consider two principles - the administration of justice and the right of free speech - that both require protection in the public interest, and determine what should prevail in the overall public interest.

The court held also that it is clearly necessary for a plaintiff in a civil defamation action to prove that those who knew him understood the words to refer to him, and that the same applies in a criminal defamation case except that in the latter there must be proof beyond reasonable doubt that this was so.²²⁹ Gibson was acquitted.

In *State v Revill* 1970 (3) SA 611 (C), the court convicted the accused of contravening section 1 of Act 46 of 1882 (C) where it found that he had published defamatory libel of a judge who had presided in a matrimonial suit between him and his wife, and that he had failed to establish his defence of truth and public benefit.²³⁰

In *Regina v Mac Donald* 1953 (1) SA 107 (107), the court held that defamation is a crime whether or not it is (a) aggravated, gross or serious, (b) calculated to lead to a breach of the peace, (c) likely to affect the common weal, or (d) directed against a state official.²³¹

In *Rex v Fuleza* 1951 (1) SA 519 A, the court held that the offences of slander, or injuria verbis, had not been abolished in Cape Colony. Judge of Appeal Hoexter ruled that slander that affected the state's interests by reason of its results was a crime under the law (leaving open the question whether slander that did not affect the state's interests was a crime). Judge of Appeal Fagan ruled that slander, at least if it was of a serious nature, remained a crime under the law (leaving open the question whether the court should dismiss the charge or acquit the accused if it did not consider the slander serious and leave the complainant to pursue the matter through a civil claim.)²³²

Access to Information

The 1996 Constitution, under Section 32, guarantees "everyone" the right to access "any information held by the state" as well as "any information that is held by another person and that is required for the exercise or protection of any rights," and provides for the enactment of national legislation giving effect to that right. This was done with the passage of the Promotion of Access to Information Act (PAIA) of 2000. The act's preamble refers to the "secretive and unresponsive culture" that existed in the period preceding 1994 and states that the PAIA aims to "foster a culture of transparency and accountability in public and private bodies."²³³

After its enactment, the PAIA was praised internationally but in practice it has proved disappointing – it provides only for access to records, not other information; allows information officers to withhold records by means of procedural delay; and allows exemptions on vague grounds such as "commercial confidentiality."²³⁴

In 2013, when enacting the Protection of Personal Information Act (POPI) to provide for the responsible handling of personal information by public and private organizations in South

227 "Statement: Swaziland, Angola, SA and Zim: defend freedom of expression," *Right2Know*, March 2015, <http://www.r2k.org.za/2015/03/24/statement-swaziland-angola-sa-and-zim-defend-freedom-of-expression-stop-criminalising-dissent/>

228 Information provided by Dario Milo, senior partner at Webber Wentzel Bowens, attorneys, Johannesburg.

229 *Hoho v The State* (493/05) [2008] ZASCA 98, <http://www.saflii.org/za/cases/ZASCA/2008/98.pdf>

230 *Hoho* at para 8.

231 *Ibid.*

232 *Ibid.*

233 PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000. Government of South Africa. February 2000. https://www.saps.gov.za/re-source_centre/acts/downloads/promotion_of_access_act2_2000.pdf. p.1

234 Dale T McKinley, "The State of Access to Information in South Africa," *Human Rights Initiative* http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/McKinley%20-%20FOI%20in%20South%20Africa.pdf

Africa, the government created (in section 39) the position of Information Regulator to oversee implementation of both the POPI and the PAIA, including by monitoring and enforcing compliance with both laws by public and private bodies and investigating complaints.²³⁵

In February 2015, a group of NGOs comprising the PAIA Civil Society Network reported that official compliance with the PAIA remained at a low level; in 2014, government departments had failed to respond to 25 per cent of requests and refused more than 50 per cent.²³⁶

The constitutional right of access to information, as given effect in the PAIA, was threatened by the Protection of State Information Bill (POSIB), which was the subject of protracted parliamentary debate in 2011-2013. Currently, it remains unclear whether the government intends to proceed with the POSIB because the President has not signed it into law nor indicated when he will do so; if enacted in its present form, it would impose severe penalties for disclosing classified information held by the state even when such disclosure is in the public interest.

Impact of criminal defamation

With so few cases having come before the courts, it appears that the availability of criminal defamation law has had much less impact on freedom of expression in South Africa than in many other countries. In practice, as the standard of proof required to succeed in civil claims for defamation is lower than that necessary to win criminal defamation cases, the civil route has generally proved the more attractive alternative for those claiming that their right to reputation has been violated by the media or others. Nevertheless, as long as criminal defamation remains on the statute book in South Africa it remains a potent threat to freedom of expression, including media investigations, comment and reporting – as the government has itself readily acknowledged in recent years.

Cecil Motsepe, one journalist who was prosecuted for criminal defamation (see above), said the experience ruined his career and had a severely negative impact on his private life. He acquired a criminal record, with the result that newspaper editors were unwilling to employ him and he felt that his public credibility as a journalist was much diminished. He believes that because his successful appeal received less publicity than his trial and conviction, he is still seen as a criminal by many members of the public and says that the deeply chilling effect of being charged with criminal defamation transformed him from a bold and enterprising journalist into a “tentative journalist” in fear of the law. He told PEN South Africa:

“I know from personal painful experience that being charged under these kind of laws had some extremely chilling effect on me and eventually led me to become a tentative journalist. This is a far cry from the young unflinching and cheeky (reporter) who spent ten years exposing wrongdoings by powerful individuals ranging from church leaders, to dangerous syndicates right up to the state president.”²³⁷

In July 2016, journalists and editors who attended a media law workshop in Cape Town hosted by FXI expressed diverse views when questioned about the impact of South Africa’s criminal defamation on their work and experiences as media professionals. Some said they did not know the details of the law but were aware of the potentially serious consequences that they and their newspapers could face for any breaches, and consequently remained “on their guard.” Some said they had withheld certain stories from publication for fear of possible prosecution for defamation or withdrawn stories when they received threats from people who objected to what they had written and claimed it was defamatory. One editor said he had dropped a story under threat of prosecution but other journalists said they had felt unaffected by the law when reporting news stories.²³⁸

When questioned about media employers’ attitude to the defamation laws, those attending the July 2016 media workshop gave a mixed response. Several editors said they had never felt threatened by the law or asked to drop a report for fear of the law but some said their employers had advised them to drop stories or cautioned them not to pursue others because of the threat posed by the criminal defamation law.

Some participants openly acknowledged exercising self-censorship and editing out material that they considered risky while recognizing that this could result in the publication of distorted information. They attributed their exercise of self-censorship partly due to the high legal costs of defending themselves and their newspapers against possible defamation charges, possibly leading to their newspaper’s closure. One editor said he found it difficult **“to practice freedom of speech without censorship”** and that journalists had to **“filter information to produce a publication safe from criminal defamation and other laws.”** He said he was particularly cautious when reporting on foreign relations and public figures as a criminal case would make it difficult to maintain profitability, particularly for cash-strapped community newspapers, whose content, consequently, failed to present a true reflection of the news. One editor said his outlet avoided reporting allegations of corruption in business because of the threat posed by criminal defamation law.²³⁹

The journalists and editors said they felt the public generally appeared unaware of criminal defamation law and its consequences, and had little sympathy for newspapers, and

235 In October 2016, President Jacob Zuma appointed Pansy Tlakula as Information Regulator. See REPUBLIC OF SOUTH AFRICA THE INFORMATION REGULATOR (SA) Media Statement, 2 December 2016, <http://www.justice.gov.za/infocreg/docs/ms-20161202-infocreg.pdf>

236 “Media Release: 15 years on, Shadow Report reveals compliance with access to information laws remains low,” *Centre for Environmental Rights*, February 2015, <https://cer.org.za/news/media-release-15-years-on-shadow-report-reveals-compliance-with-access-to-information-laws-remains-low>

237 PEN South Africa, interview with Cecil Motsepe, July 2016.

238 Survey responses to PEN South Africa questionnaire, July 2016.

239 Survey responses to PEN South Africa questionnaire, July 2016.

that the media needed to ensure that reporting is accurate and factual to overcome this. Two senior journalists said they were aware of the laws but had not been directly affected by them during many years in their profession, although they knew editors who had observed the defamation law's chilling effect on their staff and news rooms. Both journalists said they had never dropped a story because of the defamation law or been told to do so by an editor or publisher, although one said anonymous callers had threatened his personal safety for pursuing an investigation and lawyers representing people he was investigating had sought to warn him by threatening legal action.²⁴⁰

CONCLUSIONS AND RECOMMENDATIONS

Even though criminal defamation is sparingly used in South Africa it is clear from the FXI workshop in Cape Town that the presence of the law on the statute book has a chilling effect on a number of those journalists who are aware of it. There are also indications that the intimidating effects extend beyond the fear of a criminal conviction and a fine or imprisonment to include the fears of costs such a prosecution could incur for a publication. This aspect has prompted some publishers and managements to become more acutely aware of the legislation and its potential impact on the bottom line resulting in unacceptable interference by owners in editorial conduct.

But, of course, the major effect of this legislation is the totally unacceptable self-censorship and other forms of censorship that it induces. Bluntly stated, it prevents the flow of information and thus censors the public's right to know. It prevents people, therefore, from being well-informed about current affairs.

PEN International and PEN South Africa urge the government to:

- Promptly implement its public commitment to abolish criminal defamation; ensure that provisions in the hate speech bill do not introduce provisions which would limit the right to freedom of expression and that any restrictions are narrowly prescribed and are drafted in conformity with the international legal principles of legality, necessity and proportionality; ensure that truth is available as a complete defence to proposed civil defamation legislation;
- Strengthen the Promotion of Access to Information Act (PAIA) to ensure full access to information in the public interest and ensure its full and effective implementation
- Do not enact the Protection of State Information Bill (POSIB)

PEN International and PEN South Africa urge media owners, publishers, editors, journalist organisations and practitioners to:

- Train journalists and other media workers in ethical and other professional standards

3.5 Ghana

“Nobody can overestimate the importance of media freedom, but media practitioners must also know that there is nothing like unbridled freedom. If democracy can work well, it must have its own punitive measures.”²⁴¹

Ghana's Parliament repealed the criminal libel and seditious libel provisions of the country's Criminal Code in 2001,²⁴² a year after the New Patriotic Party (NPP) was elected to power. The NPP government's action was praised internationally and at home as a significant step towards realizing the expansive provisions on freedom of expression and media freedom set out in the Fourth Republican Constitution when it was adopted in 1992.

The 1992 Constitution marked Ghana's transition to democratic civilian rule after decades of military dictatorship. The new Constitution was intended to usher in a new, more rights friendly era after the repression of military rule. However, the first civilian government, composed largely of former leaders of the military-dominated Provisional National Defence Council (PNDC), continued to stifle expression and sought to control the media by invoking the Criminal Code provisions criminalising libel and sedition against journalists and other critics. The government's attempts to deny the media the newfound freedoms promised by the 1992 Constitution, however, caused public outrage, sparking renewed demands for reform. The repeal of the criminal defamation laws became a central issue during campaigning for the national elections of 2000, which saw the main opposition NPP oust the ruling National Democratic Congress (NDC).²⁴³

Today, 16 years on from the 2001 act of reform, it can be seen that the repeal of the criminal defamation laws brought very real benefits in Ghana. It created a climate much more conducive to free and open political debate and the ready exchange of information and ideas, facilitating greater public participation, and recognition of the need for greater official transparency. It also opened the way for the media to play a far more effective role as a public watchdog and guardian of the public interest.

Yet, as this chapter shows, the decriminalisation of defamation was not a panacea. Serious problems remain with the media

240 Survey responses from journalists to PEN South Africa questionnaire, July 2016.

241 Ransford Gyampoh, November 2016

242 Criminal Code (Repeal of Criminal Libel and Seditious Libel Laws) (Amendment) Act, 2001 (Act 602).

243 Criminal libel law repealed' *Graphic Online* (July 2001). <https://www.modernghana.com/news/15786/1/criminal-libel-law-repealed.html>

– at least, some sections of it – who are now reportedly held in low esteem by the Ghanaian public and seen as overly powerful, irresponsible, self-serving and untrustworthy. Underscoring this, the removal of criminal defamation has seen media outlets hit with a rising toll of civil defamation suits and damages awards by courts to politicians and other powerful figures claiming that their reputations had been impugned. As well, legislators and judges have used their powers under the vaguely-drawn criminal laws on contempt of parliament and the courts to punish or deter media criticism. Unsurprisingly, some now see the repeal of criminal defamation laws in 2001 as a much-needed and long overdue reform that unwittingly opened the media to become so powerful, yet unrestrained, unethical and unprofessional as to run counter to the public interest.

Undoubtedly, certain media outlets, particularly some radio broadcasters, have become notorious for spewing out vilification and abuse, but it would be a grave error to attribute Ghana's media problems to the repeal of the criminal defamation laws. Rather, these problems stem from an array of other factors: a general lack of investment in the media, leading to inadequate training of journalists in professional and ethical standards; manipulation and misuse of the media by political parties more concerned with propaganda than truth; and particularly the National Media Commission's (NMC)²⁴⁴ failure to effectively carry out its function as a media regulator due to a lack of financial and other resources. Moreover, the continued absence of an effective access to information law impedes the media's ability to act as a public watchdog and ensure government transparency and accountability.

The NPP government elected to office in 2000 proposed a Right to Information Bill in 2003 to give effect to the right of every citizen to access government-held information enshrined in Article 21 (1) (f) of the 1992 Constitution. However, it was not until February 2016 that a parliamentary committee adopted an amended version of the draft legislation which was then debated by Parliament but has yet to be enacted.²⁴⁵ In April 2016, a judge of the High Court of Justice ruled that the government could not use the absence of an access to information law to deny citizens' their constitutional right to information, declaring "[t]he individual does not need a Freedom of Information Act to enjoy the right to information in Ghana," and ordered the authorities to disclose information about a contract between the Ministry of Transport and a bus company.²⁴⁶

BACKGROUND

Colonial origins of repressive media laws

Ghana inherited most of its repressive media laws from the time of British colonial rule, which ended when Ghana (formerly the Gold Coast) became independent in March 1957, and as such these laws were largely shaped by English libel law. The British first introduced the law on sedition, for example, as part of the Gold Coast Criminal Code of 1892, and subsequently amended the Code in 1934 to add provisions that declared certain expressions through the press "seditious acts".²⁴⁷

In a remarkable case of historical continuity, the criminal libel, secrecy and seditious libel provisions of the 1892 Code were incorporated into modern Ghana's Criminal Code of 1960 following independence. In addition, the state authorities introduced what prominent human rights lawyer Akoto Ampaw described as "even more outrageous additions."²⁴⁸ These included Section 185 of the Code, which criminalised "false reports likely to injure the reputation of the government of Ghana," and section 183A of the Code, enacted by decree²⁴⁹ in 1966, which criminalised expression deemed defamatory of or insulting to the President.

This latter amendment, which Ghana's first military government, the National Liberation Council (NLC,) introduced before the country returned to civilian rule under the Second Republic in 1969, resurrected an offence under the 1892 Code that had criminalised defamation of the British monarch but which had been omitted when the Criminal Code replaced the 1892 Code in 1960. The British colonial authorities enacted the Newspaper Registration Ordinance, the first law directly regulating the press, in 1894, and thereafter issued further regulatory press ordinances "in direct response to the socio-political climate,"²⁵⁰ unleashing the full force of the criminal law against those calling for change, as anti-colonial agitation mushroomed in the late 1940s and the 1950s.²⁵¹

In particular, the colonial authorities used the laws on "defamation (both civil and criminal); sedition, and contempt of court" to curtail press activity, thereby undermining their value and potential as instruments for combating popular outrage and disaffection against the state and those holding power. Unsurprisingly, once Ghana achieved independence, its new rulers retained these laws virtually unaltered and

244 Established in accordance with the National Media Commission Act 1993, the NMC's main functions include ensuring the establishment and maintenance of high journalistic standards within the mass media, including by investigating complaints against the media and resolving them through mediation or other means, http://laws.ghanalegal.com/acts/id/182/section/2/Functions_Of_The_Commission

245 Jonas Nyabor, "We'll pass RTI bill this year," *Citi FM Online*, February 2017, <http://citifmonline.com/2017/02/02/well-pass-rti-bill-this-year-bawumia/>

246 The case was brought by the Citizen Ghana Movement (CGM), a civil society pressure group formed in 2015. Suit No HR/0027/2015 <https://www.dropbox.com/s/cv9yshx4x2zo9bw/BUS%20BRANDING%20JUDGMENT%20-%2013TH%20APRIL%202016.pdf?dl=0>

247 The 1934 amendment was used to target leading critics of colonial rule and advocates of African nationalism: in 1936, a court convicted Nnamdi Azikiwe, the Nigerian editor of Accra's *African Morning Post* newspaper, and Isaac Theophilus Akunna Wallace-Johnson, a Sierra Leonean journalist, on charges of publishing and possessing seditious material, sentencing them to six-month prison terms. Azikiwe subsequently became the first President of Nigeria in 1963.

248 Akoto Ampaw (2004), "Legislation on Media, Speech and Expression. A Source Book," Accra. MFWA.

249 Under Section 10 of the Criminal Code (Amendment) Decree, 1966 (National Liberation Council Decree 398).

250 Sylvanus Ekwelieh, "The Genesis of Press Control in Ghana," *Gazette* 24 (1978), 196-206. Quoted in Kwame Karikari and Kofi Kumado (Editors), 2000. *The Law and the Media in Ghana*. Legon, School of Communication Studies.

251 Kwame Karikari, "The Press and the Law on the Twilight of Colonial Rule in Ghana," In Karikari and Kumado, pp. 12-29.

even strengthened them during the following decades of the 20th Century.²⁵²

Legal prosecutions to silence the press

Like some other countries in Africa, Ghana was gripped in the late 1980s and early 1990s by growing popular demands for democratic reform – an end to the one-party state: the institution of constitutional governance based on multiparty democracy and elections; adherence to the rule of law; and respect for human rights, including freedom of expression and media freedom. In particular, there were demands for an end to the state’s monopoly over the media, increased media privatization, plurality and diversity, and less state interference in and control over the media and the work of journalists. State control of the media was widely seen to have created “a culture of silence” before the restoration of privately owned independent press journalism during the last years of military government helped pave the way for the adoption of the Fourth Republican Constitution in 1992, heralding a return to multi-party democracy and civilian rule.

The new Constitution, which has been described as “the boldest and most imaginative attempt to provide both a substantive law and institutional framework for guaranteeing, protecting and promoting an independent and free media” in Ghana²⁵³ guarantees freedom of expression, including “freedom of the press and other media” under Article 21 and devotes a full chapter, Chapter 12, to “Freedom and Independence of the Media.”²⁵⁴

In practice, however, the new Constitutional guarantees were undercut by existing statutes, such as the Criminal Code provisions on defamation and sedition, that the new civilian government – composed largely of former leaders of the military-dominated PNDC who had successfully held on to power via the ballot box – retained and continued to apply. As the burgeoning media took up its public watchdog role, exposing corruption and abuses of power, and serving as a forum for popular expression and criticism of the government, it quickly came into collision with the authorities. As the PNDC, they had brooked no dissent and had been violently intolerant of independent opinion and the press. As a civilian government that was heavily dependent on foreign aid, however, they sought different means to combat their critics and control the media based on the “rule of law,” and turned to the existing, unreformed Criminal Code provisions on defamation, sedition and false news to achieve this.

The years after the new Constitution came into force in 1993 saw numerous legal actions against the media, leading

human rights lawyer Akoto Ampaw to draw parallels with the colonial repression of the emerging nationalist movement half a century earlier:

“Considered from the viewpoint of the last days of an epoch and the vigour with which the colonial state pursued nationalist agitators and publicists, the late 1940s and early 1950s had a striking similarity with the 1990s, which could be legitimately described as the period of transition from the Rawlings years of dictatorship to a democratic republic.”²⁵⁵

Citing a study conducted by Akua Kuenyehia,²⁵⁶ Ampaw observed that the 1990s saw “the greatest concentration of civil defamation suits brought by ministers of state and other high-ranking public officials, party functionaries and public figures against the media, particularly the print media.” Kuenyehia recorded 107 civil defamation suits against the media between January 1993, when the new Constitution took effect, and May 1997, as well as prosecutions for criminal libel, seditious libel and contempt of court. Some of these cases, especially the contempt of court cases, provoked public outrage because they were taken on behalf of politically prominent individuals and resulted in the imprisonment of those convicted of defaming them.²⁵⁷

The struggle for media rights

By the late 1990s the media environment had become increasingly vibrant. The end of the state monopoly of broadcasting liberalized the airwaves leading to the creation of privately-owned radio stations that further amplified independent voices in public debate and became more assertive and outspoken.

In this context, the authorities’ continued use of repressive laws to persecute the media fueled a perception that constitutional rule was being undermined and conditions were regressing to the point where a “culture of silence” might again prevail. The suspicious circumstances surrounding the death of Jo Mini, a popular cartoonist, and a night excrement daubing attack on the offices of the *Ghanaian Chronicle* and *Free Press* and the homes of their editors (which a government minister appeared to publicly condone), added to such fears.²⁵⁸

In 1998, a contempt case brought at the behest of Nana Konadu Agyeman Rawlings, the wife of Ghana’s then-President, led to the imposition of prison sentences against two newspaper editors, Kweku Baako of *The Guide* and Harunna Attah of *The Statesman*.²⁵⁹ The case caused public outrage and led to the formation of the Friends of

252 Ibid

253 E. Nii Ashie Kotey, “The 1992 Constitution and Freedom of the Media,” In Karikari and Kumado, pp.30-49.

254 Republic of Ghana Constitution of the Republic of Ghana, 1992, <https://www.ghanaweb.com/GhanaHomePage/republic/constitution.php>

255 Akoto Ampaw.

256 Akua Kuenyehia, “A Survey of Libel Cases,” 1993-1996.

257 Such cases included one brought by Supreme Court Justice I. K. Abban, who later became Chief Justice, against a newspaper columnist and his editor (R. v. Kwabena Mensah-Bonsu, Eben Quarcoo and Tommy Thompson Books Ltd. (Supreme Court CM 77/94, February 21, 1995)).

258 The *Guide* newspaper of February 2, 1993 reported this stinking attack on the offices of *The Chronicle* and the home of its editor. On May 12, 1994, the offices of *The Free Press* suffered the same fate of what became known as “shit bomb”.

259 See: Nana Konadu Agyeman Rawlings v. Kweku Baako, Jr., Western Publications Ltd., Harunna Attah, Kinesic Publications Ltd. Court of Appeal No., 145/97, July 23, 1998.

Freedom of Expression, a group comprising journalists, academics, lawyers, human rights activists, trade unionists and opposition political party leaders who came together to campaign for the repeal of the laws restricting media freedom.²⁶⁰ Previously, domestic protest against government attacks on media freedom had largely been limited to appeals by the Ghana Journalists Association (GJA).²⁶¹

The new coalition began actively campaigning for media law reform as the first democratically-elected civilian government under the Fourth Republic approached the end of its second term and President Jerry Rawlings prepared to relinquish office after eight years as a civilian President and the 10 years previous to that as military dictator of Ghana. The continued harassment of the independent media made Rawlings' ruling NDC unpopular and the demand for media law reform became a key issue in the run up to the national elections of 2000, with the main opposition NPP adopting a GJA reform proposal as part of its platform.²⁶²

Abolition of criminal defamation

After winning the election, the NPP moved quickly to repeal the Criminal Code provisions restricting media freedom. Attorney General Nana Akufo Addo presented a repeal bill to Parliament, which once approved, was signed into law by President John Kufuor on 1 August 2001.²⁶³

In a memorandum accompanying the bill, the Attorney General acknowledged that the Criminal Code provisions on criminal libel, sedition, defamation of the president, and false news had been “systematically employed” by the previous government “to harass and browbeat media practitioners” and had “come to symbolize authoritarian, anti-democratic, anti-media impulses within our body politic.”²⁶⁴ He described them as **“unworthy of a society seeking to develop on democratic principles, on the basis of transparency and accountability in public life”** and expressed hope that the **“expanded space created for expression and the media”** created by the laws would **“be used for the development of a healthy, free, open and progressive society operating in accordance with the rule of law and respect for human rights.”**²⁶⁵

The new law repealed Criminal Code sections 112 to 119 on criminal libel; section 182A giving the President discretionary power to ban organisations; section 183 criminalising sedition; section 183A concerning defamation of the President; and section 185, criminalising the communication of a false statement or report considered likely to injure Ghana's image or reputation.

LEGAL FRAMEWORK

International and constitutional law

According to Article 21 (1) of the 1992 Constitution, all persons have the right to “freedom of speech and expression, which shall include freedom of the press and other media” as well as freedom of thought, conscience and belief, including academic freedom, and information.

Chapter 12 of the Constitution, containing 11 articles (162-173) guarantees “freedom and Independence of the media.” It declares that “there shall be no censorship” nor any impediment to the establishment of private media, such as an official licensing requirement, and that editors and publishers of mass media outlets “shall not be subject” to government “control or interference” and may not be “penalized or harassed” for their opinions or the content of their publications. According to Article 164, however, these rights “are subject to” – meaning that they may be limited by – laws that are “reasonably required” by interests of national security, public order or public morality or to protect the “reputations, rights and freedoms” of others. Article 162, paragraph 6, specifically addresses the issue of reputation; it requires that “any medium for the dissemination of information to the public” that publishes a statement “about or against” a person must publish any rejoinder that that person provides.

Article 166 provided for the creation of the NMC as a body independent of government. It was duly established and given a mandate to “promote and ensure the freedom and independence” of the mass media; to “ensure [...] the highest journalistic standards” including by investigating, mediating and settling “complaints made against or by” the media; to “insulate” state-owned media from governmental control; and to create a registration system for newspapers and other publications that could not be used as a means to direct or control them. As well as presidential and parliamentary nominees, the NMC also includes representatives of the GJA, the publishers and owners of privately-owned media outlets, media training institutions, the Ghana Association of Writers, the Ghana Bar Association, the national teachers', librarians' and advertisers' associations, and different religious faiths.

Ghana is also obliged to uphold the right to freedom of expression under international human rights treaties that it has ratified, notably the ICCPR and the African Charter on Human and Peoples' Rights.

260 The ruling NDC responded by forming a counter group, the “Friends of the Rule of Law.”

261 The GJA's “diplomatic” approach at the time was reflected by the case of Gershon Dompheh, a journalist of the state Ghana News Agency, who was the first on record to receive the longest prison sentence of 20 years for a journalist on charges under the State Secrets Act, 1962 (Act 101). He was released, after spending eight years of his sentence, following the GJA's many years of quiet appeals.

262 Nana Akufo Addo, one of the top leaders of the NPP, later the party's attorney general and three times its presidential candidate (2008, 2012 and 2016) actively participated in the coalition's meetings and programmes.

263 William Owusu. ‘The Ghanaian Media Landscape: How unethical practices of journalists undermine progress’. *Reuters Institute for the Study of Journalism* (2012). <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/The%20Ghanaian%20Media%20Landscape%20How%20unethical%20practices%20of%20journalists%20undermine%20progress.pdf> p. 1

264 Memorandum to the Criminal Code (Repeal of Criminal Libel and Seditious Libel Law) (Amendment) Bill, 2001, 7 June, 2001.

265 Ibid.

Laws that formerly criminalised peaceful expression

The criminal laws repealed in 2001 had created the following offences:

Criminal libel, defined by section 113 of the Criminal Code as the unlawful publication “by print, painting, effigy, or by any means otherwise than solely by gestures, spoken words, or other sounds” of “any defamatory matter concerning another person, either negligently or with intent to defame that person.” The provision defined “defamatory matter” in broad terms as anything that imputed to a person “any crime, or misconduct in any public office or which is likely to injure him in his occupation, calling or office, or to expose him to general hatred, contempt, or ridicule.”

The provision purported to protect the reputations of all citizens from unjustified public attack. In practice, however, it was mostly used against journalists for published statements concerning public office holders or individuals close to the government, with the authorities justifying such prosecutions as necessary to protect officials from “incurring public opprobrium whilst performing their duties, and the possibility of the disruption of public peace occasioned by such publications.”²⁶⁶

Seditious libel: section 183 of the Criminal Code made it a crime punishable by up to five years of imprisonment to prepare or commit any “seditious enterprise” or print, publish, write or utter any “seditious words,” or sell, reproduce, distribute or possess newspapers or other publications containing such words. It defined “seditious intention” in extremely broad terms, which made it particularly menacing to free speech and the media, covering expression ranging from that which the state could interpret as advocating the “desirability of overthrowing the government by unlawful means”, advocacy that could “bring it into hatred or contempt” or “excite dissatisfaction” against it, “excite disaffection” against the administration of justice, raise popular “discontent or disaffection” or “falsely accuse any public officer of official misconduct.”²⁶⁷

Defamation of the President: section 183A made it a crime punishable with up to three years’ imprisonment and a fine to publish “by writing, print, word of mouth or in any other manner” anything deemed intended to expose the President to “hatred, ridicule or contempt.”

Communication of false news: section 185 made it a crime to communicate by speech, writing or other means any “false statement or report” deemed likely to “injure the credit or reputation” of Ghana or its government” while knowing or believing it to be false.

President’s powers to ban organisations: section 182A of the Criminal Code empowered the President to prohibit any organisation whose “objects or activities” he deemed “contrary to the public good” or which could be used, in his opinion, for “purposes prejudicial to the public good,” giving the President discretionary power to ban organisations.

Laws criminalising expression that remain in force

The repeal of the criminal libel and sedition provisions of the Criminal Code in 2001 left in place other provisions potentially inimical to free speech and media freedom because they “pertain to criminal liability for putting words into circulation.”

They include the law on the “abetment of crime” – that is, speech or writing that incites others to crime, or that counsels the commission of crime; the law on obscenity; laws relating to “exciting prejudice as to proceedings in court” and “printing illegal offers.” None of these provisions are known to have been used in recent years, although in one case a prosecution under section 208 of the Criminal Code was contemplated before public outrage caused it to be dropped.²⁶⁸

The laws on contempt of court and contempt of Parliament, however, have continued to be invoked against the media, as detailed below.

Other laws that constrain the media’s freedom to inform the public or demand accountability from public office holders include those protecting state or official “secrets” such as the State Secrets Act of 1962; in the continued absence of a freedom of information law that enables citizens and the media to access information held by the state and its authorities in accordance with their constitutional right, such secrecy laws have wide reach and impact.

Access to information

Article 21 (1) (f) of the 1992 Constitution states that every person shall have the right to “information, subject to such qualifications and laws as are necessary in a democratic society.” However, to date no government has enacted enabling legislation – an access to information law – to give effect to this right in practice, although the Right to Information (RTI) Coalition, a coalition of rights advocacy organisations, has been actively campaigning for such a law since 1998.

However, according to a High Court ruling of April 2016, the absence of an access to information law cannot be used by the authorities to deny citizens their constitutional right to access information, enshrined in Article 21(1) (f) of the 1992 Constitution.²⁶⁹

266 H.J.A.N Mensah-Bonsu, “The Press and the Criminal Law in Ghana,” In Kwame Karikari and Kofi Kumado (Editors), 2000. *The Law and the Media in Ghana*. Legon, School of Communication Studies, pp. 88 – 118.

267 Section 183 (11) of the Criminal Code, 1960 (Act 29).

268 The case arose after a man was arrested after he made statements on radio accusing former President Jerry Rawlings, without proof, of causing a fire. He was accused under what has since been popularly known as the “causing fear and panic” provision of the Criminal Code, which makes it a crime to publish or reproduce “any statement, rumour or report which is likely to cause fear and alarm to the public or disturb the public peace” while knowing or believing it to be false.

269 Michael Nyarko, “Ghana’s High Court gives life to the right to information,” *AfricaLaw*, April 2016, <https://africlaw.com/2016/04/15/ghanas-human-rights-court-gives-life-to-the-right-to-information/>

Media regulation and standards

Chapter 12 of the 1992 Constitution guarantees the “freedom and independence of the media” and affords publishers and editors protection against government control or interference. Media regulation is carried out by two statutory bodies, the NMC and the National Communications Authority (NCA). The latter is responsible for licensing telecommunications operations and radio and television broadcasting by allocating and managing broadcast frequencies but it is the NMC that has legal responsibility for regulating both broadcast and print media content. The NMC was established under the National Media Commission Act, 1993, in accordance with Article 116 of the 1992 Constitution. Initially, it had 15 members but this was increased to 18 in 1998. The NMC is mandated to “promote and ensure the freedom and independence of the media,” “ensure the highest journalistic standards in the media” and “investigate, mediate and settle complaints made against or by the media.” It must also ensure that state-owned media afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions, and “insulate the state-owned media from governmental control.”²⁷⁰

The NMC appears to carry out its functions through soft measures in line with Article 167 of the Constitution, which states that the regulatory body should not have powers of control or direction over the work of media professionals. Therefore, it has virtually no powers to compel the media or journalists to comply with its decisions. Its main regulatory role is taken up with investigating, mediating and resolving media-related complaints but it is widely perceived to be ineffective due to its lack of coercive powers to enforce its rulings – reflected on several occasions by the refusal of editors to comply with NMC summonses to appear before it to respond to public complaints.²⁷¹

In consequence, the NMC’s perceived lack of “teeth” has been seen widely as a main factor contributing to a decline in media standards and ethical abuses by the media, and to a possible waning of public commitment to defending and upholding media freedom. Following growing calls from various sections of society for the NMC to take action against the media – especially, radio – the NMC proposed new legislation in 2015 to regulate media content,²⁷² which received parliamentary approval but could not be enforced due to a Supreme Court injunction obtained by the Ghana Independent Broadcasters Association (GIBA) pursuant to a ruling that aspects of the legislation violated the media freedom provisions of the Constitution.²⁷³

To date, attempts by associations of media professionals to establish mechanisms for self-regulation have proved unsuccessful. The GJA set up an Ethics Committee in

1996, but it was not widely supported and journalists and editors who were summoned to appear before its peer committee failed to attend or comply with its decisions or recommendations. The GIBA issued a Code of Conduct to guide its members’ practice during the 2012 general elections and re-issued it in advance of the 2016 elections. However, incidents of unethical conduct, particularly by radio broadcasters persisted.²⁷⁴

Repeal of criminal laws: impact and lessons

The repeal of criminal defamation laws was one of the most important and enduring achievements of the Fourth Republic’s first decade, both because of its impact on free speech and media freedom and because the repeal campaign demonstrated how popular advocacy and coalition-building could bring about democratic reform. In particular, the GJA was well-organized following leadership and other changes in the early 1990s, and proved effective in mobilizing support and building a broad-based coalition that was able to ensure that the demand for media law reform became a central issue in the run up to the national elections of 2000.

Today, 16 years on, it is clear that the euphoria that greeted the repeal of the criminal libel and sedition laws in 2001 has long since evaporated. Some have even questioned the wisdom of the change, due to perceived “excesses” by the media – particularly, radio talk shows whose hosts and panelists are allowed to disparage, condemn and vilify others with impunity, and the use of radio and TV programmes to allow political activists to pour out partisan propaganda without regard to ethical or basic standards of good journalism.

Sixteen years ago there was a wide consensus that the media was too tightly controlled, weak and unable to serve the public interest. Now, however, the common public perception is that the pendulum has swung too far the other way, and that some sections of the media are virtually out of control and have “crossed the bar” away from proper standards of accuracy, objectivity, taste and decency to the point where their actions make it more difficult to promote harmony and good relations between different groups and sectors within Ghanaian society.

According to Kwasi Agyeman,²⁷⁵ president of the GIBA, “the media feel empowered but sometimes they abuse their powers [...] to the extent where people are even afraid to go into public office” for fear that they will be maligned and the media will publish libelous material about them in circumstances where there is “practically little” they can do to clear their name other than go to court with a civil law action for damages. At times, the malaise has been so deep that even associations of media professionals have felt

270 “Politics will have no place in solving GBC crisis: NMC chair,” *Modern Ghana* November 2010, <https://www.modernghana.com/news/306470/1/politics-will-have-no-place-in-solving-gbc-crisis-.html>

271 Some editors have gone to court and obtained a court decision to the effect that the NMC has no legal authority to compel journalists to appear before its Complaints Settlement Committee.

272 The Contents Standards in Electronic Communications, LI 2224.

273 Fred Djabanor, “Court strikes out NMC’s media control regulations,” *Citi FM*, November 2016, <http://citifmonline.com/2016/11/30/court-strikes-out-nmcs-media-control-regulations/>

274 ‘GIBA launches new code of conduct to check intemperate language’, CitiFMOnline, 26 July, 2016, <http://citifmonline.com/2016/07/26/giba-launches-new-code-of-conduct-to-check-intemperate-language/>

275 PEN consultant, interview with Kwasi Agyeman, 2 September, 2016.

obliged to publicly criticize their own members' disrespect for professional standards of journalism, while those aggrieved by negative media reporting and publicity tend to blame media infractions of any kind on the repeal of the criminal libel and sedition laws in 2001.

Undoubtedly, over the past 16 years the record and performance of the media has fallen far short of the heady ideals evident at the time of the reform. Nevertheless, objective assessment suggests that the media's shortcomings derive not from the decriminalisation of defamation but from factors such as the rapid growth of the media industry and corresponding low availability of trained media professionals; low remuneration rates which deter well-qualified entrants to the industry; and the proliferation of media, especially radio and television, owned by politicians and operated for party propaganda purposes, rather than any regard for ethics or good journalistic standards.

Impacts of decriminalisation

From the perspective of media practitioners, the decriminalisation of defamation in 2001 had an immediate, positive impact. Media owners, editors and journalists alike attest that it created an atmosphere in which Ghana's media had never before felt so free and able to perform its function as the "fourth estate."²⁷⁶ The reform also earned the new government wide international praise and was seen to enhance Ghana's international standing and reputation, adding to the sense of achievement.

All those interviewed during the preparation of this chapter – including journalists, editors, leaders of associations of media professionals, writers, academics and government officials – agreed that the repeal of the criminal defamation laws had significantly widened the space for free speech and liberated the media, enabling it to delve into issues that it would previously have avoided. Writers interviewed by PEN Ghana all agreed that the 2001 reform has had a significant impact in opening the space for political debate and entrenching democracy.

Many expressed concern, however, that since decriminalisation some media outlets had become so "emboldened" that they "overstep their bounds," creating a perception that the pendulum of media freedom has swung too far from the direction of control towards a lack of restraint. Many bemoaned the failure of some sections of the media, particularly radio and TV stations that broadcast shows that are regularly used to vilify individuals unfairly and using offensive language, to observe good ethical and professional standards. Some sections of the media now "feel they can do whatever they like" because "nobody can stop them," a leader of a media professional association said, adding "a right balance" has still to be achieved.²⁷⁷

A leading member of an influential policy think tank, said the criminal libel and sedition laws had been "anachronistic" and that such laws were "never justified" in modern democracies. Their repeal was "not a favour; it was just proper." It had given writers and journalists much greater freedom but not "a license to write anything" as they remained subject to civil libel law, an important difference being that they "now had to contend with the market and not the powers that be."²⁷⁸

Ransford Gyampoh, head of political science at the University of Ghana and fellow of the Institute of Economic Affairs, said government attempts to gag the media in the years immediately after the return to civilian rule under the 1992 Constitution, had threatened the country's democratic development because wherever "the media was not free to perform its role in society many things will go wrong." But he too expressed concern that some in the media had evidently interpreted the removal of criminal sanctions as a license to act irresponsibly: "what we have now are media tyrants who think that because they have access to information, they can malign anybody without being taken on." He deplored some media outlets' failure to publish a retraction or apologise when they get things wrong, saying:

"A media house or a journalist publishes and perpetrates falsehood against you, and when one draws their attention to the fact that their publication was false and that they should apologise, they will not, but if you try to sue them, the usual Ghanaian way of fama Nyame (give to God) comes in. Only few media houses apologise or do rejoinders".²⁷⁹

Gyampoh pointed to the NMC's ineffectiveness as a regulator, due to lack of resources and other reasons, as partly responsible for this state of affairs but said that main blame lay with the media itself:

"Nobody can overestimate the importance of media freedom, but media practitioners must also know that there is nothing like unbridled freedom. If democracy can work well, it must have its own punitive measures."²⁸⁰

Another interviewee, who is both a writer and trade union leader, said that the repeal of the criminal libel and sedition laws had given Ghanaian media professionals a sense of security that had been denied to them previously, when they had felt obliged to exercise self-censorship. This had opened the way for the development of a much more vibrant media scene in Ghana than in neighbouring countries that he had visited where the media had less freedom and media professionals "complain that it always seems as if someone was standing on one's shoulders as they perform their duties." He cautioned, however, that "media freedom must of necessity go with high levels of professionalism" and urged writers and journalists to conduct their professional

276 Freedom House and other international media rights monitoring groups rank Ghana as one of the African countries with the greatest degree of media freedom.

277 PEN consultant, interview with Kwasi Agyeman, president of the Ghana Independent Broadcasters Association, 2 September, 2016.

278 PEN Ghana, interview with vice-president of a think-tank, November 2016.

279 PEN Ghana, interview with Ransford Gyampoh, November 2016.

280 PEN Ghana, interview with Ransford Gyampoh, November 2016.

activities “with decency and decorum” because of the vital role they play in society.²⁸¹

A Member of Parliament (MP), who is also a lawyer, also expressed concern about “media irresponsibility” but said the government had been right to abolish criminal defamation in 2001. He said that he would “not for a moment” advocate return to a situation where criminal defamation laws are used to suppress freedom of expression and that it was better to have the current system, where anyone who feels they have been unfairly maligned by the media can seek redress through the courts under the civil libel law, rather than the former system that saw the authorities “**using the police to settle scores with writers and journalists.**”

He observed: “**We are much better off having an irresponsible media than suppressing freedom of expression**” and suggested that those concerned about media “excesses” should give attention to the problems faced by media practitioners, such as low pay and lack of training facilities, especially for new entrants to journalism profession, rather than call for the restoration of criminal sanctions.

One problem, the MP said, is that some media outlets employ people who are essentially political activists to pump out partisan propaganda, and who have little or no journalism training, nor much knowledge of or commitment to ethical and good practice standards of journalism. The NMC, meanwhile, remains ineffective as a media regulator, being unable to get media organisations and journalists to comply with its directives to publish retractions and apologies when they got something wrong, leaving those who feel the media has wronged them no option other than to take legal action through the courts to seek redress. The NMC’s mandate should be reviewed and it should be given greater powers to address unprofessional and unethical practices by media outlets, the MP said.²⁸²

Rise in civil libel/defamation cases

One apparent consequence of the decriminalisation of defamation has been a significant rise in civil defamation suits against the media, resulting in media outlets incurring legal defence costs and large compensation or damages payments awarded to complainants, often senior politicians or public officials, by the courts.

No systematic official or published record of civil libel suits filed since 2001 is available but press reports indicate that they have been numerous; that the complainants in such cases were frequently politicians, from a range of political parties, and persons in high public office; and that some resulted in heavy damages or compensation awards against the media. For example, on 10 November 2016, the *Daily Graphic* reported that the president of

the Ghana Football Association had filed a civil suit for defamation against Multimedia Group Limited, owners of a chain of radio and television stations, seeking damages of Ghana cedi 2 million (approximately US \$500,000). He claimed that the company had failed to apologise or desist from broadcasting defamatory references to him despite several complaints.²⁸³

An earlier high profile case brought by Johnson Asiedu Nketiah, General Secretary of the ruling NDC against the *Daily Guide*, the largest circulation private daily, resulted in a High Court damages award of 250,000 Ghana cedi (approximately US \$60,000).²⁸⁴

According to Godfried Dame, who acts as defence lawyer for the *Daily Guide*, owned by a senior member of the main opposition NPP and editorially sympathetic to that party, the newspaper has faced 24 defamation suits since 2004, including 21 that have been filed since the NDC replaced the NPP as Ghana’s ruling party after winning national elections in December 2008. Ten of the defamation suits were lodged against the newspaper by politicians, including government ministers and other senior state officials.²⁸⁵

Use of contempt laws

The 2001 reform decriminalised defamation but, as reported above, left in place other legal provisions that criminalise free speech and media expression. These include the laws of contempt, which empower both parliament and the courts to take action against those who express disrespect or obstruct their workings.

Contempt of parliament

On several occasions since 2001, Ghana’s unicameral Parliament has summoned individuals, mostly journalists, to be questioned by its Privileges Committee about criticisms they had expressed about its work. At least four journalists – three newspaper editors and a radio programme host – and a medical scientist have been summoned for questioning in this way, indicating the legislature’s sensitivity to certain types of media and other criticism. None of those summoned before the Privileges Committee received custodial sentences but in July 2016, a reporter working for the state-owned *Daily Graphic*, Ghana’s largest circulation newspaper, was banned from reporting proceedings of the House.

Commenting on this development, NMC Executive Secretary George Sarpong said:²⁸⁶

“It appears that in the absence of a comprehensive regulatory framework for regulating the media, institutions that have power, for their self-protection

281 PEN Ghana, interview with writer and trade union leader, November 2016.

282 PEN Ghana, interview with MP, November 2016.

283 ‘Multimedia apologizes to Nyantakyi’. *Daily Graphic* (November, 2016). <http://www.graphic.com.gh/sports/football/multimedia-apologises-to-nyantakyi.html>

284 Asiedu Nketia wins case against Daily Guide, *Ghana News Agency*, 27 February 2014, <http://www.ghananewsagency.org/human-interest/asiedu-nketia-wins-case-against-daily-guide-71415>

285 Papers presented to PEN consultant by Godfried Dame.

286 PEN consultant, interview with George Sarpong, NMC Executive Secretary, 28 August, 2016.

or for the protection of their functions have activated those powers. So Parliament has used its powers of the Privileges Committee to summon journalists or people who have expressed opinions Parliament did not like. [...] That we think constitutes a major threat to free expression and to media independence.”

Contempt of court

The law of contempt as it relates to the administration of justice equips the courts with powers to punish expression or other actions deemed to show “contempt” that appear both “arbitrary” and “undefined.”²⁸⁷ The two most prominent contempt of court cases that have excited public interest and concern, both of which involved election-related issues and activists of the two leading political parties, occurred in 2013 and 2016. Both cases heightened fears that the courts were using their contempt powers as a self-protecting instrument to muzzle criticism of their functions.

In the first case, the Supreme Court summoned three members of the opposition NPP to appear before it in 2013 for allegedly “scandalizing” the Court in comments they had made separately on radio stations about the Court’s hearing of a NPP petition seeking annulment of the results of the December 2012 national elections. The NPP filed the petition after the Electoral Commission declared that the ruling NDC had won the elections. Amid a highly politically polarized atmosphere, the Supreme Court jailed Ken Kuranchie, editor of the *Daily Searchlight* newspaper for ten days and another journalist for three days, and severely reprimanded – but did not jail – the NPP’s deputy communications director for describing the Court’s judges as “hypocritical and selective” and fined other NPP officials.²⁸⁸

The Court’s use of the contempt law to impose custodial sentences on journalists aroused concern in some quarters and two NGOs, the Media Foundation for West Africa and the Center for Democratic Development, which held a public forum to campaign for reform of the law, including the introduction of clear definitions and codification.²⁸⁹

The second case, in 2016, saw the Supreme Court summon the host and two panelists on *Pampaso*, a programme notorious for expressions of vitriol, hate and invective broadcast by the *Montie FM* radio station, owned by a leading member of the ruling NDC. The three were accused of “scandalizing” the Court in comments about its ruling on another petition concerning the Electoral Commission.²⁹⁰ The panelists had threatened the Supreme Court’s judges with violence, including threatening to rape the female Chief Justice. The Ghana Bar Association

called the Court’s attention to its contempt powers and the Supreme Court duly sentenced the three men to four-month prison terms, fined them, and also imposed fines on the owners of *Montie FM*. Other groups urged the Attorney General to charge the three men with threatening to commit murder and rape, but the Attorney General declined to do so.

This case also occurred during a period of high political polarization in the run up to national elections in December 2016 with attitudes divided along party political lines. The NDC party rallied its supporters²⁹¹ to urge the President, the party’s candidate for re-election whom the *Pampaso* host and panelists claimed to be supporting with their radio propaganda and invective, to pardon the three men. The President subsequently invoked his powers under the Constitution to release the three men.

Despite the politically-polarized climate and wide condemnation of the *Pampaso* host and panelists for using the radio to threaten judges with violence, many public comments on the affair reflected serious unease at the use of contempt of court provisions to impose prison sentences and included renewed calls for the laws on contempt to be clearly defined and codified.

CONCLUSIONS AND RECOMMENDATIONS

The NMC’s inability to carry out its mandate to “ensure and uphold high journalistic standards”²⁹² has been mirrored by the inability of media workers’ professional associations to ensure that their members adhere to their ethical codes and standards and to impose effective sanctions when those standards are breached. These failures, together with persistent unprofessional and unethical conduct by some sections of the media, are widely seen to have seriously eroded public confidence in the media as a whole, and in its credibility.

As a result, nowadays the media cannot rely on the degree of public support and solidarity it formerly enjoyed when it comes under attack from one or other quarter, and public support for the notion of media freedom appears to be diminishing. Fortunately, based on interviews with media actors and leaders, there is no evidence currently that the government is using political means to reduce media freedom and it appears that any such move would be neither expedient nor popular, and would face stiff resistance in the courts.

On the other hand, the weakening of public confidence in the media may encourage more civil libel suits and give

287 Akoto Ampaw (2004), “Legislation on Media, Speech and Expression. A Source Book,” Accra. MFWA. Introduction, p. 10.

288 Radioxyz, “Ghana Supreme Court rules in President Mahama’s favor,” *Vibe Ghana*, August 2013, <http://vibeghana.com/2013/08/29/ghana-supreme-court-rules-in-president-mahamas-favor/>

289 Codify Contempt Law – Karikari, *Modern Ghana*, 11 July 2013, <https://www.modernghana.com/news/474461/1/codify-contempt-law-8211-karikari.html>

290 Kweku Zurek, “Montie FM: Asamoah Gyan serves Mugabe with defamatory suit,” *Graphic Online* August 2016, <http://www.graphic.com.gh/news/general-news/more-legal-woes-for-mugabe-as-asamoah-gyan-s-defamatory-case-looms.html>

291 The party organized demonstrations and a signature campaign aimed at soliciting one million signatures to appeal to the President to free the jailed radio broadcasters.

292 GNA, “NMC charged to ensure high journalistic practice,” *Ghana Web*, November 2006, <http://www.ghanaweb.com/GhanaHomePage/region-al/NMC-charged-to-ensure-high-journalistic-practice-114601>

the courts justification to impose new restraints on media freedom. Also, just as some politicians and public figures pointed to media “excesses” as a reason not to enact the Right to Information law, so too may Parliament avoid reforming other criminal laws with the argument that the 2001 act of reform created a new set of problems that put the very wisdom of that reform into question.

As this study shows, the courts are resorting increasingly to the law on contempt to curb the media and punish its failure to adhere to good standards of professional and ethical accountability. This further fuels the public’s negative perception of the media, which, if it deepens, may encourage the authorities to start using other criminal laws that remain on the statute book against the media. The writing, it might be said, is on the wall if the media fails to put its house in order.

PEN International and PEN Ghana urge the government to:

- Resist any calls for the re-criminalisation of defamation;
- Reform contempt laws to bring them in line with international law;
- Reduce or cap damages in civil defamation cases;
- Provide the NMC with the powers, authority, financial and other resources necessary to enable it to carry out its mandate, including independently investigating and adjudicating complaints against the media and ensuring appropriate remedies – which could include published retraction and/or apology and/or the payment of compensation by the media outlet responsible – when such complaints are found to be well-founded;
- Promptly enact an Access to Information law that gives effect to the right to information enshrined in Article 21 (1) (f) of the Constitution, and provide the financial and other resources and training required to implement the new law effectively

PEN International and PEN Ghana urge media owners, publishers, editors, journalist organisations and practitioners to establish and implement effective mechanisms and systems to ensure:

- prompt independent investigation of complaints against the media, and the provision of appropriate remedies – such as published retractions and/or apologies, and financial or other compensation - whenever such complaints are upheld;
- training of journalists and other media practitioners in ethical and other professional standards.
- provision of adequate legal, financial and professional support to employees facing civil defamation charges

CIVIL DEFAMATION BEST PRACTICES: SOME CONSIDERATIONS

Even after the decriminalisation of defamation, civil defamation laws must also be structured carefully in order to create a climate open to investigative journalism. Abuse of civil defamation laws can also be as limiting as criminal defamation, since exorbitant damages can mean financial ruin for media corporations. Journalists may remain silent out of fear of financial consequences. Civil defamation laws should therefore follow certain best practices.

The first category of best practices is related to penalties and the administration of penalties. The second set focuses on which types of expression should be penalised. The final set is related to restrictions on the kind of operational laws that may be imposed on media organisations.

Overall, the best practices related to civil defamation laws involve minimizing the penalty, ensuring that laws are drafted specifically and with reference to actual persons, ensuring that defences are available, and entrusting the media itself with its regulation. If these best practices are followed, journalists will be able to operate freely, and maintain their investigative curiosity, while true offenses of defamation will be rectified in fairness.

Limit the Penalty

- The most important set of best practices is that of limiting the extent of the penalty. In civil law, the penalty can be either pecuniary or non-pecuniary. When the remedy is a pecuniary one, meaning monetary by nature, it is key that the penalty should be directly proportional to the harm caused.²⁹³ The penalty cannot be so heavy as to block freedom of expression, and should be designed to restore the reputation that was harmed, but not to compensate the plaintiff or punish the defendant. While there is an interest in maintaining integrity in reporting, repairing damage that has been done is costly enough to be a deterrent.²⁹⁴
- Ideally, a cap on the amount of fine permitted would also be imposed, and juries should not be used, or should be well directed by the judge on the size of the award. If juries are used, they should also be required to decide separately on liability and damages as well.²⁹⁵ Moreover, preference should be given to non-pecuniary remedies, like apology, rectification, and clarification.²⁹⁶
- This would be the best outcome for journalistic freedom, minimizing the harm to the defamer, while correcting the harm to the victim. In addition, with both pecuniary and non-pecuniary penalties, the charged party should keep the right to practice journalism.²⁹⁷ These best practices would make it difficult for a government to restrict freedom of expression through civil defamation laws.

293 La Rue, Frank, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," April 20, 2010, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.pdf>, pg.15.

294 *Ibid.*

295 Griffen, Scott, "In Depth: Libel damages squeeze Ireland's press," January 4, 2017, <https://ipi.media/in-depth-libel-damages-squeeze-irelands-press/>

296 La Rue, p.15.

297 Ligabo, Ambeyi, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," January 2, 2007, <http://www.refworld.org/docid/45fea3f62.html>, p. 21.

Clearly Define the Offence and Defences

- The second set of best practices involves the definition of the prohibited activity itself, and the defences available. First, the laws should require the plaintiff or claimant to prove falsity, malice, and other key elements of the offence. The laws should not penalize true statements, or statements of opinion. Similarly, there should be limited protection of abstract bodies and ideas. For example, the state, state symbols, public bodies, religions, religious symbols, beliefs, schools of thought, ideologies, and other non-persons should not be protected by defamation laws. Public officials and figures should also be required to tolerate a greater degree of criticism than ordinary citizens.²⁹⁸ Finally, laws should be specific and not vague.
- Defences available should include truth, public interest, and privileged reporting. In addition, in privileged reporting, where media organisations quote third parties, they should not be liable for the statements of those parties.²⁹⁹

Allow for Media Self-Regulation

- The third set of best practices involves regulation of the operation of media organisations and journalists. The state should not require media organisations or individuals to register or obtain permission to operate online in any capacity, for example a website, blog or online broadcast.³⁰⁰ There should also be no subjective licencing procedures for media outlets, and no restrictions placed on the activities of journalists. Most importantly, however, media organisations should be responsible for their own oversight.
- A self-regulatory body that is capable of investigating, considering and rectifying complaints against the media would help to keep journalists ethical³⁰¹, and maintain the publics' support for democracy and freedom of expression.³⁰² A media ombudsperson entrusted with implementing the relevant laws and regulations could also have a mediator function, and the ability to impartially evaluate seriousness, and issue penalties that do not put core values of freedom of expression at risk.³⁰³ Finally, media organisations should finance legal defence and provide professional support to those journalists facing defamation claims.³⁰⁴

298 UN Human Rights Committee, "General comment No.34," 12 September 2011, CCPR/C/GC/3; United Nations General Assembly "Tenth anniversary joint declaration: Ten key challenges to freedom of expression in the next decade," March 25, 2010, <http://www.osce.org/fom/41439?download=true>, p.4.

299 International Press Institute, Media Laws Database accessed August 2017, <http://legaldb.freemedia.at/legal-database/austria/?target=criminal-defamation,Austria> page, 'Civil defamation'.

300 Ligabo, 2007, p. 23.

301 Ligabo, Ambeyi, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," February 28, 2008, <https://daccess-ods.un.org/TMP/2191371.47068977.html>, p. 6.

302 Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia, <http://hrlibrary.umn.edu/achpr/expressionfreedomdec.html>

303 Ligabo, 2007, pg. 21.

304 See above, PEN report, 'Stifling Dissent, Impeding Accountability', November 2017.

4. CONCLUSIONS AND RECOMMENDATIONS

As this report shows, particularly the country case studies on Uganda, Zambia, Sierra Leone and South Africa, criminal defamation laws severely restrict media freedom and impede the media's ability to perform its key role as a watchdog of the public interest. Such laws also stifle expression generally, suppressing debate and the free flow of ideas. Such laws, many of which were inherited from the period of colonial rule, should have no place in modern-day Africa.

Criminal defamation and insult laws continue to be used by many other governments in Africa, although the ACHPR and its Special Rapporteur on Freedom of Expression and Access to Information in Africa have been forthright in their condemnation of such laws and have called for the decriminalisation of defamation. The landmark ruling of the African Court on Human and Peoples' Rights in the case of the Burkina Faso journalist Lohé Issa Konaté further underscored the illegitimacy of such laws because their criminal penalties act as a "disproportionate interference" in the right of every individual to freedom of expression that the AChHPR guarantees.

There have been further positive developments towards decriminalisation with respect to recent court decisions in Zimbabwe and Kenya declaring criminal defamation laws unconstitutional, as well as proposed legislative changes such as in Liberia where a draft bill has been submitted to parliament. Commitments to repeal in Sierra Leone and South Africa also offer hope of reform.

As the Ghana experience of decriminalisation demonstrates, the right to reputation can and should be adequately protected using civil law remedies, although care needs to be exercised to ensure that financial penalties for breaches of the right are not so heavy as to enable civil suits to be used to hold the media in thrall. Ghana's experience also underscores the importance of responsible journalism. Media owners, publishers and practitioners should at all times respect their role and responsibility to serve the public interest, including by training journalists and other media workers in ethical and professional standards and by establishing effective self-regulation mechanisms capable of speedily investigating, considering and appropriately rectifying complaints against the media. It is also clear that media houses need to support journalists if they are charged with such laws.

Calls for decriminalisation should be supported by robust and effective freedom of information laws. Such laws enable individuals and the media to gain access to government-held information to allow them to verify information.

Finally, in order to take these recommendations forward and build on gains made in respect to repeal of criminal defamation laws, civil society and media groups should continue to work in coalition to lobby countries to repeal their criminal defamation laws. The wider public should also be educated on the chilling effect of criminal defamation laws and the benefits of decriminalising defamation.

RECOMMENDATIONS

PEN International and PEN African Centres make the following recommendations:

To all Member States of the African Union:

1. All States that have yet to do so should promptly abolish criminal defamation laws and ensure that adequate safeguards to protect the right to reputation are provided through civil law, while also ensuring that such safeguards do not permit the imposition of fines or damage awards so excessive as to imperil media freedom, including media diversity and plurality.
2. Thoroughly review and repeal or amend other laws that criminalise peaceful exercise of the right to freedom of expression in order to bring them into full conformity with international law, including Article 19 of the ICCPR and Article 9 of the African Charter on Human and Peoples' Rights, and taking full account of Human Rights Committee General Comment No. 34 and relevant resolutions of the African Commission on Human and Peoples' Rights, particularly its 2002 Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa and its 2010 Resolution on Repealing Criminal Laws in Africa.
3. Release promptly and unconditionally any journalists or writers detained or imprisoned on criminal defamation charges and discontinue all prosecutions on criminal defamation charges.
4. Uphold the public right to know, an essential element of freedom of expression and democratic accountability, by enforcing existing freedom of information legislation or promptly enacting an access to information law that enshrines this right, and make available appropriate financial and other resources to facilitate its effective implementation.

5. All States that have yet to do so should promptly ratify the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights that came into effect in 2004. All states that have yet to do so, including states that have ratified the Protocol, should promptly make a declaration, in accordance with Article 34 of the Protocol, accepting the competence of the Court to receive cases under article 5 (3) of this Protocol, i.e. petitions submitted by individuals and NGOs with observer status before the Commission.

To the African Commission on Human and Peoples' Rights:

1. Request all State Parties, when submitting reports on their implementation of the African Charter to the Commission, to make clear whether they retain criminal defamation laws, report on their application of such laws, and explain what steps they are taking to repeal or amend such laws in conformity with the Commission's 2010 Resolution on Repealing Criminal Laws in Africa and their obligations under international human rights law.
2. Urge all States to ensure that defamation is addressed solely as a matter of civil law within their national jurisdiction and include adequate safeguards to prevent the imposition of fines or damages awards so excessive as to imperil media freedom, including media diversity and plurality.
3. Call for the immediate, unconditional release of journalists and others who are detained or imprisoned on criminal defamation charges and discontinue all prosecutions on criminal defamation charges.
4. Recognizing the work done by the Special Rapporteur on Freedom of Expression and Access to Information in Africa to compile information on the prevalence of criminal defamation laws in Africa, urge that the Special Rapporteur continues this work, drawing on both official sources and information from civil society groups and associations, and report the findings to the Commission together with recommendations.

To the Pan-African Parliament:

1. Exercise its advisory and consultative powers to push for the full implementation of its Midrand Declaration by urging parliamentarians to ensure that in their respective countries defamation and insult laws are addressed exclusively as a matter of civil law, and adequate safeguards, such as limits on fines and damages awards, are applied to protect media diversity and plurality.
2. Make recommendations to Member States to work towards the harmonisation of Member States' laws on civil defamation.
3. Continue to encourage good governance, transparency and accountability in Member States through the decriminalization of defamation laws throughout the continent.

4. Continue to encourage AU Member States to use the ACHPR Model Law on Access to Information in adopting or reviewing access to information laws.
5. Update the 2013 'Pan African Parliament Resolution to Protect Media Freedoms' to include the gains made in the Konaté judgment.

To other States enjoying diplomatic, trade and assistance relations with AU member states:

1. Use all appropriate opportunities, including during bilateral discussions and at multilateral forums such as the UN Human Rights Council's Universal Periodic Review, to press AU Member States that have yet to do so to abolish laws criminalising defamation, sedition and publication of "false news" and to guarantee, in practice, the right to freedom of information and access to information, and media freedom.
2. Press AU Member States to ensure that defamation is addressed exclusively as a matter of civil law, and that adequate safeguards, such as limits on fines and damages awards, are applied to protect media diversity and plurality.
3. Urge all AU Member States to immediately and unconditionally release journalists and others who are detained or imprisoned for criminal defamation, and to desist from further prosecutions for criminal defamation.

To media owners, publishers, editors, journalist organisations and practitioners across the continent:

1. Establish independent national regulatory bodies, if not already in place, to ensure:
 - The prompt independent investigation of complaints against the media, and the provision of appropriate remedies – such as published retractions and/or apologies, and financial or other compensation - whenever such complaints are upheld;
 - The training of journalists and other media practitioners in ethical and other professional standards;
2. Provide adequate legal, financial and professional support to employees facing defamation charges.

To civil society groups, including PEN Centres:

1. Explore ways to educate the wider public on the chilling effect of criminal defamation laws and benefits of decriminalising defamation and continue to work in coalition with other civil society and media groups to push for the repeal of criminal defamation laws and the implementation of robust freedom of information laws

Annex I: Methodology

Research for the country chapters of this report was conducted by PEN national Centres in Sierra Leone, South Africa, Uganda and Zambia, and comprised analysis of relevant laws, individual cases and interviews with a range of informants, including writers, media professionals, NGO representatives, government officials and others. The Ghana chapter was drafted by a consultant with additional research from PEN Ghana.

Various laws that restrict peaceful expression were analysed, but the focus of the research centred around the impact of criminal defamation and insult laws on writers.

Additional research was conducted by PEN International; this included reviewing international law and standards relating to freedom of expression, relevant UN reports and statements and decisions/statements of the ACHPR as well as jurisprudence of the ACtHPR and other judicial bodies.

The Centre for Journalism and Media Studies at the University of the Witwatersrand in Johannesburg in collaboration with PEN International, conducted an online survey of media practitioners and writers in English, French and Portuguese-speaking countries in Africa. The survey concerned the use of criminal defamation laws and their impact on freedom of expression and media freedom; this survey elicited 38 responses from 22 countries. The survey was undertaken as a background scoping exercise to gauge the extent of the issue across other countries in Africa. Given the limited response rate to the survey, the information included in the report is not intended to be a definitive account but rather to contextualize the experiences of writers and journalists.

PEN International expresses its gratitude to all contributors to this report.

Annex II: DECLARATION OF TABLE MOUNTAIN

The World Association of Newspapers and News Publishers, meeting at the 60th World Newspaper Congress and 14th World Editors Forum Conference in Cape Town, South Africa, from 3 to 6 June 2007,

Note that in country after country, the African press is crippled by a panoply of repressive measures, from the jailing and persecution of journalists to the widespread scourge of 'insult laws' and criminal defamation which are used, ruthlessly, by governments to prevent critical appraisal of their performance and to deprive the public from information about their misdemeanours,

State their conviction that Africa urgently needs a strong, free and independent press to act as a watchdog over public institutions.

Consider that press freedom remains a key to the establishment of good governance and durable economic,

political, social and cultural development, prosperity and peace in Africa, and to the fight against corruption, famine, poverty, violent conflict, disease, and lack of education,

Reaffirm our responsibility as the global representative organisations of the owners, publishers and editors of the world's press to conduct "aggressive and persistent campaigning against press freedom violations and restrictions",

Reaffirm our commitment to freedom of the press as a basic human right as well as an indispensable constituent of democracy in every country, including those in Africa,

Note that Article 19 of the Universal Declaration of Human Rights guarantees freedom of expression as a fundamental right, and emphasise that freedom of expression is essential to the realization of other rights set forth in international human rights instruments,

Recall that those principles have been restated and endorsed in the 2002 Declaration on Principles of Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights and the African Union, thus requiring member states of the African Union to uphold and maintain press freedom,

Recall also the 1991 Windhoek Declaration on Promoting an Independent and Pluralistic African Press,

Observe that despite numerous opportunities for a free press to emerge from national independence, fully-fledged press freedom still does not exist in many African countries and that murder, imprisonment, torture, banning, censorship and legislative edict are the norm in many countries,

Recognise that these crude forms of repression are bolstered by the deliberate exclusion of certain newspapers from state-advertising placement, the burden of high import taxes on equipment and newsprint and unfair competition from state-owned media,

Note that despite the adoption of press freedom protocols and the repression of that freedom on a wide scale in Africa, the African Union in instituting its African Peer Review Mechanism under the NEPAD (New Partnership for Africa's Development) programme has excluded the fostering of a free and independent press as a key requirement in the assessment of good governance in the countries of the continent, and

Identify as the greatest scourge of press freedom on the continent the continued implementation of 'insult laws', which outlaw criticism of politicians and those in authority, and criminal defamation legislation, both of which are used indiscriminately in the vast majority of African states that maintain them and which have as their prime motive the 'locking up of information',

Declare that African states must recognise the indivisibility of press freedom and their responsibility to respect their commitments to African and international protocols upholding the freedom, independence and safety of the press, and

To further that aim by, as a matter of urgency, abolishing ‘insult’ and criminal defamation laws which in the five months of this year have caused the harassment, arrest and/or imprisonment of 229 editors, reporters, broadcasters and online journalists in 27 African countries (as outlined in the annexure to this declaration),

Call on African governments as a matter of urgency to review and abolish all other laws that restrict press freedom,

Call on African governments that have jailed journalists for their professional activities to free them immediately and to allow the return to their countries of journalists who have been forced into exile,

Condemn all forms of repression of African media that allows for banning of newspapers and the use of other devices such as levying import duties on newsprint and printing materials and withholding advertising,

Call on African states to promote the highest standards of press freedom in furtherance of the principles proclaimed in Article 19 of the Universal Declaration of Human Rights and other protocols and to provide constitutional guarantees of freedom of the press,

Call on African media professionals to promote editorial quality and uphold ethical journalism,

Call on the African Union immediately to include in the criteria for “good governance” in the African Peer Review Mechanism the vital requirement that a country promotes free and independent media,

Call on international institutions to promote progress in press freedom in Africa in the next decade, through such steps as assisting newspapers in the areas of legal defence, skills development and access to capital and equipment,

Welcome moves towards a global fund for African media development and recommends that such an initiative gives priority attention to media legal reform and in particular the campaign to rid the continent of “insult” and criminal defamation laws,

Commit WAN-IFRA to expanding its existing activities in regard to press freedom and development in Africa in the coming decade.

WAN-IFRA makes this declaration from Table Mountain at the southern tip of Africa as an earnest appeal to all Africans to recognise that the political and economic progress they seek flourishes in a climate of freedom and where the press is free and independent of governmental, political or economic control.

This Declaration shall be presented to: The Secretary-General of the United Nations with the request that it be presented to the UN General Assembly; to the UNESCO Director-General with the request that it be placed before the General Conference of UNESCO; and to the Chairperson of the African Union Commission with the request that it be distributed to all members of the African Union so that it can be endorsed by the AU at its next summit meeting of heads of state.

Annex III: 169: Resolution on Repealing Criminal Defamation Laws in Africa

The African Commission on Human and Peoples’ Rights, meeting at its 48th Ordinary Session, held in Banjul, The Gambia, from 10 – 24 November 2010:

Reaffirming its mandate to promote and protect human and peoples’ rights under the African Charter on Human and Peoples’ Rights (the African Charter);

Noting that freedom of expression is a fundamental human right enshrined in regional and international instruments, including Article 9 of the African Charter, Article 19 of both the Universal Declaration of Human Rights (UDHR), and the International Covenant on Civil and Political Rights (ICCPR), Article 13 of the American Convention on Human Rights (the American Convention); and Article 10 of the European Convention on Human Rights (the European Convention);

Recalling the Resolution on Freedom of Expression adopted at its 29th Ordinary Session held from 23 April to 7 May 2001 in Tripoli, Libya, to initiate a mechanism to review and monitor adherence to standards of freedom of expression, investigate violations and make appropriate recommendations;

Aware of ACHPR/Res.62 (XXXII) 02, on the Declaration of Principles on Freedom of Expression in Africa of 2002 (the Declaration) which elaborates on the scope of Article 9 of the African Charter, in particular Principle II (1) of the Declaration which provides that “no one shall be subject to arbitrary interference with his or her freedom of expression;”

Noting Principle XII (1) of the Declaration which protects reputation by providing that “states should ensure that their laws relating to defamation conform to certain standards, including no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;”

Recalling the Resolution on the Mandate and Appointment of a Special Rapporteur on Freedom of Expression in Africa adopted at its 36th Ordinary Session held from 23 November to 7 December 2004 in Dakar, Senegal;

Noting the Declaration of Table Mountain, adopted by World Association of Newspapers and News Publishers and the World Editors Forum in 2007, which inter alia “calls on States Parties to repeal insult and criminal defamation laws, so as to promote the highest standards of press freedom in Africa;”

Noting further, the Addis Ababa Declaration on Safety and Protection of Journalists, adopted by the Regional Workshop on Safety and Protection of African Journalists on 3 September 2010;

Underlining that criminal defamation laws constitute a serious interference with freedom of expression and impedes on the role of the media as a watchdog, preventing journalists

and media practitioners to practice their profession without fear and in good faith;

Expressing concern at the deteriorating press freedom in some parts of Africa, and in particular: restrictive legislations that censor the public's right to access information; direct attacks on journalists; their arrest and detention; physical assault and killings, due to statements or materials published against government officials;

Commending States Parties to the African Charter (States Parties) that do not have, or have completely repealed insult and criminal defamation laws;

- **Calls** on States Parties to repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments;
- **Also calls** on States Parties to refrain from imposing general restrictions that are in violation of the right to freedom of expression;
- **Urges** journalists and media practitioners to respect the principles of ethical journalism and standards in gathering, reporting, and interpreting accurate information, so as to avoid restriction to freedom of expression, and to guide against risk of prosecution.
- **Further Urges** States Parties to implement the recommendations and appeals of the Special Rapporteur.

Done in Banjul, The Gambia, 24 November 2010.

Annex IV: PEN RESOLUTION #19: CRIMINAL DEFAMATION AND INSULT LAWS

The Assembly of Delegates of PEN International, meeting at its 81st World Congress in Quebec, Canada, 13th to 17th October 2015

Despite the growing international consensus that criminal defamation infringes the fundamental right to freedom of expression as expressed by international and regional human rights bodies and mechanisms, prosecutions of journalists and other writers under criminal defamation and insult laws continue in a wide range of countries. These pernicious laws, which carry severe penalties including imprisonment, are widely used by those in positions of power to silence critics. They introduce disproportionate penalties for the expression of opinion or the publishing of an allegation, and are frequently used to target journalists who uncover corruption or malfeasance and abuse of power by political leaders and state officials. Such laws have a chilling effect on investigative reporters who are conscious of the possibility of serving lengthy prison sentences and leaving them with a criminal record. Members of civil society also face similar reprisals when expressing themselves in the public sphere,

including on social media. The result is the stifling of reporting and public debate and difficulty in holding power to account.

While there have been some positive changes in the last year – such as the partial decriminalisation of defamation in **Lithuania**, other countries have introduced new penalties for defamation, such as **Kuwait's** new cybercrime law. Journalists and writers around the world have continued to face prosecution under such laws including in:

- **Burkina Faso**, where Boureima Ouédraogo, the managing editor of *Le Reporter*, a privately-owned investigative newspaper, was sentenced to three months in prison and a fine in July 2015 for alleged defamation. He remains free pending appeal.
- **Bangladesh**, where journalist Probir Sikdar was held for three days in August 2015 after being accused of defaming a government minister in a Facebook post. Released on bail, the investigation in this case is continuing.
- **Iceland**, where civilians Anna Sesselja Sigurðardóttir and Emil Thorarensen, were each sentenced to fines, the paying of damages and legal costs in two separate cases brought against them by the Icelandic State Prosecutor on behalf of officials they had criticized on Facebook.
- **Iran**, where cartoonist Atena Farghadani was sentenced to 12 years and nine months imprisonment, on 19 May 2015 on charges including 'insulting members of parliament through paintings'
- **Thailand**, where editor Alan Morison and journalist Chutima Sidasathian, could each receive a prison term of up to five years and a fine of up to 100,000 Baht (approximately 3,000 USD) for the re-publication of a Reuters news article claiming some members of the naval forces to be benefiting from the trafficking of Rohingya refugees from Myanmar. On 23 February 2015 student activists Patiwat Sarayaem and Pornthip Munkong were each sentenced to two and a half years in prison for violating Thailand's "lèse-majesté" law in a play they wrote.
- **Turkey**, where writer, journalist and documentary filmmaker Can Dündar is on trial for criminal defamation in a case brought by the President of Turkey Recep Tayyip Erdoğan and his son Bilal Erdoğan. The case relates to a series of articles that Dündar wrote in July 2014, in which he questioned the handling of a dropped corruption investigation.

However, in recent months some courts – including **Turkey's** Constitutional Court which ruled in July 2015 ruling by that a journalist's suspended prison sentence for "insulting" public officials via the media violated the freedom of expression, as well as several courts in Africa - have taken a critical view of the use of such laws.

The African rulings follow a resolution adopted in 2010 by the African Commission on Human and Peoples' Rights urging states to repeal criminal defamation; a 2013 resolution by the Pan African Parliament also called for similar legal reform.

The following year, on 12 June 2014, the **Zimbabwe** Constitutional Court hearing a criminal defamation charge case brought by Munyaradzi Kereke, a member of the ruling Zanu PF party against Nevanji Madanhire, editor of The Standard, and reporter Nqaba Matshazi, ruled that the law violates a constitutional safeguard on freedom of expression and that defamation cases should be brought before civil courts. The two had been arrested and released on bail.

In December, 2014, a more wide-ranging judicial decision was taken. The African Court of Human and Peoples' Rights, whose judgments are binding on African Union member states, handed down a judgment in a case against the **Burkina Faso** government brought by editor Lohé Issa Konaté who had been imprisoned for a year on a criminal defamation charge. It was the court's first judgment on a free speech issue but it was very firm in rejecting the conviction of Konaté.

The court ruled that imprisonment for defamation violates the right to freedom of expression and that such laws should only be used in restricted circumstances. It ordered Burkina Faso to change its criminal defamation laws -- like those in many African countries, a relic of colonialism and incompatible with an independent, democratic Africa because they violate a core civil and political right and restrict and deter debate on matters of public interest.

The judgment has so far been ignored by Burkina Faso and other member states of the African Union though its delivery by this court is binding on them to review their criminal defamation laws. This judgment had the backing of 18 vocal civil society organisations – including PEN International, along with PEN Algeria, PEN Nigeria and PEN Malawi - which were granted an amicus curiae application in support of the journalists. Their calls for the repeal of criminal defamation and insult laws have gone unheeded.

Despite these developments, campaigns against the legislation by the World Association of Newspapers and News Publishers (WAN-IFRA), which adopted the 2007 Declaration of Table Mountain calling for the abolition by African nations of insult and criminal defamation laws and other restrictions on the operations of the media, and by Pansy Tlakula, the African Union's Special Rapporteur on Freedom of Expression in Africa, have had limited success.

The Assembly of Delegates of PEN International calls on all governments:

- To repeal criminal defamation and insult laws
- To drop all existing charges against writers and journalists under criminal defamation and insult laws
- To release all writers and journalists currently detained or imprisoned on criminal defamation charges.

It also directs a special appeal to African Union member states to abide by the ruling of the African Court of Human and Peoples' Rights in the Konaté case by amending their criminal defamation and insult laws.

“In Burkina Faso, we accepted to sacrifice ourselves for freedom of expression and press freedom. Some have lost their lives, like Norbert Zongo; others have been through the torments of imprisonment, like us. It is without a doubt due to a part of our sacrifices that today laws have been changed so a journalist will not be jailed on defamation charges anymore.”

-Lohé Issa Konaté



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