



## RESOLUTION ON CRIMINAL DEFAMATION IN AFRICA

We are deeply concerned by the continued existence in the majority of African States of colonial-era laws that make defamation a criminal offence. These laws are used to crack down on and silence writers, journalists and others who express dissenting opinion and criticism of those in authority, and often carry heavy penalties including imprisonment. These laws are fundamentally incompatible with the right to freedom of expression as it is protected in international universal and regional human rights law and in domestic Constitutions.

Since PEN's latest resolution on criminal defamation adopted at the 80<sup>th</sup> World Congress in Bishkek, we welcome a number of positive developments on the African continent. In particular, we welcome:

- the landmark *Konaté v. Burkina Faso* judgment of the African Court on Human and Peoples' Rights, which concluded that the prison sentence imposed on Konaté, editor of the weekly *L'Ouragan* newspaper, amounted to disproportionate interference in his exercise of freedom of expression and his role as a journalist;
- the February 2016 decision by Zimbabwe's Constitutional Court ruling that criminal defamation is unconstitutional;
- the February 2017 decision by Kenya's High Court<sup>1</sup> that the country's criminal defamation law is incompatible with the country's constitutionally enshrined right to freedom of expression; and,
- the May 2018 decision by the Constitutional Court of Lesotho<sup>2</sup> that declared criminal defamation unconstitutional, finding many of the terms in the impugned law to be overbroad and vague.

Despite these successes, however, defamation remains a criminal offence in many African countries, where these laws are used to protect the powerful and to evade public scrutiny of and accountability for Government actions.

A recent PEN report found that just under half of the 38 writers and journalists from 22 African countries who responded to a survey indicated that the use of criminal defamation, libel and insult laws - as well as laws criminalising sedition, 'fake news' and contempt of court - inhibit the practice of their professions. Sixteen respondents indicated they have avoided writing stories because of these laws, on topics such as corruption, crime, justice and politics. Furthermore, the PEN study found that:

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<sup>1</sup> *Okuta v Attorney General* Constitutional Petition No. 397 of 2016 [2017] eKL. Immediately following the judgment, Kenya's Attorney General directed the Director of Criminal Investigations to withdraw all criminal defamation cases with immediate effect, and then filed an appeal against the judgment, which it is understood remains pending.

<sup>2</sup> *Peta v Minister of Law*.

- In Sierra Leone, criminal defamation laws have long had a severely detrimental effect on the right to freedom of expression, stifling debate, undermining media freedom and hindering government transparency and accountability. It is welcomed that the incoming government has committed to abolishing criminal defamation during the election campaign and it should now rapidly translate that commitment into action by seeking parliamentary enactment of a law repealing the criminal libel, sedition and false news provisions of the Public Order Act and any other laws that restrict the right to freedom of expression;
- In South Africa, criminal defamation is used only sparingly, but continues to exercise a considerable 'chilling effect', which manifests itself among other things in interference by newspaper owners in editorial conduct and in self-censorship practices;
- In Uganda, criminal defamation laws restrict peaceful exercise of the right to freedom of expression and inhibit political debate. They are used to protect the country's political and economic elite, while affording little or no protection to ordinary citizens; and,
- In Zambia, positively the Government has re-committed to the enactment of access to information laws, which elsewhere have played a key role in enabling citizens to participate more fully in the democratic process in a deliberative manner and to hold public officials accountable. However, such laws alone are unlikely to produce these positive effects as the authorities retain and continue to apply criminal defamation legislation that has a considerable 'chilling effect' on free speech.

Lastly, it should be acknowledged that the decriminalisation of defamation is not without its own risks: in Ghana, the aforementioned PEN study found, the process was not accompanied by a parallel strengthening of professional journalistic standards and the institutional framework that enforces them. This has served to undermine confidence in the media and increased recourse to other laws, including contempt of court, with a view to curbing the media and punishing its perceived failure to adhere to high professional and ethical standards.

**The Assembly of Delegates of PEN International calls on all African States:**

- that have yet to do so to promptly abolish criminal defamation laws and to put in place sufficient safeguards to protect the right to reputation through civil law that includes safeguards preventing the imposition of excessive fines or damages;
- to release promptly and unconditionally any journalists or writers detained or imprisoned on criminal defamation charges and discontinue all prosecutions on such charges;

**Calls on the institutions of the African Union:**

- to remain seized of the matter and to continue to exercise their judicial, advisory and consultative powers to push for the decriminalisation of defamation on the African continent;

**Calls on media owners, publishers, editors, journalist organisations and practitioners across the continent:**

- to establish independent national regulatory bodies and to ensure the implementation of high professional and ethical journalistic standards.