



Defamation and Insult laws: overview of the practice in SADC

ARTICLE 19 has studied the statutes on defamation and insult in SADC countries. We examined the constitution of each country, and the laws used to prosecute claims for defamation and insults - or to restrict free speech in other ways.

The research has revealed that the use of these laws has increased in some countries over recent years - especially in countries facing political crisis or civil conflict. An alarming finding is that in most cases charges are dismissed for lack of merit either by the courts or by the prosecutors. There is also a regular and unwarranted use of criminal defamation associated with excessive and unreasonable fines.

Under the current laws of most SADC countries, charges of criminal defamation or insult against journalists have been used in a number of cases brought by public officials/figures. This pattern is worrying because the main purpose of defamation laws (the protection of reputation against the abuse of free speech) is defeated. In many cases, criticism of public officials/figures is considered an abuse of the right to free speech, and thus irresponsible journalism. Such a position deprives not only journalists and other media workers of their rights to receive and disseminate information, but also the public of its right to know.

Public figures in SADC countries are over-protected from criticism, even in the performance of their duties. In SADC countries, most defamation cases are brought not by ordinary citizens, but by those in government, who by virtue of their activities are susceptible to public scrutiny.

Moreover, defamation laws often put intolerable pressures on journalists. Some legal provisions can allow for people to be imprisoned if found guilty. In many cases, defamatory statements are presumed to be untrue unless proven otherwise by the defendant. Putting the burden of proof on journalists can render their work impossible. In some cases, statements might be correct, but proving them true could be difficult - especially when informants are third parties. This legal requirement means that, in practice, journalists are not allowed to make mistakes - even when it has been proved that they have acted professionally and with due diligence, and that they have made the statement in the public interest.

Contrary to practice in most of the SADC countries, many jurisdictions around the world have recognised that journalists are not obliged to prove that their statements are completely accurate, especially where the allegations

involve public officials. Instead, they are only required to conform to certain standards of professionalism. In the famous case of *New York Times v. Sullivan*, the US Supreme Court held that public officials may only recover damages for a defamatory falsehood if they prove that the statement was made with actual knowledge that it was false or with reckless disregard for the truth.

Worryingly, defamation laws often make no distinction between statements of fact and opinions or value judgements. In many cases, journalists are condemned for statements that are opinions about politicians, rather than statements of fact.

Many courts around the world have ruled that criticism of public officials is an essential component of a democratic society. Striking a reasonable balance between the right to freedom of expression and the protection of reputation is a challenging task, but necessary in any democratic society that recognises the role of the press.

The European Court has stated that 'the press has not only a right but a duty to impart information and ideas on all matters of political and public interest(...)' According to the Court, 'Journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation.' The Court recognised the protection of reputation of public figures but considered that 'the limit of acceptable criticism' of [a] politician in [his] public life is wider than those applying to private individuals.

Lastly, criminal defamation poses a grave threat to freedom of expression in the SADC region. The African Commission on Human and Peoples' Rights has stressed in its 'Declaration of Principles on Freedom of Expression in Africa' that: 'states shall review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.'

There have been moves to decriminalise defamation in many parts of the world. The severe penalties that criminal charges carry are considered detrimental to free expression and a threat to open public debate. In 1991, the State of California repealed its criminal defamation law and stated that: "The Legislature finds and declares that every person has the right to speak out, to poke fun, and to stir up controversy without fear of criminal prosecution."

However, in many SADC countries, defamation or insult of the President or other senior officials and institutions is considered as a serious criminal offence, punishable with imprisonment and heavy fines.



ANGOLA

In Angola, the Law on Crimes against State Security (law 7/78) gives powers to the state to determine threats to national security. Such threats include defaming the President and other government officials. Defaming the President or his representative is a criminal offence. In defamation cases, the burden of proof of the truth lies with the defendant, but when the case concerns the President, the defendant is not allowed to use truth as a defence.

Raphael Marques is a case in point. He was accused of defaming the President in his publications of 3 July and 28 August 1999 in the independent weekly AGORA, where he referred to the President as a dictator responsible for the destruction of Angola. The Provincial Court of Luanda later found him guilty of defaming, slandering and injuring the president, and ordered him to pay compensation of 30,000 kwanza (approx. US\$950) to President Eduardo dos Santos. Contrary to all principles of criminal procedures, he was presumed guilty throughout the trial.

DEMOCRATIC REPUBLIC OF CONGO

In Democratic Republic of Congo, criminal defamation is governed by many laws. The Penal Code provides for defamation of individuals. In addition, the 1996 press law prohibits 'insulting the person of the Head of State'. Defamation and/or insult of senior officials or the army has been used often. There have been many instances where allegations detrimental to, or critical of, the army were considered as insult.

Freddy Loseke of "La Libre Afrique" was accused and charged with (treason) 'betraying the state in times of war' over a story he published on 29 and 31 December 1999 alleging that a military coup against the former President Laurent Kabila was imminent. During the trial, his charges were changed to 'Outrage à l'armée' ('insulting the army'). On 19 May 2000, he was sentenced to three years in prison and was released on 4 January 2001.

Delly Bosange and Raymond Kabala were arrested on 19 and 22 July 2001, respectively, for publishing an article in which it was reported that the Minister of Security and Public Order had allegedly been poisoned. The journalists were charged with "writing falsehoods" and making "harmful accusations" On 6 September, a Kinshasa/N'Djili tribunal tried and sentenced them to six (6) and twelve (12) months' imprisonment, respectively, and a

total fine of US\$300,000 for damages. In appeal, the Kinshasa/N'Djili high court found the charge of "writing falsehoods" brought against Bonsange to be "unfounded," but did find him guilty of "failure to publish the newspaper's address" His original US\$100,000 fine was reviewed to 300,000 Congolese francs (approx. US\$750) and his six-month prison sentence quashed. The High Court, however, found Kabala guilty of "harmful accusations" against the minister, but decided to reduce his sentence from twelve to seven months' imprisonment with no parole. His fine of US\$200,000 for damages was also reduced to one million Congolese francs (approx. US\$2,500). He was released after serving his prison sentence.

Interestingly, in this case, the High Court had found the charges of writing falsehoods unfounded, meaning to some extent that the truth of the allegations was not disputed. But in its ruling, it still retained a penalty for 'harmful allegations'. It is well established in international law that true statements of fact cannot be defamatory especially when they are directed at public figures. Another interesting element of these cases is the exorbitant amount of the fines imposed, especially in the first instance. There is no doubt that sanctions of this nature against journalists are harmful to the right to free expression. The African Commission has called upon states party to the African Charter to free all journalists detained in their prisons.

SWAZILAND

In Swaziland, defamation is still governed by an old colonial law of 1882, the Cape Libel Act. Criminal defamation is an offence punishable by two years' imprisonment, or a fine, or both. The Criminal Procedure and Evidence Act, 1939, provides for punishment in cases of criminal defamation. The 'Protection of the person of the Ndlovukati' Act (1968) gives special protection to the Queen Mother, who should not in any circumstances be criticised. In 2001, a Royal Decree extended this protection to the King.

Many journalists practise self-censorship when covering the monarchy and national security issues. The Publications Act of 1968 gives the Minister for Public Service and Information powers to scrutinise any publication that does not conform to Swazi morality and ideals.

On 12 September 1999, Bheki Makhubu, editor of the Swaziland's Times Sunday, published a story that the king's fiancée was a high school drop-out. Although the



facts were not disputed, Makhubu was charged with criminal defamation due to his alleged “disrespect” for the monarchy. He was released on a US\$500 bail and forced to surrender his passport, and was instructed not to write anymore about the King’s fiancée.

ZAMBIA

In Zambia, section 69 of the Penal code prohibits defamatory statements against the President, foreign ambassadors and other notables. If a defamation of such authorities is established, the defendant faces a criminal prosecution that could lead to imprisonment. Parliament is also granted the right through investigative tribunals to deal with defamatory suits against the media who report parliamentary misconduct. Failure to comply with the summons of such a tribunal is considered as contempt, punishable by up to six months in prison.

Fred M’membe, editor-in chief the “Post” newspaper, was accused of defaming the President over a story of 17 August 2001 in which he stated that the former President Patrick Chiluba had stolen US\$4 million. He was arrested and charged with defamation of the President. M’membe appeared in court and pleaded not guilty. The trial was repeatedly postponed and the charges later dropped by the state on 12 July 2002.

On 5 June 2002, four journalists, Emmanuel Chilekwa, editor of the “People” newspaper, the assistant editor Shadrreck Banda, reporter Kings Lweendo and Jane Chirwa, a student journalist, were arrested and charged with defamation of President Levy Mwanawasa. Their arrest followed a story they published in the “Post” newspaper of 25-31 May 2002, stating that President Levy Mwanawasa has brain disease. They were refused bail by the magistrate court and later appeared in court on 25 June 2002, where they pleaded not guilty. They were released after the intervention of their lawyers and granted bail of K500, 000 (US\$125) with two working sureties, each worth K500, 000 by the Lusaka High Court. On 30 July 2002, the state dropped the case when Chiekwa and his co-accused admitted in court that the story was false and they were misled by their sources.

ZIMBABWE

In Zimbabwe, the Public Order and Security Act 2002 imposes editorial control on the media. The act limits freedom of expression and assembly and goes against internationally accepted norms and standards. For

example, it criminalizes the making of statements critical of the President.

The official secrets laws prevent investigative journalism. Draconian defamation and sedition laws protect reputations of public figures at the expense of accountability. There is also a Parliamentary Privileges and Immunities Act, which prevents journalists from reporting the activities of the people’s representatives, and permits parliament to sit as a court to pass sentences, including jail sentences, on journalists. Over the last three years, this legislation has been used with increasing frequency. Independent journalists have been arrested, purportedly for having violated these laws.

On 16 June 2000, three “Standard” journalists were convicted on charges of criminal defamation for publishing an incorrect story stating that the draft constitution had been printed while the body responsible for the document was still soliciting opinions on it. Former acting editor of the paper, Andy Moyse, reporter Chengetai Zvauya and publisher Clive Wilson were ordered to pay a total fine of Z\$18,000 (US\$473.68).

In April 2001, *Daily News* editor Nyarota and two of his reporters, Nyaira and Zava, were charged with criminal defamation of President Robert Mugabe and parliamentary speaker Emmerson Mnangagwa. All three journalists denied the charges in statements recorded at a police station in the capital, Harare. The charges arose from *Daily News* stories, published in November and December 2000, that linked Mugabe and Mnangagwa to payments made by Air Harbour Technologies in order to secure a contract to build a new international airport in Harare. The three journalists were charged under the Law and Order Maintenance Act. The case was still pending at the time of publication.

From the assessment of some of the laws and practice governing defamation and insult in the above SADC countries, ARTICLE 19 notes with concern that the provisions under which journalists are often charged are in violation of fundamental rights recognised by international standards on freedom of expression.

Shifting the burden of proof of truth onto the accused not only has a chilling effect on freedom of expression, but also negates the right to be presumed innocent until proven guilty.

The imposition of custodial penalties for defamation, and the special protection afforded to senior public officials against defamation or insult, are unnecessary and prevent debate on matters of public interest. These laws should be repealed to allow free flow of information and ideas in SADC.



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