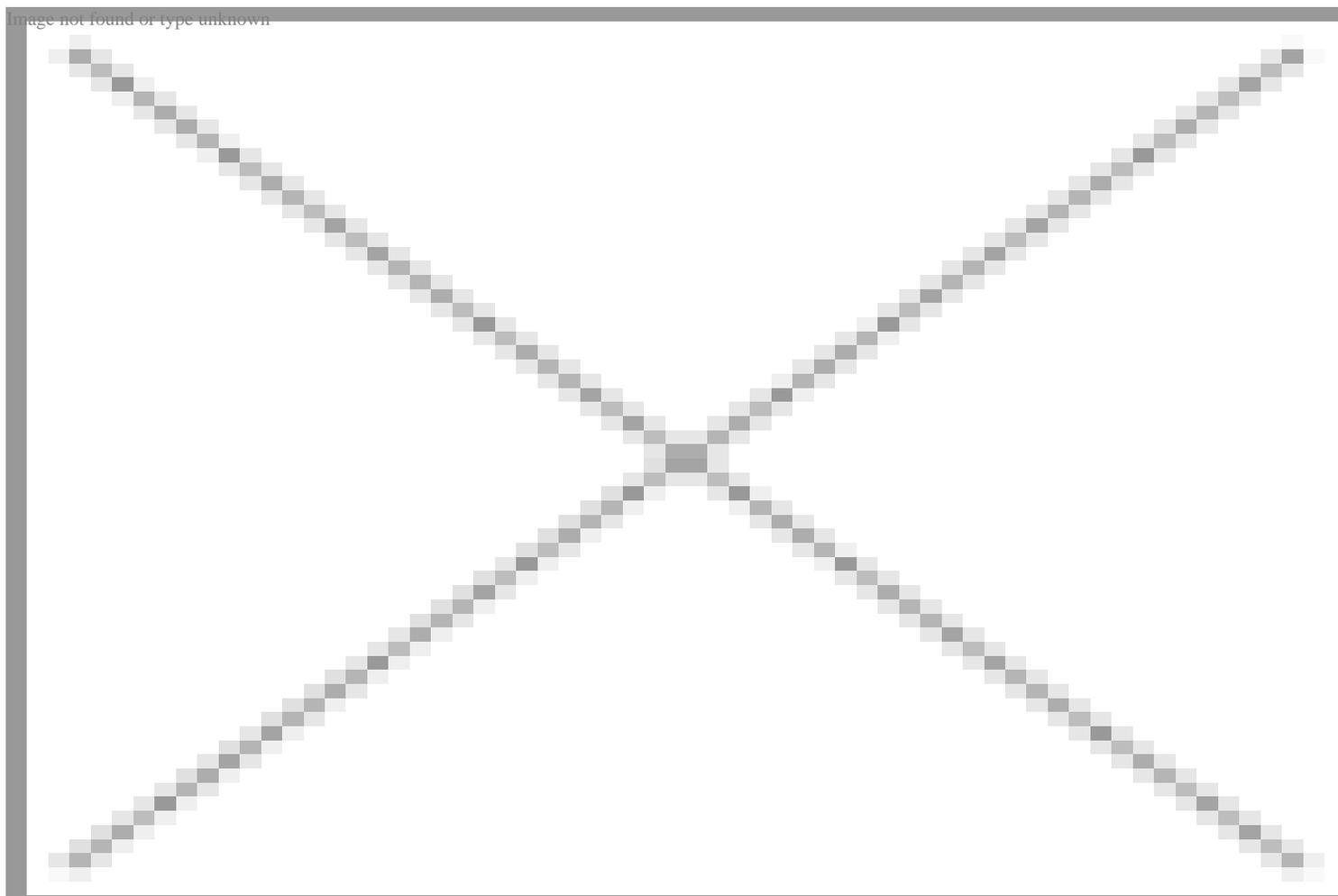


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Judicial independence is critical to protecting press freedom in Africa

By Anneke Meerkotter

In this opinion piece, Anneke Meerkotter, Litigation Director of the [Southern Africa Litigation Centre](#) [1] (SALC), discusses a recent High Court of Lesotho (sitting as a Constitutional Court) judgment which declared the offence of criminal defamation unconstitutional. She takes the opportunity to also reflect more generally on the extent to which judiciaries have created the space for constitutional jurisprudence to be exercised in a manner that facilitates social transformation.



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One of the enduring legacies of colonialism is the creation of fairly uniform Penal Codes throughout our continent. Whilst some countries have been robust in reforming their criminal laws, others have been reticent

to remove some archaic offences, especially when these offences protect the government from criticism. Given the imperatives of rights protections enshrined in national constitutions and the [African Charter on Human and Peoples' Rights](#) [3], courts in Africa have gradually started to explore the extent to which some criminal offences can comfortably co-exist with human rights provisions. A few courts have recently had to grapple with the question whether the offences of criminal libel/defamation, publishing false information and sedition justifiably limit the right to freedom of expression. The diverse findings of these courts provide us with an important opportunity to reflect on the extent to which judiciaries have created the space for constitutional jurisprudence to be exercised in a manner that facilitates social transformation.

The High Court of Lesotho (sitting as a Constitutional Court) delivered a judgment on 21 May 2018 declaring the offence of criminal defamation unconstitutional. A panel of 3 judges, in the case of [Basildon Peta v Minister of Law, Constitutional Affairs and Human Rights and Others](#), [4] considered the extent to which a satirical article criticising the then-Commander of the Lesotho Defence Force limited the right to freedom of expression. In a democracy, the acceptance of public office inevitably means that a person is open to close scrutiny. The Court held that, where the constitutionality of legislation is challenged, the onus of proving that an impairment of a right is justified, rests on government and must be discharged clearly and convincingly. The Court is then required to determine whether the legislative objective is of sufficient importance to warrant overriding the right and whether the limitation is proportionate. In the Court's analysis, the offence of criminal defamation was over-broad in that it applied even when no person other than the person who was defamed became aware of the supposedly defamatory statement, and it extended to cover defamation of persons who were deceased.

Usually, a defence to the charge of criminal defamation would be that the matter was true and for the public benefit. The Lesotho Court held that the concept "public benefit" "has a worrying potential of abuse by the political power-that-be to silence legitimate criticism" which "all but granted an unfettered discretion on the prosecutorial authorities". The Court held that the result of this vagueness "is the chilling of truth-searching and the concomitant undermining of the purposes of guaranteeing freedom of expression".

The Lesotho High Court aligned itself with the Zimbabwe Constitutional Court, which in the 2014 decision of [Mandahire and Another v Attorney General](#) [5], cautioned against the severe long-term impact of arrest, trial, conviction and imprisonment and declared the offence of criminal defamation unconstitutional. A similar concern around custodial sentences as a disproportionate response to criminal defamation was echoed by the African Court in its 2014 decision in [Konaté v Burkina Faso](#) [6]. The *Mandahire* decision was also followed by the Kenya High Court in the case of [Okuta and Another v Attorney General and Others](#) [7], when it declared the offence of criminal defamation unconstitutional. Ultimately these courts held that given the existence of civil damages as a remedy, the offence of criminal defamation was unnecessary.

The above courts' decisions are in line with the thinking of the ECOWAS Community Court of Justice in its decision in February 2018 in the case of [Federation of African Journalists and Others v Republic of Gambia](#) [8]. The ECOWAS Court concluded that the offences of sedition, criminal libel and publication of false news were "inacceptable instances of gross violation of free speech and freedom of expression". It emphasised that the right to freedom of expression is "not only the cornerstone of democracy, but indispensable to a thriving civil society" - "wide or vague speech-restricting provisions forces self-censorship". The Court pointed out that these offences originated in an era when freedom of expression was not recognised as a fundamental right. In recognition of this, countries such as the United Kingdom and Ghana have deliberately repealed these offences. The offence of publishing false news was similarly declared unconstitutional in 2014 by the Zambia High Court in the case of [Chipenzi and Others v the People](#) [9].

Some courts have however taken a markedly different approach. In February 2018, the Botswana Court of Appeal, in the case of [Outsa Mokone v the Attorney General and Others](#) [10], when confronted with a case which challenged both a warrant of arrest and the constitutionality of the offence of sedition, determined that a successful decision on the warrant issue avoided the constitutional determination. The Court upheld the

principle that where it is possible to decide any case without reaching a constitutional issue, “that is the course that should be followed”.

Seditious intent is linked to an act of exiting disaffection against the President, government or administration of justice. However, the term “disaffection” is broad enough to include expressive conduct that would ordinarily constitute an essential element of democratic discourse. The vagueness of the offence makes it hard to know with reasonable certainty what conduct is prohibited and arguably violates the principle of legality. The journalist in the matter, having been subjected to this outdated offence, ought to have had the opportunity to challenge its constitutionality.

A different aspect of the principle of constitutional avoidance was followed by the Supreme Court of the Gambia in May 2018 in the case of [Gambia Press Union and Others v Attorney General](#) [11]. The Supreme Court considered the constitutionality of the offences of sedition and publication of false news. The Court followed the principle of a presumption of constitutionality, i.e. it presumed the Act of Parliament to be constitutional unless shown otherwise. This presumption is based on the generalisation that legislatures try to avoid enacting unconstitutional laws. However, it is highly questionable whether this presumption is valid when considering offences dating back to the colonial era. Even if the constitutionality of a more modern law is at issue, the idea that legislatures would avoid enacting unconstitutional laws is not based on empirical evidence. The presumption ignores that courts have been given powers in terms of national constitutions to assess the constitutionality of laws precisely to act as a safeguard in cases where legislatures overstep their constitutional mandate.

The Supreme Court of Gambia went further to argue that the person challenging the constitutionality of legislation bears the onus of proving that the offence does not serve a legitimate purpose. This understanding of the onus of proof is contrary to jurisprudence elsewhere on the continent. Many courts have said that the obligation of a government in discharging the onus of proving that a law is reasonably required includes placing before the court factual material, policy considerations and legal argument. The Supreme Court of Gambia’s approach ignores the lack of equality of arms in cases where the constitutionality of a law is challenged. Not only does the imposition of such an onus place an impossible burden on the applicant to discharge, but it also makes a mockery of the constitutional inquiry itself, which has as its purpose for the court to have the most accurate and relevant information about the offence itself before it when determining its validity. Such information will usually only be at the disposal of a law-maker not the victim of the law.

The above approach of the highest courts in Botswana and Gambia are concerning. Their approach should be evaluated in the context of the constitutional issues that were before them – the freedom of journalists to criticise the President. Whether courts feel comfortable to address such an issue might well be affected by the extent to which judges feel secure in their positions, which raises broader issues around judicial independence. The approach of constitutional avoidance and of burdening the applicant with the entire onus in a constitutional matter also greatly limits the ability of courts to assist countries to escape from the shackles of colonial era offences that are simply no longer relevant in constitutional democracies based on fundamental human rights, free debate and open discussion.

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[7] <http://kenyalaw.org/caselaw/cases/view/130781/>

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