THE BLACK SHEEP OF COMMUNICATION LAW; THE CRIMINALISATION AND SILENCING OF CRITICS IN KENYA

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INTRODUCTION

Today, the black sheep lays exposed, the black sheep can be spotted from a far, with its long horns hovering above the white sheep, and the shepherd does not take long to realize that this black sheep is not a saint, that the black sheep is a tool used by the mighty to oppress the poor and normal citizens. The black sheep is a secret weapon used by the powerful and irresponsible politicians, those who have refused to be held accountable, and those who believe that they own the world. The shepherd was warned in *New York Times v Sullivan*[1], of the effects of this black sheep, the US Supreme Court stated that;

> The circulation of information and ideas should be uninhibited, robust and wide-open. No politician should be permitted to silence his or her critics. It is a matter of the most fundamental importance that such criticism should be free, open, robust and even unrestrained. This is so because of the inordinate power and influence which is wielded by politicians, and the seductive influence which these attributes have upon corrupt men and women. The most appalling crimes have been committed by politicians because their baseness and perversity was hidden from public scrutiny

And the shepherd today is on the streets singing the songs of Jericho so that like the wall of Jerusalem, this black sheep will collapse. The shepherd is motivated by the view expressed by Lord Keith in *Derbyshire*[2] that

[1] New York Times v Sullivan 376 US 254 (1964).
[2] Derbyshire CC v Times Newspapers [1993] AC 534 (Law)

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'It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism ... all other utterances or publications against the government must be considered absolutely privileged.'

The shepherd is blowing the trumpets asking Kenyans of good will to join him in singing, the shepherd is ready to provide the vuvuzela, but this black sheep must be terminated.

The black sheep only serves a single purpose, the silencing of critics, and the curtailing of the freedom of expression[3]. Bury in his work History of Freedom of Thought [4]has observed that freedom of expression is "a supreme condition of mental and moral progress" In the words of American Supreme Court, it is "absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities"[5] Crucially, freedom of expression is constitutionally enshrined and encouraged, as the lifeblood of democracy[6]. The freedom to wield fists and firearms enjoys no similar status in our supreme law. Thus the analogy between assault and defamation breaks down[7]. As the Sri Linka supreme court noted that

The basic assumption in a democratic polity is that government shall be based on the consent of the governed. The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources... … There must be untrammeled publication of news and views and of the opinions of political parties which are critical of the actions of government and expose its weakness. Government must be prevented from assuming the guardianship of the public mind[8].

[3] No country has a monopoly on democracy or freedom of expression. No court has a monopoly on truth or wisdom. Each has to make its individual contribution to the quest and attainment of a just and decent society in which freedom of expression is cherished as an indispensable value. In that quest may we be guided by the humble spirit of the Vedic saying: "Let noble thoughts come to us from all sides

[4] {1913}, p.239.

[5] See Speiser v. Randall {1958)}257 US 513 (530)

[6] The sanctity and significance of Freedom of Speech and Expression in a democracy is not in doubt.

[7] In the Mail & Guardian of 1 to 7 October 2013, Also reproduced in Const. Application No CCZ 78/12

[8] M Joseph Perera & Ors v. Attorney-General, App.Nos. 107-109/86, (SC) Judgment of 25 May 1987.

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FREEDOM OF EXPRESSION; A FREE CLEARING HOUSE IN A TRUE DEMOCRACY

'True democracy can only thrive in a free clearing-house of competing ideologies and philosophies - political, economic and social - and in this the press has an important role to play. The day this clearing house closes down would toll the death knell of democracy'[9]

Freedom to express an individual's opinion is a 'pillar of democratic society,'[10] and may only be curtailed in limited circumstances[11] where restrictions are narrowly tailored and proportionate to a legitimate need.[12] Freedom of expression as enshrined in various international and regional legal instruments[13], is a fundamental human right and its importance in a democratic society has been reiterated numerous times[14] . It encompasses discussion on human rights[15], public affairs[16] as well as religious[17], political discourse[18], entailing not only information or ideas that are favorably received, but also those that offend, shock or disturb[19]. Means of expression are also

[9] Bombay High Court, Binod Rao v. M R Masani (1976) 78 Bom. LR 125.
[10] Advisory Opinion OC-5/85 (n 116), Series A No 5 [70]; General Comment No 34 (n 73) [2]; Erbakan (n 111) [56]; Onder Bakircioglu, 'Freedom of Expression and Hate Speech' (2008) 16 Tulsa J Comp & Intl L 1, 2.
[11] ICCPR art 19; General Comment No 34 (n 73) [13] [43]; UNGA 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (2013) UN Doc A/HRC/23/40 [26].
[12] UNGA 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (2013) UN Doc A/HRC/23/40 [42]; Corey Omer, 'Intermediary Liability for Harmful Speech: Lessons from Abroad' (2014) 28 Harv J L & Tech 289, 294.
[13] UDHR (adopted 10 December 1948) UNGA Res 217 A(III) Article 19; ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 19; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNGA Res 2106 (XX) Art 5(d)(viii); Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 October 1950,entered into force 3 September 1953) Article 10; ACHPR (adopted 27 June 1971, entered into force 21 October 1986)OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M.58 (1982) Article 9; American Convention on Human Rights (adopted 22 October 1969, entered into force 18 July 1978) 08/27/79 no 17955 (ACHR) Article 13..
[14] Tae Hoon Park v Republic of Korea, Communication no 628/1995, UN Doc. CCPR/C/64/D/628/1995 (3 October 1998) para 10.3; Handyside v United Kingdom App no 5493/72 (ECtHR, 7 December 1976) para 49; Communication no 1173/2003, Benhadj v Algeria (20 July 2007); Communication no 628/1995 UN Doc. CCPR/C/90/D/1173/2003 (2007), HRC, 'General comment No 34' on 'Article 19 (Freedom of Opinion and Expression)' (2011) UN Doc CCPR/C/GC/34, para 2.
[15] Vladimir Velichkin v Belarus, Communication no 1022/2001, UN Doc. CCPR/C/85/D/1022/2001 (2005).
[16] Coleman v Australia, Communication no 1157/2003, UN Doc. CCPR/C/87/D/1157/2003 (2006).
[17] Malcolm Ross v Canada, Communication no 736/1997, UN Doc. CCPR/C/70/D/736/1997 (2000).
[18] Essono Mika Miha v Equatorial Guinea, Communication no 414/1990, UN Doc. CCPR/C/51/D/414/1990 (1994).
[19] Handyside v United Kingdom App no 5493/72 (ECtHR, 7 December 1976) para 49; La Rue, Report of the Human

considered to include Internet – based forms[20]. This freedom of expression as reflected in Article 19 of the UDHR[21] and ICCPR,[22] is 'the Foundation stone for every free and democratic society'.[23] It is the vehicle for public discourse[24] accordingly, any interference should not render these rights illusory[25].

The freedom of expression is a bridge to the enjoyment of the other rights, In *Palco*[26]Cardozo J while adding his voice on this fact, he stressed that;

"Freedom of thought and speech is the matrix, the indispensable condition, of nearly every other form of freedom."

Freedom of expression serves an important role in a democratic state, it provides a platform for the sharing of ideas, a platform to express a different opinion, and this is the hallmark of democracy. A democracy cannot exist in a country where there is no freedom of expression, 'The free exchange of information and ideas on matters relevant to the organization of the economic, social and political life of the country is crucial to any democracy. Without this it can scarcely be called a democracy at all'[27]. The UN Human Rights Committee has said that the right of freedom

Rights Council's Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27, 16 May 2011, para 37.

[20] HRC, 'General comment No 34' on 'Article 19 (Freedom of Opinion and Expression)' (2011) UN Doc CCPR/C/GC/34, para 12; HRC, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (11 May 2017) para 21

[21] UDHR (adopted 10 December 1948) UNGA Res 217A (III)

[22] 2 ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. See also ECHR (adopted 4 October 1950, entered into force 3 September 1953) art 10; ACHR (adopted 22 October 1969, Entered into force 18 July 1978) art 13...

[23] HRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 ('General Comment 34') para 2. See also Bowman v UK App no 24839/94 (ECtHR, 19 February 1998) para 42; Claude-Reyes v Chile, Merits, Reparations and Costs Judgment (IACtHR, 19 September 2006) para 85

[24] General Comment 34 (n 3) para 2; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (17 April 2013) UN Doc A/HRC/23/40 ('UNHRC April 2013 Report') para 30.

[25] UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (28 February 2008) UN Doc A/HRC/7/14 ('UNHRC February 2008 Report') para 49; General Comment 34 (n 3) para 21

[26] Palco v Connecticut 302 US 326-7

[27] Ibid. [148].

of expression 'is of paramount importance in any democratic society'[28] **Elena Mihajlova** aptly puts it that;

Freedom of speech and expression is fundamental human right, playing vital role in exercising and protecting other rights. Possibility to express opinion and to share information is a value indicator for the democratic capacity and institutional commitment to democracy in the societies. Concepts of both citizenship and pluralism cannot be attained without the possibility to freely express thought and the objective competition of opposing political ideas. Tolerance of thought of the other and different one provides for co-existence in modern multicultural societies[29].

The European Court of Human Rights has also elaborated on the importance of freedom of expression:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'[30]

Freedom of expression is a basic condition for the progress of democratic societies and for the development of each individual[31].It is the freedom upon which all others depend[32]; it is the freedom without which the others would not long endure[33] It is a fundamental and universal human right[34] that applies equally to speech communicated on the internet and speech communicated through traditional

[28] Tae-Hoon Park v. Republic of Korea, 20 October 1998, Communication No. 628/1995, para. 10.3.
[29]Elena Mihajlova, Ph.D., Jasna Bacovska, Ph.D. ,Tome Shekerdjiev LLM , FREEDOM OF EXPRESSION AND HATE SPEECH
[30] Handyside v. United Kingdom, 7 December 1976, Application No. 5493/72, para. 49. Statements of This nature abound in the jurisprudence of courts and other judicial bodies around the world.
[31] Handyside v United Kingdom App no 5493/72 (ECtHR, 7 December 1976) [49].
[32] Mandela v Falati 1994 (4) BCLR 1 (W)
[33] Ibid by Van Schalkwyk J
[34] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 19; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19; European Convention on Human Rights (adopted 4 October 1950, entered into force 3 September 1953) 213 UNTS 1932 (ECHR) art 10; American Convention on Human Rights (adopted 22 October 1969, entered into force 18 July 1978) (ACHR) art 13; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (ACHPR) art 9; Arab Charter on Human

Means[35]

Criminal defamation; the unjustifiable limitation on the freedom of expression

"Liberty of thought soon shrivels without freedom of expression"[36]

Freedom of expression can be subject to restrictions on specific and limited grounds, which are set out in the Article 19 (3) of the ICCPR[37] and Article 29 (2) of the UDHR[38]. However, restrictions imposed by a State may not put the right in jeopardy[39]. Therefore they must satisfy the three-part test, meaning that they have to be provided by law and be justified as being

Rights (adopted 22 May 2004, entered into force 15 March 2008) (ArCHR) art 32. See also ACmHPR 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa' (2002) ACHPR/Res 62(XXXII)02 Principle II; ACmHPR 'Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe' (2009) AHRLR 268 Comm no 294/04 [80]; Handyside (n 71) [49]; Interights v Mauritania Comm no 242/2001 (ACmHPR, 2004) [78]–[79]

[35] IACHR 'Freedom of expression and the Internet' (31 December 2013) OEA/Ser.L/V/II [148]. See also ICCPR art 19(2); ECHR art 10(1); ACHR art 13; ACHPR art 9; UNGA 'The promotion, protection and enjoyment of human rights on the Internet' (29 June 2012) UN Doc. A/HRC/20/L.13; UNHRC 'General Comment No 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [12]; Nicola Wenzel, 'Opinion and Expression, Freedom of, International Protection' Max Planck Encyclopedia Of Public International Law (2009) [14]-[15]; Peter Malanczuk, 'Information and Communication, Freedom of' Max Planck Encyclopedia Of Public International Law (April 2011) [97]; Fatullayev v Azerbaijan App no 40984/07 (ECtHR, 22 April 2010) [95].

[36] US Supreme Court Justice Felix Frankfurter In Dennis V United States, 341 U.S .494, 550 (1951)

[37] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 19.

[38] UDHR (adopted 10 December 1948) UNGA Res 217 a (III), Article 19.

[39] HRC, 'General Comment No 10' on 'Article 19 (Freedom of Expression)' (1983), para 1.

necessary for a particular legitimate purpose, as it has been elaborated by the UNHRC[40], the IACtHR[41], the ECtHR[42], AHRLR[43] and the ACommHPR[44].

According to Art. 19 (3) of the ICCPR and the case law of the ECtHR[45], for a restriction to be legitimate, it must be provided by law. Moreover, it has to be publicly accessible[46], clear[47], drawn narrowly and with precision[48] in order to be understood by everyone and to enable individuals to regulate their behavior accordingly[49].

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[40] Hak-Chul Shin v Republic of Korea, UN Doc. CCPR/C/80/D/926/2000 (HRC, 19 March 2004) para 7.2; Womah Mukong v Cameroon UN Doc CCPR/C/51/D/458/1991 (HRC, 10 August 1994) para 9.7; Sohn v Republic of Korea UN Doc CCPR/C/54/D/518/1992 (HRC, 19 July 1995) para 10.4; Malcolm Ross v Canada UN Doc CCPR/C/70/D/736/1997 (HRC, 18 October 2000) para 11.2; Vladimir Velichkin v Belarus UN Doc CCPR/C/85/D/1022/2001 (HRC, 20 October 2005) para 7.3; UNHRC 16 May 2011 Report (n 4) para 24; General Comment 34 (n 3) para 35; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (17 April 2013) UN Doc A/HRC/23/40 ('UNHRC April 2013 Report'), para 29.

[41] Francisco Martorell v Chile (IACtHR, 3 May 1996) para 55; Herrera-Ulloa v Costa Rica (IACtHR, 2 July 2004) para 120; IACHR, "Freedom of expression and the Internet" OEA/Ser.L/V/II., CIDH/RELE/INF. 11/13, 31 December, 2013, para. 58; IACHR, 'Report of the Special Rapporteur for Freedom of Expression' (2009) OEA/SER L/V/II Doc. 51, para 626.

[42] Handyside v UK App no 5393/72 (ECtHR, 7 December 1976) para 49; Sunday Times v UK (no 1) App no 6538/74 (ECtHR, 26 April 1979) para 45; Ceylan v Turkey App no 23556/94 (ECtHR, 8 July 1999) para 24; Murat Vural v Turkey App no 9540/07 (ECtHR, 21 January 2015) para 59; Perinçek v Switzerland App no 27510/08 (ECtHR, 15 October 2015), para 124

[43] The Law Society of Zimbabwe v The Minister of Transport and Communications and Another (2004) AHRLR 292 (ZwSC 2004), para 18.

[44] ACommHPR, 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa' (2002) ACHPR/Res 62(XXXII)02 Principle II (2); Interights and Others v Mauritania AHRLR 87 Comm no 242/2001 (ACommHPR, 2004), paras 78–79; Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe AHRLR 268 Comm no 294/04 (ACommHPR, 2009), para 80.

[45] Handyside v UK App no 5393/72 (ECtHR, 7 December 1976) para 44; Sunday Times v UK App no 6538/74 (ECtHR, 26 April 1979) para 45; Ceylan v Turkey App no 23556/94 (ECtHR, 8 July 1999) para 25; Murat Vural v Turkey App no 9540/07 (ECtHR, 21 January 2015) para 59; Perinçek v Switzerland App no 27510/08 (ECtHR, 15 October 2015), para 131.

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22 Gaweda v Poland App no 26229/95, (ECtHR, 14 March 2012), para 40.

[46] 18 HRC, 'General comment No 34' on 'Article 19 (Freedom of Opinion and Expression)' (2011) UN Doc CCPR/C/GC/34, para 24

[47] Recommendation CM/Rec (2014)6 of the Committee of Ministers to member States on a guide to human rights for Internet users – Explanatory Memorandum, para 47

[48] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, UN Doc. E/CN.4/1996/39 (1996)

[49] The principles compiled by the Special Rapporteur from various public sources, including the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4, annex) and the general comments adopted by the Human Rights Committee, including No. 10

Limitations of the freedom of expression

1. THE RESTRICTION MUST BE PRESCRIBED BY LAW;

International law and most constitutions only permit restrictions on the right to freedom of expression that are set out in law. This implies not only that the restriction is based in law, but also that the relevant law meets certain standards of clarity and accessibility. The European Court of Human Rights has elaborated on the requirement of "prescribed by law" under the ECHR:

> [A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail[50].

This is akin to the "void for vagueness" doctrine established by the US Supreme Court, which is also found in constitutional doctrine in other countries[51]. The US Supreme Court has explained that loosely worded or vague laws may not be used to restrict freedom of expression:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." (References omitted)[52]

(Article 19 of the Covenant); Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/14/23, paras 78, 20 April 2010

[50] The Sunday Times v. United Kingdom, note 22, para.49.

[51] See, for example, the Canadian Charter of Rights and Freedoms, Section 1; Dutch Constitution, Article 13.

25 Grayned v. City of Rockford, 408 U.S. 104, 108-9.

[52] Grayned v. City of Rockford, 408 U.S. 104, 108-9.

Laws that grant authorities excessively broad discretionary powers to limit expression fail the requirement of "prescribed by law".

In *Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors*, the Ontario High Court considered a law granting the Board of Censors the power to censor any film it did not approve of. In striking down the law, the Court noted that the evils of vagueness extend to situations in which unfettered discretion is granted to public authorities responsible for enforcing the law:

It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law[53].

In addition, the idea behind this first criterion is "First, the law has to be adequately accessible – the citizens have to be knowledgeable/informed, adequately to the circumstances, of the legal rules applicable to a particular case. Second, certain rule cannot be considered as a law, unless it is formulated precisely enough so as to enable the citizen to comply its behavior, who has to be able, with an adequate advice if necessary, to predict the level, which is reasonable in given circumstances, of the consequences that can occur as a result of a certain action. These consequences should not be absolutely predictable, experience shows it is unattainable"[54]

2. THE RESTRICTION MUST PURSUE A LEGITIMATE AIM – IN THE CASE OF THE EUROPEAN CONVENTION, THOSE LISTED IN ARTICLE 10(2);

[53] (1983) 31 O.R. (2d) 583 (Ont. H.C.), p. 592.
[54] Slagjana Dimiskova, p. 18, Freedom of Expression and Democracy, Vecer Press Doo Skopje, Cetis Print, 2008, Skopje.

It is clear from both the wording of Article 10(2) of the ECHR and the views of the

European Court of Human Rights that restrictions on freedom of expression that do not serve one of the legitimate aims listed in Article 10(2) constitute a violation of the right to freedom of expression[55] . This is also the position under the ICCPR and ACHR[56] . To satisfy this part of the test, a restriction must truly pursue one of the legitimate aims; it is illegitimate to invoke a legitimate aim as an excuse to pursue a political or other illegitimate agenda[57].

The Canadian Supreme Court has noted:

Justification … requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose as pressing and substantial as to be capable of overriding the Charter's guarantees[58].

3. THE RESTRICTION MUST BE "NECESSARY IN A DEMOCRATIC SOCIETY".

Regardless of the precise phrase used, this part of the test presents a high standard to be overcome by the State seeking to justify the restriction. The use of the word "necessary" in international law implies that, when deciding to restrict freedom of expression, the government must be faced with a situation of need, not merely convenience. The European Court has held:

[W]hilst the adjective "necessary", within the meaning of Article 10 (2), is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable".[59]

The European Court has further elaborated that necessity involves an analysis of whether:

[55] See, for example, Sunday Times v. the United Kingdom, note 22, paras. 54-57.
[56] See, for example, Mukong v. Cameroon, note 22, para. 9.7; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, note 15 (Inter-American Court of Human Rights
[57] Article 18, ECHR. See also Benjamin and Others v. Minister of Information and Broadcasting, 14 February 2(1), Privy Council Appeal No. 2 of 1999, (Judicial Committee of the Privy Council).
[58] R. v. Zundel, (1992) 2 SCR 731, p.733.
[59] Sunday Times v. the United Kingdom, note 22, para. 59.

[There is a] "Pressing social need" [whether] the inference at issue was "proportionate to the legitimate aim pursued" and whether the reasons adduced…to justify it are "relevant and sufficient."[60]

Constitutional courts such as the US Supreme Court have commented on the important nature of this requirement: Even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved[61].

There must be a proportionality between the effects of the measures taken on the right concerned and the objective of the measures[62]. A restriction which provided limited protection to reputation but which seriously undermined freedom of expression would not pass muster[63].

CRIMINAL DEFAMATION LAWS FAIL THE PROPORTIONALITY TEST

"It is necessary for all government that the people should have a good opinion of it. And nothing can be worse to any government than to endeavor to procure animosities, as to the management of it"[64]John Holt

Restriction of freedom of expression has to be proportionate[65], which means that a restrictive measure is the least intrusive instrument among those which might achieve their protective function and proportionate to the interest to be protected[66]. It is customary that in case of Freedom of expression violation, custodial sentences can be applied only in very exceptional

[60] See Lingens v. Austria, 8 July 1986, Application No. 9815/82, EHRR 407, paras. 39-40.
[61] Shelton v. Tucker, 364 US 479 (1960), p. 488.
[62]R. v. Oakes, note 37, pp.138-139 (Supreme Court of Canada).
[63] See, for example, Open Door Counselling and Dublin Woman Well Centre and Others v. Ireland, 29 October 1992, Application No. 1423/88 and 142335/88 (European Court of Human Rights), para.73
[64]Quoted in Make No Law, Antony lewis, vintage books, New York , pg 52
[65] Criminal defamation laws represent a potentially serious threat to freedom of expression because of the very sanctions that often accompany conviction. It is the conviction that makes criminal defamation laws disproportionate
[66] HRC, 'General comment No 34' on 'Article 19 (Freedom of Opinion and Expression)' (2011) UN Doc CCPR/C/GC/34, para 34.

circumstances[67]. Application of criminal law should only be counteracted in the most serious of cases and imprisonment is never an appropriate penalty[68].

Restrictions must be sufficient and proportionate to the aim pursued[69]. Restrictions that least restrict the rights and are rationally objective must be selected[70]. The use of criminal sanctions should be seen as last resort measures[71] when other alternative sanctions are already considered[72]. In Jersild[73] and Lehideux and Isorni[74], the ECtHR considered that imposition of a criminal conviction to restrict Freedom of expression is enough to violate the proportionality principle. Criminal defamation is such a black sheep, a tool to only silence critics, politicians no longer want to be held accountable, politicians as stated in *New York Times v Sullivan*[75] by the US Supreme Court public figures have lesser expectation of privacy and should tolerate a greater degree of criticism[76]. It should be noted that freedom of expression extends to both the favorable and unfavorable speeches, as noted by the House of Lords in *Handyside* that

"Freedom of expression … is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population"[77]

[67] Lohé Issa Konaté v Burkina Faso (2014) App no 004/2013 (ACHPR 2014), para 165.
[68] HRC, 'General comment No 34' on 'Article 19 (Freedom of Opinion and Expression)' (2011) UN Doc CCPR/C/GC/34, para 47.
[69] Lingens v Austria App no 9815/82 (ECtHR, 8 July 1986), paras 39-40.
[70] R. v Oakes Inter-American Court of Human Rights, Compulsory Membership, note 8, para 46; 1986 1 SCR 103, pp. 138-139.
[71] Venice Commission, Report on the Relationship between Freedom of Expression and Freedom of Religion (17-18 October 2008) <http://www.venice.coe.int/docs/2008/CDL-AD (2008)026-e.pdf> acessed 1 October 2017.
[72] Lehideux and Isorni App no 24662/94 (ECtHR 23 September 1998), para 57.
[73] Jersild v Denmark App no 15890/89 (ECtHR, 23 September 1994) para 35.
[74] Lehideux and Isorni App no 24662/94 (ECtHR, 23 September 1998) para 57.
[75] New York Times v Sullivan 376 US 254 (1964); Lingens v Austria App no 9815/82 (ECtHR, 8 July 1986).
[76] Aubry v. Éditions Vice-Versa Inc [1998] 1 SCR 591.
[77] Handyside v. the United Kingdom, Application no. 5493/72, Judgment 7th December 1976.

In August 1998, the ECtHR found that there had been a violation of Article 10 in the case of Hertel concerning the prohibition on the applicant from publishing articles on the health dangers of microwave ovens. The Court noted that the prohibition measures contested were disproportionate. According to the European judges:

> The effect of the injunction was […] partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied. It matters little that his opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas[78]

In Africa, the African Commission on Human and Peoples' Rights, in Resolution 169 adopted on 24th November 2010, condemns criminal defamation in the specific context of journalism and the media, by emphasizing that:

> "criminal defamation laws constitute a serious interference with freedom of expression and impedes on [sic] the role of the media as a watchdog, preventing journalists and media practitioners to practice [sic] their profession without fear and in good faith;"

Accordingly, the Commission calls upon States Parties to the African Charter on Human and Peoples' Rights:

> "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."

CRIMINAL DEFAMATION LAWS; THE BLACK SHEEP SHOULD BE ABOLISHED

> "Criminal defamation laws and laws proscribing 'insult' are providing heavy-duty ammunition to governments wishing to deny citizens their right to freedom of expression. Today over a quarter of all PEN's cases of imprisoned and prosecuted writers around the world have been charged under such repressive legislation. We urgently call for an end to this pernicious form of censorship."[79]

[78] Hertel judgment of 25 August 1998, Reports 1998-VI, para. 50.
[79] Harold Pinter ,Nobel Laureate and Vice-President of English PEN

Criminal defamation laws represent a potentially serious threat to freedom of expression[80] because of the very sanctions that often accompany conviction and they should be used as the last resort[81] According to Lisby: 'Even the mere threat of prosecution, results in the suppression of freedom of speech'.[82] A number of international bodies have condemned the threat of custodial sanctions, both specifically for defamatory statements and more generally for the peaceful expression of views[83]. Criminal defamation laws put the right of freedom of expression into a jeopardy, it makes the right moribund, and The Human Rights Committee has stated that restrictions on freedom of expression "may not put in jeopardy the right itself."[84] The US Supreme Court while recognizing that the right to freedom of expression can be limited, it also decried the fact that criminal defamation makes the right to freedom of expression unachievable[85]

Criminal defamation laws are mostly used by politicians and government officials, they are meant to silence all critics.[86] The politicians are to be reminded that "Freedom of expression …

[80] laws criminalizing defamation is a violation of freedom of expression and that criminal defamation laws are outdated and unduly harsh, hence they are unnecessary and disproportionate measures to protect the reputation of others and that they are ambiguous, vague or overly broad restrictions on freedom of expression and therefore impermissible and that such restrictions are only necessary and proportionate to secure the legitimate aim and that criminal defamation proceedings violate the right to freedom of expression and that breach of defamation laws leads to a harsh sanction

[81] Konate vs. Burkina Faso African Court on Human and People's Rights App No 004/2013, where the court stated that criminal defamation laws should only be used as a last resort when there is a serious threat to the enjoyment of other human rights in exceptional circumstances such as hate speech and incitement

[82] G C Lisby, 'No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence' (2004) 9 Communication Law and Policy 433.

[83] E/CN.4/2000/63, page 17

[84] Human Rights Committee, GC 34, para 21

[85] Shelton v. Tucker, 364 US 479, 488 (1960), where the court stated that Even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved

[86] Derbyshire County Council v. Times Newspapers Ltd, [1992] 3 All ER 65 (CA), affirmed [1993] 2 WLR 449 that It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech…. What has been described as "the chilling effect" induced by the

is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population"[87] the ECtHR held in Sunday Times v UK that speech that shocks, offends or disturb is also protected .the ideas shared on the Internet[88]

In his treatise on liberty John Stuart Mill advances many reasons why the individual should be free to advance hostile and even pernicious ideas. One such reason is this:

"The beliefs which we have most warrant for have no power to rest on, but a standing invitation to the whole world to prove them unfounded."

And here is another:

"In the case of any person whose judgment is really deserving g of confidence, how has it become so? . . . Because he has felt, that the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner." [89]

Criminal defamation laws are meant to induce fear into the electorates, they are meant to allow the continued corruption by government officials, there is a higher need to decriminalize defamation. The Human Rights Committee has recommended that;

States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has

threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public

[87] Handyside v. the United Kingdom, Application no. 5493/72, Judgment 7th December 1976.

[88] The Sunday Times v UK (1979) 2 EHRR 245; Fressoz and Roire v France, Handyside v UK (1976) 1 EHRR 737. Also see Oberschlick v Austria (1995) 19 EHRR 389.

[89] John Stuart Mill Utilitarianism, Liberty and Representative Government, Everyman's Library at pages 82 and 83 respectively

a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others[90]

The Assembly consequently takes the view that prison sentences for defamation should be abolished without further delay. In particular it exhorts states whose laws still provide for prison sentences – although prison sentences are not actually imposed– to abolish them without delay so as not to give any excuse, however unjustified, to those countries which continue to impose them, thus provoking a corrosion of fundamental freedoms.[91] Also in the Zimbabwean case of *Navajo Madanhire and Another vs. A.G.*[92]the court declared defamation laws as unconstitutional and the African Court on Human and Peoples Rights[93]where the court found inter alia criminal penalties for defamation are inappropriate because the civil remedy is sufficient. It was also submitted that International and Regional bodies have called upon states to decriminalize defamation on numerous occasions.

With regards to criminal defamation, the Kenyan high court while declaring section 290 of the penal code as unconstitutional made the following observations;

Freedom of speech and expression in a spirited democracy is a highly treasured value. The media, Authors, philosophers and thinkers have considered it as a prized asset to the individuality and overall progression of a thinking society, as it permits argument, allows dissent to have a respectable place, and honors contrary stances. Needless to emphasize, freedom of speech has to be allowed specious castle, but the question is should it be so specious or regarded as so righteous that it would make reputation of another individual or a group or a collection of persons absolutely ephemeral, so as to hold that criminal prosecution on account of defamation negates and violates right to free speech and expression of opinion. Keeping in view the foregoing, I propose here and now to see how the constitutional conception has been understood by the Courts where democracy and rule of law prevail[94].

[90] General Comment 34.
[91] Parliamentary Assembly of the Council of Europe, Resolution 1577 (2007), "Towards decriminalization of defamation."
[92] Const. Application No CCZ 78/12
[93] Lone Issa Konate vs The Republic of Burkina Faso
[94] Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR p 5

The high court was however not the first to hold those views, As long ago as 1923, the US Supreme Court declared in the case of *City of Chicago v Tribune Co:*

"Every citizen has a right to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely."

The court went ahead to say that;

The freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and views with complete freedom and by resorting to any available means of publication, subject again to such restrictions as could be legitimately imposed under Article 24 of the constitution[95].

The court overemphasized on the negative effects of criminating speeches, it held that;

The overhanging effect of the offence of criminal defamation is to stifle and silence the free flow of information in the public domain. This, in turn, may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices[96]

The UN, OSCE, and others have also declared that freedom of expression offences should never be criminalized.[97] Relatedly, the ECtHR overturned nearly all national courts' sentences of imprisonment under defamation law.[98] The ECtHR explained, 'Limits of permissible criticism

[95] Ibid at p 6

[96] Ibid at p 11

[97] Ambeyi Ligabo, Freimut Duve, Eduardo Bertoni 'International Mechanisms for Promoting Freedom of Expression' UN, OSCE, OAS (2002) <www.oas.org/en/iachr/expression/showarticle.asp?artID=87> accessed 1 December 2017. See also UNHCHR 'Expert Seminar on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (2-3 October 2008) Conference Room Paper #6; 'ConCourt says criminal defamation law is dead and invalid, cannot be used to arrest journalists' The New Zimbabwe (2 March 2017) <www.newzimbabwe.com/news-27501-Criminal+defamation+law+dead+ConCourt/news.aspx>accessed 30 December 30 2017

[98] Barford v Denmark App no 11508/85 (ECtHR, 22 February 1989); Thorgeir Thorgeirson v Iceland App no 13778/88 (ECtHR, 25 June 1992); De Haes and Gijsels v Belgium App no 19983/92 (ECtHR, 24 February 1997); Dalban v Romania App no 28114/95 (ECtHR, 28 September 1999); Nilsen and Johnsen v Norway App no 23118/93 (ECtHR, 25 October 1999); Colombani and Others v France App no 51279/99 (ECtHR, 25 June 2002); Castells; Scharsach and News Verlagsgesellschaft v Austria App no 39394/98 (ECtHR, 13 October 2003).

are wider [regarding] the government than . . . a private citizen or even a politician'[99].In Şener v Turkey, Şener was convicted of disseminating separatist propaganda after publishing an article endorsing a negative opinion of the government.[100] The ECtHR held that the public's right to be informed of Şener's opinion, 'irrespective of how unpalatable that perspective may be',[101] offset the State's national security claim. The criminal defamation laws fail the test of proportionality, they make the right derogatory. There is already civil defamation where an individual can obtain damages, what does criminal defamation serve? Two criminal defamation suits filed against journalists by the Chilean president and a Peruvian governor have been widely condemned, fearing criminal sanctions could have a chilling effect on press in both South American countries[102] Damages sought in those cases were found to be 'utterly disproportionate . . . [and] typical of the way powerful . . . public officials use the justice system to censor and retaliate against journalists'.[103] Criminal defamation only serves one purpose, the censoring of government critics. A government cannot 'use a sledge-hammer to crack a nut'.[104] Similarly, measures adopted must 'not be arbitrary, unfair, or based on irrational considerations . . . [and] must be rationally connected to the objective'.[105] Disproportionate monetary and criminal

[99] Karatas v Turkey App no 23168/94 (ECtHR, 8 July 1999) [50-52]. See also New York Times v Sullivan 376 US 254 (1964); Lingens v Austria App no 9815/82 (ECtHR, 8 July 1986) [45]; Ceylan v Turkey App no 23556/94 (ECtHR, 8 July 1999); Sürek (n 118); Mahmudov and Agazade v Azerbaidjan App no 35877/04 (ECtHR, 18 December 2008) [39].

[100] Şener v Turkey App no 26680/95 (ECtHR, 18 July 2000).

[101] ECHR art 10; Şener (n 127).

[102] OAS, 'Office of the Special Rapporteur Expresses Concern over a New Criminal Conviction for Defamation against a Journalist in Peru' (6 May 2017) <www.oas.org/en/iachr/expression/showarticle.asp?artID=1024&lID=1.asp> accessed 5 December 2017; 'Criminal defamation suits in Peru and Chile could have chilling effect' Committee to Protect Journalists (3 June 2017) <http://cpj.org/reports/2017/03/critics-are-not-criminals.php> accessed 5 December 2017; 'Peru: RSF condemns disproportionate penalties in defamation cases' Reporters Without Borders (5 October 2017) <http://rsf.org/en/news/peru-rsf-condemns-disproportionate-penalties-defamation-cases> accessed 5 December 2017; 'Freedom of the Press 2015: Peru' Freedom House http://freedomhouse.org/report/freedom-press/2015/peru accessed 5 December 2017.

[103] 'Peru: RSF condemns disproportionate penalties in defamation cases' (n 137).

[104] Mendel ibid

[105] R v Oakes (1986) 1 SCR 103 [138]-[139].

punishments can cause a chilling effect for bloggers and modest-income journalists. For example, in Oman, two journalists who alleged corruption in the Omani judiciary were convicted of 'undermining the prestige of the state' for publishing material that would 'disturb public order'.[106] Each face three year's imprisonment and were initially held on $130,000 bail. The UN Special Rapporteur condemned Oman's actions as part of a pattern of 'silencing voices of dissent'[107].

In Lohé Issa Konaté v Burkina Faso,[108] a journalist who wrote two articles accusing a government official of corruption was sentenced to one-year imprisonment and $12,000 in monetary penalties[109]. The ACtHPR held that Burkina Faso must amend its law to disallow criminal penalties for defamation and reasoned that the punishment represented a disproportionate interference for criticizing a public figure[110].

In *Taranenko v Russia, Taranenko* was one of approximately forty protestors who forced her way into a government building, occupied the building, and distributed anti-government leaflets through the windows.[111] While the ECtHR found that Taranenko's actions disturbed the public

[106] 'Urgent Action: Journalists' Trial Postponed To 12 December' Amnesty International (18 October 2017) <www.amnestyusa.org/sites/default/files/uaa20616_4.pdf> accessed 26 October 2017

[107] 'Oman: 'Journalists Sentenced over Articles Alleging Corruption' Human Rights Watch (3 October 2017) <www.hrw.org/news/2017/10/03/oman-journalists-sentenced-over-articles-alleging-corruption> accessed 26 October 2017; 'Oman: End crackdown on peaceful dissent' Amnesty International (18 October 2017) www.refworld.org/docid/583844964.html accessed 27 October 2017.

[108] Lohé Issa Konaté v The Republic of Burkina Faso Comm no 004/2013 (ACmHPR, 2014).

[109] Lohé Issa Konaté (n 108).

[110] Lohé Issa Konaté (n 108).

[111] Taranenko v Russia App no 19554/05 (ECtHR, 15 May 2014).

order, they unanimously held that her punishment of one-year pre-trial detention and three-year suspended prison sentence was disproportionate and would deter future activists.[112]

CONCLUSION

The right to freedom of expression is a fundamental human right[113]. This right has a long five-decade philosophical- ethical and legal-political history[114] the right has a wide scope and extends to the internet and on other electronic sources[115]. The right further includes the right to anonymous speech[116] and its reception[117]. Newsgathering[118] and publication is also part and parcel of the right to freedom of expression[119]. The European Human Rights Court in *Handyside v The United Kingdom*[120] described freedom of expression as one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. The right as the European court mentioned in Handyside is applicable not only to

[112] 'Oman: 'Journalists Sentenced Over Articles Alleging Corruption' (n 184); 'Oman: End crackdown on peaceful dissent' (n 184).

[113]International Covenant on Civil and Political Rights, art 19; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10; Nihal Jayawickrama Judicial Application of Human Rights Law (Cambridge University Press 2002) 665-670...

[114] US Declaration of Independence, French Declaration of the Rights of Man and of the Citizen dated 1789 (Article 11), Virginia Declaration of Rights dated 1776 (Article 12), The Constitution of the United States of America dated 1791 (First Amendment).

[115] Reno v ACLU 521 US 844 (1997); UNCHR, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2011) UN Doc A/HRC/17/27; General Comment No. 10, CCPR/C/GC/10 adopted on 29 June 1983, para 2; Richard Clayton and Hugh Tomlinson, The Law of Human Rights (1st end, OUP 2000) 1059

[116]Talley v California 362 US 60 (1960); McIntyre v Ohio Elections Commission 514 US 334 (1995); Dendrite International Inc v Doe No 3 775 A 2d 756 (NJ 2001); Council of Europe, 'Declaration on Freedom of Communication on the Internet' (2003) prin 7; Article 19: Global Campaign for Free Expression, Statement on the Right to Communicate (London, 2003) http://www.article19.org/data/files/pdfs/publications/right-to-communicate.pdf (accessed 1/1/14); Constitution of Sweden 1991, ch 2.

[117]4 Reader Privacy Act 2011 (California); Tattered Cover Inc v City of Thornton 44 P.3d 1044 (Colo 2002); The Constitution of the United States, First Amendment.

[118] Goodwin v UK (1996) 22 EHRR, 123; Constitution of South Africa, s 16(1) (a).

[119]Branzburg v. Hayes 408 U.S. 665, 681 (1972); Article 19 v The State of Eritrea, African Commission of Human and Peoples' Rights, Communication No. 275/2003 (2007); Media Rights Agenda and Others v Nigeria (2000) AHRLR 200 (ACHPR 1998).

[120] Handyside v The United Kingdom (5493/71) [1976] ECHR 5 (7 December 1976)

information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Freedom of expression can then be understood as three distinct aspects: the right to seek, receive and impart information and ideas[121]. The freedom of the press, the freedom of the print, electronic and online media, is clearly one of the major components of this infrastructure of ideas. The survival, the defense and the flourishing of all these ideas is critical to us. It is this infrastructure of ideas that restrains tyranny, underpins national institutions, and generates constitutional rule as opposed to personal dictatorship[122] .Freedom of press is the sine qua non of a true democracy. Indeed, it has been held to be the fourth limb of the government[123]

The constitutional right to freedom of expression is a powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion[124] criminal defamation is therefore a black got that only needs to be killed[125] criminal defamation is a tool to censor critics as it was rightly put by Lord Bridge of Harwich that [126]

"In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political **censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding**

[121] R. Smith and C. Van Den Anker, The Essentials of Human Rights (Hodder Arnold 2005) 128
[122] David Makali (ed), Media Law and Practice: The Kenyan Jurisprudence(Phoenix Publishers Ltd Nairobi 2003) 30
[123] Jeffrey Archer in the fourth Estate records
[124] Cohen v. California, 403 U.S. 15 (1971) Justice Harlan 24-25
[125] In Hector v Attorney-General of Antigua and Barbuda [1990] 2 AC 312 the Judicial Committee of the Privy Council held that a statutory provision which made the printing or distribution of any false statement likely to undermine public confidence in the conduct of public affairs a criminal offence contravened the provisions of the constitution protecting freedom of speech.
[126] Ibid at p318:

office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalizes statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion." (Emphasis added)

Let’s strangle the black sheep!

Let’s help the shepherd!

Let’s decriminalize defamation!