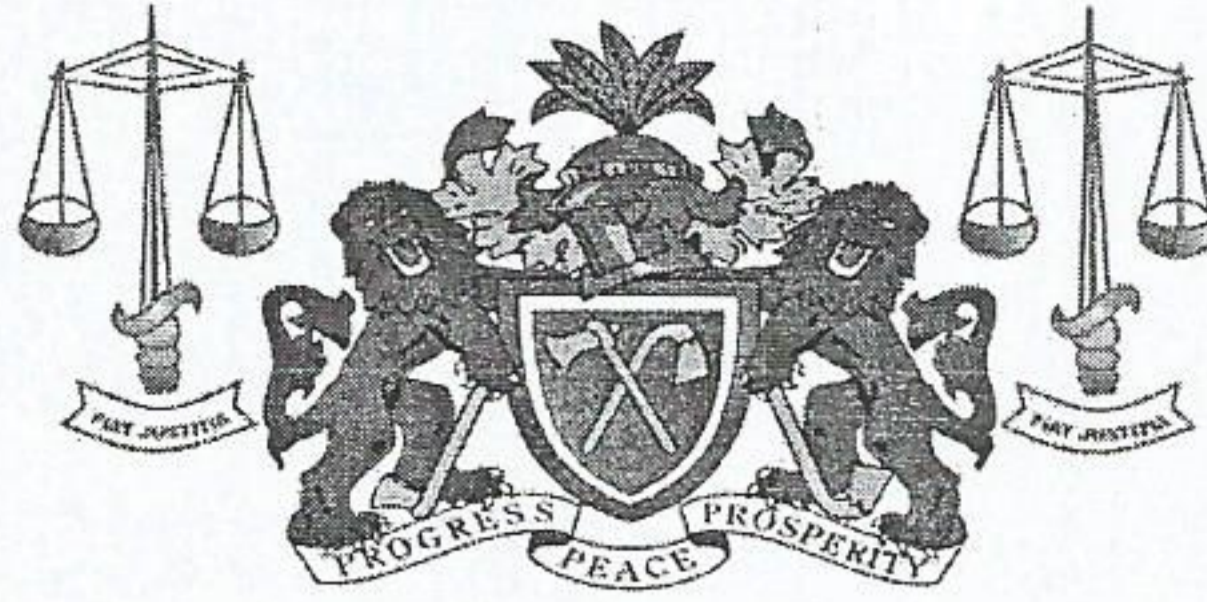


IN THE SUPERIOR COURTS OF THE GAMBIA



IN THE SUPREME COURT OF THE GAMBIA

SC CIVIL SUIT NO: 1/2014

BETWEEN:

GAMBIA PRESS UNION 1st PLAINTIFF
BABOUARR CEESAY 2nd PLAINTIFF
SAIKOU JAMMEH 3rd PLAINTIFF

AND

THE ATTORNEY GENERAL DEFENDANT

CORAM:

THE HON. MR. JUSTICE H B JALLOW, CHIEF JUSTICE
THE HON. MR. JUSTICE A D YAHAYA, JSC
THE HON. MR. JUSTICE N C BROWNE-MARKE, JSC
THE HON. MR. JUSTICE C S JALLOW QC, JSC
THE HON. MRS. JUSTICE M M SEY, JSC

COUNSEL:

MRS. H SISAY-SABALLY, with her S Jahateh, for the Plaintiffs
MR. ABOUBACARR TAMBADOU Attorney General, with him Binga D, for the
Defendant

C S JALLOW QC, JSC

Introduction

By a Writ of Summons dated and filed 2nd September, 2014, supported by two affidavits verifying facts relied upon, the Plaintiffs challenged the constitutionality of certain sections of the Criminal Code relating to sedition and publication of false news. The First Plaintiff is a Union representing journalists and media practitioners in The Gambia and duly registered under the Laws of The Gambia. The Second Plaintiff is a media practitioner/journalist who at the material time was the Vice President of the First Plaintiff. The Third Plaintiff is also a media practitioner/journalist and a member of the First Plaintiff. All the three Plaintiffs, by virtue of the profession they represent and/or in which they practice, have a legitimate interest in initiating this action as, according to them, their constitutional rights to free speech and freedom of the press and other media are being violated on the basis of the existence of certain laws enacted by the Parliament of The Gambia.

2. The specific law concerned is the Criminal Code (Cap. 10:01) of the Laws of The Gambia. The sections of the Code whose constitutionality are being challenged are sections 51 (definition of "seditious intention"), 52 (offence for committing seditious intention), 52A (power to confiscate printing machine on which seditious material is published), 53 (statutory time limit for initiating prosecution), 54 (required evidence to warrant a conviction), 59 (publishing or reproducing statement, rumour or report likely to cause fear and alarm to the public or to disturb the peace), and 181A (false publication and broadcasting).

3. The sections of the Constitution relied upon by the Plaintiffs in support of their challenge are sections 4 (supremacy of the Constitution), 5 (power to commence action for declaration of act or omission as inconsistent with the Constitution), 17 (respecting fundamental rights and freedoms), 25 (1) (a) & (b) (freedom of speech and expression, including freedom of the press and other media), 25 (4) (power of the Legislature to impose reasonable restrictions on the exercise of rights and freedoms which are necessary in a democratic society), 207 (guaranteeing of

freedom of the press and other information media), and 209 (right and freedom of the press guaranteed under section 207 subject to laws that are reasonably required in a democratic society).

Issues

4. The issues presented in the application by the Plaintiffs are, in the considered view of this Court, three-fold:

(a) Whether or not the provisions of the Criminal Code on sedition and false news unreasonably restrict the rights of freedom of expression and the media;

(b) If the answer to the first issue is in the affirmative, whether those restrictions are lawful, in the sense that they have a legitimate aim, are 'provided by law' and are necessary in a democratic society; and

(c) If the answer to the second issue is in the affirmative, whether the restrictions are proportionate, having regard to the constitutional guarantees of freedom of speech and the right and freedom of the press and other media.

5. In the course of this judgment, all these three issues will be considered and dealt with together in relation to the provisions of the Criminal Code whose validity is being contested.

Summary of Submission by Counsel for the Plaintiffs

6. According to learned Counsel for the Plaintiffs, the sedition and false news provisions contained in the Criminal Code tantamount to interference with the fundamental human rights to freedom of expression and of the media as protected by the Constitution of the Republic of The Gambia. Such interference, according to learned Counsel, is not capable of justification as the provisions concerned fail to meet the principle of legality and proportionality. As a consequence, such unlawful interference with constitutional rights ought to be declared unconstitutional and void.

7. Specifically, sections 52, 59 and 181A of the Criminal Code go beyond the scope of the lawful limitations imposed on the fundamental rights of the freedom of expression and of the media as set out in sections 25 (4) and/or 209 of the

Constitution. The proper construction of the scope of the lawful limitations upon fundamental rights and freedoms, in learned Counsel's submission, ought to take into account the lawfulness of such limitations as a matter of international human rights law, considering that The Gambia is a signatory to the International Covenant on Civil and Political Rights, African Charter on Human and Peoples' Rights and Treaty of the Economic Community of West African States. Learned Counsel, therefore, invited this Court to interpret domestic law provisions (that is, the Criminal Code and the Constitution) in a manner that is compatible with international law.

8. In addition, sections 52, 59 and 181A of the Criminal Code, according to learned Counsel, amount to an unlawful infringement of constitutional rights because those provisions violate the criteria by which the lawfulness of limitations on rights is judged. In essence, the provisions violate the criteria of sufficient legal certainty and proportionality. In any case, the State bears a heavy burden of proof to demonstrate to the Court that the said provisions are capable of satisfying the criterion of serving a legitimate aim. The Plaintiffs, therefore, reserved their position on that issue until the State set out their purported purpose of the sedition and false news provisions. In outlining this submission, learned Counsel relied on the UN Human Rights Committee's report which stated that:

"[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."

9. In relation to sections 59 and 181A of the Criminal Code in particular, learned Counsel submitted that while those sections presuppose that it is possible to state with certainty when a statement is or is not false, the determination of the falsity of a statement is not quite as straightforward, especially in the context of political and public comments that journalists undertake. In many areas of journalistic comments, fact and opinion must necessarily merge as a journalist may be charged with providing comment on the success or failure of a policy or proposal and there will naturally be disagreements between reasonable people on whether the journalist's

assessment is correct. The question, therefore, of whether a publication is false or true is a difficult one, especially where a journalistic publication seeks to comment upon currently accepted policies. Learned Counsel specifically referenced the phrase "likely to cause fear and alarm" outlined in section 59 as being vague and uncertain.

10. Accordingly, the enactment of sections 52, 59 and 181A of the Criminal Code exceeds the powers conferred on the Legislature by the Constitution and is therefore contrary to the constitutional obligation that requires the Legislature, along with the other arms of government, to respect and uphold the fundamental human rights enshrined in the Constitution. Consequently, the enacted sections are void under section 4 of the Constitution as being inconsistent with the fundamental rights protected by the Constitution.

11. Furthermore, according to learned Counsel, even though the restrictions on the right to free speech and expression are formally set out in the Criminal Code, they cannot be characterized as 'law' in substance because the restrictions relating to sedition and false news are not defined with sufficient clarity. An insufficiently defined provision, in learned Counsel's submission, provides scope for abuse by authorities and persons subject to it are unable to predict the legal consequences of their actions.

12. At the end of her submission, learned Counsel for the Plaintiffs invited the Court to interpret the terms "reasonable restriction", and "reasonably required" as respectively contained in sections 25 (4) and 209 of the Constitution.

Summary of Submission by Counsel for the Defendant

13. Learned Counsel for the Defendant conceded the Plaintiffs' Counsel's submissions on sections 51, 52, 52A, 53, 54 and 59 of the Criminal Code as being inconsistent with the relevant sections of the Constitution, save section 181A the constitutionality of which he vigorously defended. According to learned Counsel, the right to freedom of speech is a constitutional right; it is, however, not an absolute right. In that context, therefore, it is subject to such reasonable restrictions as may be prescribed by law, justifiable and necessary in a democratic society.

14. While the Court may have regard to international best practices and thus take into account international treaties that The Gambia is a signatory to, including taking into account interpretations, applied by international bodies, these are not binding on this Court; they are merely of persuasive consequence. Any interpretation of provisions of the Constitution and other laws must be carried out having regard to the particular context of The Gambia. In other words, interpretations of law or international treaties adopted or applied in other jurisdictions do not necessarily translate into the same effect or result with regard to the laws of The Gambia. Each case must be dealt with on the particularities of its own facts having regard to the prevailing political, social and economic circumstances in which the fundamental rights provisions are being invoked.

15. Learned Counsel rejected the Plaintiffs' Counsel's submission that the restriction framed in section 181A is not prescribed by law or that it is unreasonable or disproportionate or unnecessary in a democratic society. In his submission, section 181A is contained in the Criminal Code which is an Act of Parliament made pursuant to legislative powers conferred by the Constitution (he referred to section 7 (a) of the Constitution) and, in that context, the restriction it places on the right to freedom of speech is prescribed in law. In addition, the word "false" in the context used in section 181A is neither vague nor ambiguous.

16. Furthermore, according to learned Counsel, falsity is not an uncommon term in legal discourse and therefore ought to bear its ordinary meaning. Courts deal routinely with issues of perjury or falsity in criminal and civil proceedings (and he cited sections 89, 95, 96, 114 and 302 of the Criminal Code in which the ingredients of offence contain falsehood) and it would be incorrect to allude that courts are incapable of differentiating between what is false and what is true. It is important to make a distinction between instances where the maker of a false statement did so in complete ignorance of the falsity of his or her statement at the time the statement was made and those where the maker of the false statement did so willfully, negligently or without reason to believe that the statement is true. The latter, in learned Counsel's submission, is the mischief that section 181A seeks to address and the section therefore has a legitimate aim; it aims to protect all the public interests identified in section 25 (4) of the Constitution, namely preservation of

national security, maintenance of public order, decency or morality, or in relation to contempt of court (notwithstanding that these are not specified in section 181A of the Criminal Code).

17. Learned Counsel further submitted that section 181A of the Criminal Code creates a reasonable restriction on the exercise of the right to freedom of expression, considering that it does not make publication of false news a strict liability offence. Rather, the prosecution must prove beyond a reasonable doubt every element of the offence of publishing false news, namely that the false news was made willfully, negligently or recklessly.

18. Learned Counsel concluded his submission by arguing that if publication of false news remains unchecked, it can have catastrophic consequences on society, especially in the context of modern advances in technology and the rapid growth of social media. The Court, in learned Counsel's submission, should consider the prevailing context in which the restriction is being made in order to determine its reasonableness. Section 181A of the Criminal Code was not, in his view, enacted in excess of legislative authority and should therefore be upheld.

Decision

19. The supremacy of the Constitution over all other laws is clearly outlined in section 4 thereof and any such laws that are inconsistent with the Constitution are void to the extent of the inconsistency. Chapter IV of the Constitution embodies the fundamental rights and freedoms which are protected. The nature of the protection is such that the provisions are entrenched, thus demonstrating the higher value placed on them by the framers of the Constitution.

20. It is correct that a Constitution, no less the Constitution of the Republic of The Gambia, must be given a broad and purposive construction. In *The AG of Gambia v. Momodou Jobe [1984] UKPC 10*, the Privy Council held that:

"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled; is to be given a generous and purposive construction."

21. However, the first rule of this Court when the constitutionality of an Act of Parliament is challenged is to presume the Act of Parliament to be constitutional unless shown otherwise. This is a heavy burden placed on the Plaintiffs. In *Steven Grant v The State* [2006] UKPC 2 (16th January 2006) at page 10, the Privy Council (per Lord Bingham) stated that:

“It is clear that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and the burden on a party seeking to prove invalidity is a heavy one. Thus the Appellant has a difficult task.”

22. In *Mootoo v The AG of Trinidad & Tobago* [1979] 1 WLR 1334 at pages 1338-1339, the Privy Council held that:

“It is a strong thing indeed to rule that legislation passed by a democratic Parliament establishing a new type of judicial body to adjudicate upon a new body of law is unconstitutional. The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one.”

23. The same rule applies with respect to whether an enacted parliamentary measure is reasonably required (in a democratic society). In *AG & Anor v. Antigua Times Ltd.* [1976] AC 16 at page 32, the Privy Council held that:

“Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question are, to use the words of Louisy J.: “so arbitrary as to compel the conclusion that it does not involve an exertion of a different and forbidden power”.

24. In the light of these constitutional pronouncements which strengthen this Court's own position, this Court differs from the submission of learned Counsel for the Plaintiffs that the State bears the burden of proof to demonstrate to this Court that sections 52, 59 and 181A of the Criminal Code are capable of satisfying the criterion of serving a legitimate aim. Rather, the obligation rests with the Plaintiffs to

discharge the burden of proving unconstitutionality. After all, they are the ones questioning the validity of those provisions and where they are claiming that specific provisions of the Criminal Code do not serve a legitimate purpose, the burden rests with them to establish that. This Court does not interpret the UN Human Rights Committee's report learned Counsel for the Plaintiffs relied upon as shifting the burden of establishing unconstitutionality. Rather, what that report does is to set out how a defendant may successfully resist a claim that a provision of a law that appears to infringe rights and freedoms does not have a legitimate aim.

25. Still in relation to the issue of constitutional presumption of validity of an Act of Parliament, this Court also presumes that the framers of the Constitution of the Republic of The Gambia, in outlining in detail the fundamental rights and freedoms of individuals and of the press and other media, intended that those rights and freedoms must be jealously guarded against arbitrary interference. The exceptions or restrictions created to the exercise of those rights and freedoms must be given careful and stricter construction. In the case of *In State v Petrus [1985] LRC (Constitution) 699, 720D-F*, the Botswana Court of Appeal, referring to the case of *Corey v. Knight (1957)150 Cal App 2d 671*, observed that:

"it is another well known principle of construction that exceptions contained in constitutions are ordinarily to be given strict and narrow, rather than broad, constructions."

26. This Court recognises at the same time that the exercise by an individual of his or her rights and freedoms is subject to non-interference with the rights and freedoms of others (see section 17 (2) of the Constitution). An Act of Parliament or a provision therein is not to be construed or held as unconstitutional on a mere assertion that it impinges on the rights and freedoms exercisable by persons. The Constitution creates exceptions to the exercise of rights and freedoms and thus places a discretion on Parliament to make laws providing limitations to the exercise of such rights and freedoms as Parliament considers are reasonably required in a democratic society. Towards that end, whatever laws Parliament makes must be lawful, must have a legitimate aim and must be proportionate. In *Kenneth Surrat &*

Ors v. The AG of Trinidad & Tobago [2008] A C 655, the Privy Council, in a majority decision held that:

"It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in sections 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The courts may on occasion have to decide whether Parliament has achieved the right balance."

27. The mere fact that the Constitution empowers Parliament to place limitations on the exercise of individual rights and freedoms means that Parliament has an obligation to guard against mischief in the exercise of those rights and freedoms. The mischief, as evident in section 25 (4) of the Constitution, is to prevent interference with the sovereignty and integrity of The Gambia, prevent impairment of national security, ensure maintenance of public order, decency or morality and in relation to contempt of court. In enacting a law limiting or restricting the exercise of individual rights and freedoms, Parliament need not specifically provide in the law the mischief it is trying to prevent or guard against. That can be discerned or inferred from the law itself and therefore the mere absence of the basis upon which the law is enacted limiting or restricting rights and freedoms is not, on that account alone, fatal to the validity or existence of the law. In *The AG of Gambia v. Momodou Jobe [1984] UKPC 10*, the Privy Council buttressed this position in the following terms:

"Where, as in the instant case, omissions by the draftsman of the law to state in express words what, from the subject matter of the law and the legal nature of the processes or institutions with which it deals, can be inferred to have been Parliament's intention, a court charged with the judicial duty of giving effect to Parliament's intention, as that intention has been stated in the law that Parliament has passed, ought to construe the law as incorporating, by necessary implication, words which would give effect to such inferred

intention, wherever to do so does not contradict the words actually set out in the law itself and to fail to do so would defeat Parliament's intention by depriving the law of all legal effect."

28. It is incumbent on this Court, in determining the validity of an Act of Parliament or a provision thereof, to establish what Parliament's intention was in enacting the Act. If appropriate inference, where that is necessary, can be drawn to give effect to such intention without causing harm to the underlying protected right and freedom, then that is the course of action to follow. Parliament does not legislate in a vacuum; it is guided by policies designed to achieve a desired goal or to prevent a mischief, whether current or potential, as part of the process of good governance of a country. This, in essence, underlines the judicial presumption to the constitutionality of an Act of Parliament. Embedded within that presumption is that Parliament does not engage in the futile act of enacting laws that contravene the provisions of the primary and fundamental law of the country, namely the Constitution. Indeed section 17 (1) of the Constitution requires all organs of the Executive, the Legislature and other persons to respect the fundamental rights and freedoms enshrined in the Constitution. In addressing the constitutional challenge before this Court, therefore, the responsibility of this Court is simply to determine whether the Parliament of The Gambia, in enacting laws to restrict the exercise of rights and freedoms of speech and of the press and other media as mandated by the Constitution, has achieved the right balance.

29. This Court agrees with the submission of learned Counsel for the Defendant that any interpretation of the provisions of the Constitution must be premised in the particular context of The Gambia. In other words, the Constitution does not exist in isolation; it exists within a particular context and must therefore be interpreted within that context if it is to have any value as the Supreme Law of The Gambia. In that regard, this Court considers it appropriate and indeed quite fundamental that the question of the validity or otherwise of any provision of the Constitution must be looked at carefully with due regard to the prevailing political, social and economic circumstances of the country. Indeed Parliamentary intention in any legislative measure takes into account both current and future circumstances to the extent defined or contemplated in the legislative measure.

30. With regard to the submission of learned Counsel for the Plaintiffs that the provisions of the Criminal Code criminalizing sedition and the publication of false news do not in substance constitute 'law' or cannot be so characterized on the basis that they are vague and/or lack sufficient clarity, this Court takes the view that every Act of Parliament that is lawfully enacted by a duly constituted Parliament acting in accordance with the Constitution and the rules of Parliament qualifies as law. That status of law remains until the Act is either repealed by Parliament or declared as invalid by the Court. Section 7 (a) of the Constitution indeed makes it clear that, in addition to the Constitution, other laws of The Gambia comprise Acts of the National Assembly.

Sections 51, 52, 52A, 53, 54 and 59 of the Criminal Code

31. As already noted, the initial sections of the Criminal Code (Cap. 10:01) whose validity is being challenged are sections 51, 52, 52A, 53, 54 and 59. These sections, save section 59 which deals with the offence of publication of false news, collectively deal with the law criminalizing sedition, whether of publication or otherwise. The definition of what constitutes a seditious intention in section 51 is, in the view of this Court, the most fundamental. The foundation for sections 52, 52A, 53 and 54 is essentially built on these sections. If the foundation survives, whether in whole or in degree, they survive too; if the foundation collapses, they collapse with the foundation, save where this Court determines that they or any of them can be severable and therefore able to stand on their own independently.

32. Section 51 defines "seditious intention" and, by virtue of section 52, a person commits an offence if he or she:

- "(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;*
- (b) utters any seditious words;*
- (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or*

(d) *imports any seditious publication, unless he or she has no reason to believe that it is seditious.*"

33. Section 59 of the Criminal Code is in the following terms:

"(1) A person who publishes or reproduces any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace, knowing or having reason to believe that the statement, rumour or report is false, commits a misdemeanor and is liable on conviction to imprisonment for a term of two years.

(2) It shall be no defence to a charge under subsection (1) of this section that he or she did not know or did not have reason to believe that the statement, rumour or report was false unless he or she proves that, prior to publication, he or she took reasonable measures to verify the accuracy of the statement, rumour or report."

34. The provisions of the Constitution that these sections of the Criminal Code are claimed to violate are in the following terms, beginning with section 25, the relevant part of which reads:

"(1) Every person shall have the right to –

(a) freedom of speech and expression, which shall include freedom of the press and other media;

(b) freedom of thought, conscience and belief, which shall include academic freedom;"

35. Section 207 (1) of the Constitution provides that:

"(1) The freedom and independence of the press and other information media are hereby guaranteed."

36. However, these sections were not enacted in isolation. Section 25 (4) of the Constitution provides the following limitations:

“(4) The freedoms referred to in subsections (1) and (2) shall be exercised subject to the law of The Gambia in so far as that law imposes reasonable restrictions on the exercise of the rights and freedoms thereby conferred, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of The Gambia, national security, public order, decency or morality, or in relation to contempt of court.”

37. Along similar lines but in relation to the press and other media, section 209 of the Constitution provides that:

“The provisions of sections 207 and 208 are subject to laws which are reasonably required in a democratic society in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of others.”

38. As is evident from these provisions of the Constitution, the rights and freedoms relative to free speech and of the press and other media are made subject to laws Parliament may make circumscribing those rights and freedoms to the extent “necessary in a democratic society” or “reasonably required in a democratic society”. This Court has to determine whether the right balance has been achieved by, on the one hand, Parliament ensuring respect for those rights and freedoms consistent with section 17 (1) of the Constitution and, on the other hand, creating restrictions in the exercise of those rights that are considered necessary and reasonable in the democratic society of The Gambia as permitted under sections 25 (4) and 209 of the same Constitution.

39. Both learned Counsel for the Plaintiffs and the Defendant have drawn the attention of this Court to essentially the same treaties, notably International Covenant on Civil and Political Rights, African Charter on Human and People’s Rights and the Treaty of the Economic Community of West African States. These treaties essentially identify the same rights and freedoms and recognise the

limitations that may be placed on the exercise of those rights. In the opinion of this Court, those treaty provisions are no more different in substance than the rights and freedoms enshrined in the Constitution in relation to free speech and freedom of the press and other media.

40. Parliament, in enacting legislation restricting any individual rights and freedoms, must satisfy the criteria set out by this Court recently in *Ousainou Darboe & 19 Ors v. Inspector General of Police & Ors* [2017], namely that the restriction:

- (a) *must be reasonable;*
- (b) *must be necessary in a democratic society; and*
- (c) *must be imposed for one or more of the purposes set out in section 25 (4) of the Constitution.*

In the context of this particular case, the restriction imposed must also meet one or more of the purposes set out in section 209 of the Constitution.

41. Embedded within these fundamental criteria in meeting the test of constitutionality are that Parliament must be clear and unambiguous as to what right or freedom it is restricting, such restriction must be lawful, the legislative measure comprising the restriction must have a legitimate aim and the restriction must be proportionate to the mischief being prevented or guarded against.

42. The legislative measure concerned must satisfy all these criteria as a whole, not just some of them, in order to stand the test of constitutionality. The fundamental rights and freedoms Chapter of the Constitution is entrenched for a reason: the framers of the Constitution consider respect for the rights and freedoms enshrined therein to be sacrosanct and may only be interfered with in the specific circumstance of each right and freedom as prescribed in the Constitution.

43. Learned Counsel have also referred this Court to a number of judicial decisions from within and outside the Commonwealth dealing with the issue of sedition and libel laws. Although not of any binding nature, this Court has carefully considered those decisions. In particular, this Court has considered the recent judgment of the Community of Justice of the Economic Community of West African

States in the case of the *Federation of African Journalists & Ors v. The Republic of The Gambia* [2018], Suit No: ECW/CCJ/APP/36/15, Judgment No: ECW/CCJ/JUD/04/18 and observe that what was in issue in that Suit was not the constitutionality of the laws contested, but rather whether those laws are consistent with international law protecting the freedom of speech and of the press. Indeed it is noteworthy that the Community of Justice specifically stated that:

“The Powers conferred on the Court, in the 2005 Supplementary Protocol should (sic) be clear and should not be misconstrued as the jurisdiction to exercise or (sic) control over the constitutionality of laws of member states which is the preserve of domestic constitutional courts.”

44. The present case hinges on the issue of constitutionality of the specific laws of the Criminal Code, a matter on which this Court has exclusive jurisdiction in accordance with section 127 (1) (b) of the Constitution.

45. Accordingly, this Court has come to the decision that the ultimate determining factors with respect to this case rest within the Constitution of the Republic of The Gambia, the intention of Parliament in enacting the challenged provisions of the Criminal Code applying the criteria outlined above, and the specific circumstances of The Gambia. To do otherwise would, in the view of this Court, be applying or adhering to decisions that are inapplicable or would have been made in contexts different from those of The Gambia, albeit relying on the same or similar rules or standards of international law.

46. The history of sedition shows that it was a common law offence in the UK. According to James Fitzjames Stephen in his *"Digest of the Criminal Law"*:

“a seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of His Majesty, his heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite

any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects."

47. The sedition laws have been described as a colonial-era law designed to suppress the voice of free expression; one that did not recognise the freedom of expression as a right compared to the level at which the right is held in modern times; and one that had found its way, in some form or the other, into the criminal laws of many Commonwealth jurisdictions.

48. The scope of the law is, no doubt, very broad and has been the subject of constitutional challenge across the Commonwealth and indeed beyond, with some jurisdictions preferring to abolish it completely through the legislative process (as the United Kingdom did in 2009). However, this Court takes the position that despite the colonial setting in which sedition laws were born, the question of their constitutionality or otherwise must be considered within the context of the constitution of each jurisdiction. As already indicated earlier in this judgment, the sections of the Criminal Code that are being challenged are presumed to be valid and constitutional unless determined otherwise. The question is, have the Plaintiffs discharged the burden of their constitutional challenge?

49. The definition of "seditious intention" in section 51 of the Criminal Code is central and it is from it that the validity of the other provisions is hinged since they all reference sedition. It is important, therefore, that each article of definition within that section is considered separately. In this context, this Court is reminded of and adopts Lord Diplock's statement in *The Attorney General of Gambia v. Momodou Jobe [1984]* (cited earlier in this judgment) wherein in holding section 8 (5) of the Special Criminal Court Act, 1979 unconstitutional, His Lordship said:

"It is, however, in their Lordships' view severable from the remaining provisions of the Act. It complies with the test of severability laid down in Attorney General for Alberta v. Attorney General for Canada [1947] A.C. 503, 518:-

“The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.””

50. Furthermore, this Court takes into account the matters relative to section 51 of the Criminal Code the doing or performing of which do not constitute sedition. The section provides that *“an act, speech or publication is not seditious only by reason that it intends –*

- (i) to show that the President has been misled or mistaken in any of his or her measures,*
- (ii) to point out errors or defects in the Government or constitution of The Gambia as by law established or in legislation or in the administration of justice with a view to the remedying of the errors or defects,*
- (iii) to persuade the inhabitants of The Gambia to attempt to procure by lawful means the alteration of any matter in The Gambia as by law established, or*
- (iv) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of The Gambia.”*

51. These exceptions serve as legitimate defences to a charge of sedition, whether of publication or otherwise. They are designed to provide what may aptly be described as a necessary balance between the exercise of the right to free speech and freedom of the press and other media and the restrictions to those rights as provided in the sections whose constitutionality is in issue. The question for this Court is whether the exceptions have achieved the right balance.

52. The first article of definition relates to an intention *“to bring into hatred or contempt or to excite disaffection against the person of the President, or the Government of The Gambia as by law established”*. This provision is clear and

unambiguous in terms of what it is restricting in relation to free speech. It is designed to protect the President of the Republic of The Gambia qua President and the Government of The Gambia from any act or conduct that will bring the President or the Government into hatred or contempt or cause public disaffection towards either or both of them. But is the provision lawful? That must be considered against the principle of whether the measure has a legitimate aim that accords with a purpose outlined in section 25 (4) of the Constitution. It is the view of this Court that, considering the vicissitudes and trappings of the Office of President and as the Office that serves first and foremost as the fountain for national cohesion and stability, coupled with the need for the holder of such Office to concentrate on State affairs and not to be unduly distracted, it is reasonable that the holder of such Office is protected. This protection is, in the context of The Gambia and the values attributed to such leadership position in this country, considered necessary and thus has a legitimate aim. It is a law that is required for purposes of preserving the interests of national security, public order, and decency or morality. Without such a protection, it is not far-fetched that statements touching on the person of the President, other than criticisms or other expressions of opinion relative to his or her performance in office or with regard to his or her measures as provided in paragraph (i) of the proviso to section 51 of the Criminal Code, may have a negative impact on national security, public order, or decency or morality, including the foreign relations of The Gambia.

53. However, this Court does not consider it reasonable that the same or similar protection can properly be extended to the Government as an institution. We do not see what legitimate aim can be attributed to shielding the Government from the conduct of others that might be considered to be contemptuous or to excite disaffection against, or to bring the Government into, hatred. A government is an institution that, by its very nature, can expect to and will be subject to varying degrees of expressions of opinion, positive or negative, whether from the media or individual citizens or otherwise. Transparency in public office is aided by individual expressions of opinion without fear of arrest, detention or prosecution. Any attempt, therefore, to restrict the right or freedom to express such opinion or to restrict conduct that is viewed or perceived as an affront to the Government is considered not to be necessary or to be reasonably required in a democratic society. It is not

lawful in the sense that it does not have a legitimate aim that properly falls within the context of section 25 (4) or 209 of the Constitution. The restriction does not, within the terms of the proviso to section 51 of the Criminal Code, achieve the appropriate balance to the exercise of the rights and freedoms being restricted.

54. This Court notes, however, that the protection accorded to the holder of the Office of President (which we hold to be reasonable and necessary) and that accorded to the Government as an institution (which we hold not to be reasonable and not necessary) are contained within the same provision of section 51 (a) of the Criminal Code. Applying the test of severability as enunciated in the case of *The Attorney General v. Momodou Jobe* (cited above), this Court forms the view that Parliament could have enacted the same provision without the offending words of “or the Government of The Gambia as by law established”. In other words, if the offending words are excised from the provision, the surviving words relating to the protection of the person of the President can independently survive. Accordingly, this Court finds and declares that section 51 (a) of the Criminal Code is *intra vires* the Constitution in relation to the holder of the Office of President; the section is *ultra vires* the Constitution to the extent that the protection therein extends to the Government.

55. The second article of the definition of “seditious intention” relates to exciting “the inhabitants of The Gambia to attempt to procure the alteration, otherwise than by lawful means, of any matter in The Gambia as by law established”. While this provision is very general and may give the appearance of vagueness, it is clear that the restriction relates to any attempt to alter any matter that is established by law. It is the case, for instance, that the three organs of government, namely the Executive, Legislature and Judiciary, are established by law under the Constitution. The same Constitution protects individual liberty. Any attempt by any person to disrupt any of those institutions or interfere with individual liberty in a manner that does not accord with the law would be a violation of the Constitution establishing or guaranteeing them. This Court does not find anything unreasonable with this restriction, for indeed the law does not restrict the alteration of any matter by lawful means, and this is supported by the third proviso to section 51 of the Criminal Code; what it restricts is the alteration of any matter established by law by using unlawful means. This Court,

Therefore, finds and declares that section 51 (b) of the Criminal Code is reasonable and necessary in a democratic society and is required for the purposes of preserving the interests of national security and public order. The provision is therefore *intra vires* the Constitution.

56. In relation to the third article of definition of "seditious intention", this relates to *bringing "into hatred or contempt or to excite disaffection against the administration of justice in The Gambia"*. The language of this restriction is clear. It is designed to protect the administration of justice in The Gambia, not necessarily the judiciary as an institution that may be subject to criticism and critical opinion. The administration of justice in any society is considered sacrosanct. It is the last hope a citizen has to redress his or her grievance. The aim of section 51 (c) of the Criminal Code (as may be inferred from the intention of Parliament) is to protect that platform of hope whose integrity is critical to a decent and stable society. The provision, in the view of this Court, is lawful, has a legitimate aim, and is necessary and reasonably required in a democratic society. Accordingly, this Court finds and declares that section 51 (c) of the Criminal Code is *intra vires* the Constitution and therefore valid.

57. The last two articles of definition of "seditious intention" can be dealt with together. These relate to raising "*discontent or disaffection amongst the inhabitants of The Gambia*" (section 51 (d)) and promoting "*feelings of ill-will and hostility between different classes of the population of The Gambia*"(section 51 (e)). What could have been the intention behind this legislative measure? It is a fact that The Gambia is fundamentally a single community comprising different tribes (classes) that have lived and continue to live side by side in peace and harmony for centuries. Both the framers of the Constitution and Parliament recognise the value of this unity and consider it an appropriate measure to thwart any attempt to cause discontent, disaffection or feelings of ill-will or hostility amongst the inhabitants or between the different tribes that will disrupt or has the potential to disrupt that unity. This Court is particularly mindful of sections 211 and 212 of the Constitution relative to the principles of State Policy which provide as follows:

"211. The principles of state policy in this Chapter shall form part of the public policy of The Gambia for the establishment of a just, free and

democratic state. These principles shall not confer legal rights or be enforceable in any court but –

(a) *subject to the limits of the economic capacity and development of The Gambia, the Executive, the Legislature and all other organs of the State in taking policy decisions, making laws and in the administration of The Gambia, shall according to their respective functions be guided by and observe them with a view to achieving by legislation or otherwise the full realization of these principles; and*

(b) *the courts are entitled to have regard to these principles in interpreting any laws based on them.* [Emphasis added]

58. Section 212 is in the following language:

(1) *All organs of the State shall strive towards the realization of national unity, peace and stability.*

(2) *Every effort shall be made to integrate the people of The Gambia and foster loyalty to The Gambia without discrimination.*

(3) *All the people of The Gambia shall be entitled to their ethnic, religious and cultural values which do not disturb the unity or cohesion of the State.*

59. While these Principles of State do not confer legal rights and are not enforceable, as evident from section 211, this Court is entitled to and does take them into consideration (in accordance with section 211 (b) of the Constitution) in interpreting the provisions of section 51 of the Criminal Code. The common theme in all the three subsections of section 212 is unity. Parliament saw wisdom in not only fostering unity amongst the inhabitants of and between the various tribes in The Gambia, it also took the active step of providing as a legislative measure restrictions

on any attempt to thwart or compromise that unity. It will be unwise, and indeed ill-advised, for this Court to interfere with or in any way short-circuit that parliamentary wisdom. This Court finds that the fourth and fifth articles of definition of "seditious intention" as outlined in paragraphs (d) and (e) of section 51 of the Criminal Code are both clear and unambiguous in their intent and they are reasonable; the provisions are also lawful in that they have the legitimate aim of fostering unity amongst the people of The Gambia and serving as a check against any attempt to create discord and instability amongst and between the people of The Gambia. Accordingly, paragraphs (d) and (e) of section 51 of the Criminal Code are constitutional and valid.

60. This Court adds further that nothing contained in the restrictions to free speech and of freedom of the press and other media as contained in section 51 of the Criminal Code is disproportionate to the protected rights and freedoms under the Constitution.

61. The question as to whether any conduct raises any discontent or disaffection amongst the country's inhabitants or amounts to promoting feelings of ill-will and hostility between the different classes within the country requires the application of an objective test and will largely depend on the facts and circumstances of each case. This Court and indeed all the courts below will be vigilant in ensuring that the real intent of Parliament to promote unity and national cohesion is not frustrated by an application of the law in a manner that unjustifiably compromises or erodes the right to free speech and of freedom of the press and other media.

62. Consequently, sections 52, 52A, 53 and 54 of the Criminal Code remain *intra vires* the Constitution, but this does not extend to the second limb of section 51 (a) in relation to the Government.

63. With regard to section 59 of the Criminal Code, this Court finds that the offence of publishing or reproducing "*any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace*" is premised on knowledge or having reason to believe in the falsity of such conduct. It is not a strict liability offence; the prosecution must still prove beyond a reasonable doubt that the

offender had knowledge or had a good reason to believe that publication or reproduction of the statement, rumour or report is false. That is in addition to establishing that the publication or reproduction of the statement, rumour or report *“is likely to cause fear and alarm to the public or to disturb the public peace”*. Thus checks are built into the offence which must be strictly adhered to if a successful criminal prosecution is to be sustained. Accordingly, this Court does not find section 59 or any part thereof of the Criminal Code to be vague or unlawful as contended by learned Counsel for the Plaintiffs or to be deficient of a legitimate aim or to be disproportionate in any way. The restriction is, in the considered view of this Court, reasonable and necessary in a democratic society and also required for the purposes outlined in sections 25 (4) and 209 of the Constitution. The challenge of the validity of this provision as it relates to the cited provisions of the Constitution therefore fails.

Section 181A of the Criminal Code

64. I now turn to section 181A of the Criminal Code, which is challenged as being unconstitutional but vigorously defended as being constitutional. The section provides as follows:

- “(1) A person who willfully, negligently or recklessly, or having no reason to believe that it is true, publishes or broadcasts any information or news which is false in any material particular commits an offence...*
- (2) It shall be no defence to a charge under subsection (1) that the person did not know that the information or news was false, unless it is proved that adequate measures were taken to verify the accuracy of the information or news.”*

65. This section of the Criminal Code is based on an objective test and it is clear and unambiguous. The issue of falsity in the criminal law is nothing new and it certainly is not uncommon. There is a legitimate basis for criminalizing it if it is enacted in the appropriate legal context. It is not the publication or broadcasting of every information or news that will likely land one in trouble on the basis of the

whims and fancies of a prosecutor. A proper prosecution can only be initiated and progressed successfully by discharging the burden that the publication or broadcasting was willfully, negligently or recklessly made or that the publisher or broadcaster of the information or news had no reason to believe in the truthfulness thereof. The burden to be discharged is proof beyond a reasonable doubt and the falsity must be established to be of a material particular. Furthermore, by virtue of section 181A (2), a defendant is given "a get-out-of-jail-free card" if he or she can prove that he or she had taken adequate measures to verify the accuracy of the information or news published or broadcast.

66. It is important to make a distinction between information or news that is presented or represented as factual and merely making a commentary on a set of facts. A commentary is an expression of opinion or an assessment of facts or of a situation or scenario. Once it does not cross the boundary of truthfulness in asserting facts, it is highly unlikely it will attract attention under section 181A, irrespective of how one may disagree with the commentary. When information or news, on the other hand, is presented or represented as factual, it is designed to make it believable as representing the truth. If that information or news is thus published willfully, negligently or recklessly, the person so publishing it becomes liable in circumstances where the information or news is false. It is this latter scenario, in the considered view of this Court, that section 181A seeks to prohibit; it represents the mischief that Parliament aims to prevent.

67. The exercise of the right to freedom of expression has its limits. Embedded within that freedom is the obligation to respect the rights and freedoms of others as clearly outlined in section 27 (2) of the Constitution. It is therefore in the public interest that Parliament should aim to strike a balance between respecting and upholding one's right to freedom of expression and averting deprivation of that same right to others.

68. It is the considered view of this Court that the Plaintiffs have not discharged the burden of establishing the unconstitutionality of section 181A of the Criminal Code. Accordingly, this Court finds that section 181A of the Criminal Code is clear and unambiguous. The restriction therein is reasonable and it is necessary in the

sense that it has a legitimate purpose pursuant to sections 25 (4) and 209 of the Constitution. It is also proportionate. This Court, therefore, upholds the constitutionality of section 181A of the Criminal Code and dismisses the challenge advanced by the Plaintiffs.

69. This Court is, however, mindful of section 207 (3) of the Constitution which implores the press and other media to feel free to uphold the principles, provisions and objectives of the Constitution and, in particular, to hold the Government responsible and accountable to the people. This Court does not believe that anything in this judgment impairs that constitutional provision. The courts will, in dealing with criminal matters before them, ensure the objective assessment of evidence presented in order to make informed decisions with due regard to the rights and freedoms enshrined in the Constitution.

70. Finally, in relation to learned Counsel for the Plaintiffs' request for this Court to interpret the terms "reasonable restriction" and "reasonably required" as respectively appear in sections 25 (4) and 209 of the Constitution, this Court prefers not to make interpretations in a vacuum and without any specific context. Suffice it to state, however, that the power to impose reasonable restriction on the exercise of the right to free speech and enact laws that are reasonably required in a democratic society are matters for Parliament. This Court nevertheless has the authority to determine whether those objectives have been achieved by Parliament if and when their constitutionality is raised before the Court.

Conclusion

71. **In summary**, with respect to the challenge of the constitutionality of sections 51, 52, 52A, 53, 54, 59 and 181A of the Criminal Code, this Court finds and declares as follows:

- (a) the validity of sections 52, 52A, 53 and 54 of the Criminal Code is tied to the validity of section 51 of the Code with regard to the definition of "seditious intention";
- (b) the principle of severability of provisions within an Act of Parliament whose constitutionality is being challenged can be properly, and is, applied in this

case. Accordingly, the part of section 51 (a) of the Criminal Code that creates restrictions in relation to the Government is severable from the rest of the provision that relates to the person of the President; the two are not inextricably linked and when the restriction in relation to the Government is removed from the section, the part in relation to the person of the President can stand on its own;

- (c) the restrictions provided in section 51 (a) of the Criminal Code are reasonable and necessary in a democratic society and required for the purpose of preserving national security, public order, and decency and morality. In that vein, the section is declared constitutional in so far as the restrictions relate to the person of the President only. However, the section is declared unconstitutional in so far as the restrictions relate and extend to the Government;
- (d) section 51 (b), (c), (d) and (e) are adjudged as reasonable and necessary in a democratic society and required for the purposes set out in sections 25 (4) and 209 of the Constitution and, therefore, *intra vires* the Constitution and declared valid;
- (e) the validity of sections 52, 52A, 53 and 54 of the Criminal Code is tied to the validity of section 51 of the Code with regard to the definition of "seditious intention". Those sections are *intra vires* the Constitution, but only in so far as that excludes the second limb of section 51 (a) with regard to the Government;
- (f) section 59 of the Criminal Code is *intra vires* the Constitution and declared valid; and
- (g) section 181A of the Criminal Code is *intra vires* the Constitution and declared valid.

72. There is no order as to cost.

(SGD.) THE HON. MR. JUSTICE C S JALLOW QC, JSC

I AGREE (SGD.) THE HON. MR. JUSTICE H B JALLOW, CHIEF JUSTICE

I AGREE (SGD.) THE HON. MR. JUSTICE A D YAHAYA, JSC

I AGREE (SGD.) THE HON. MR. JUSTICE N C BROWNE-MARKE, JSC

I AGREE (SGD.) THE HON. MRS. JUSTICE M M SEY, JSC

