IN THE SUPERIOR COURTS OF THE GAMBIA

IN THE´SUPREME COURT OF THE GAMBIA

SC CIVIL SUIT NO. 001/2017

BETWEEN:

BAI EMIL TOURAY ..... 1ST PLAINTIFF

SAIKOU JAMMEH ..... 2ND PLAINTIFF

GAMBIA PRESS UNION ..... 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, for the Plaintiffs

MR. ABOUBACARR TAMBADOU Attorney General, with BINGA D, for the Defendant

JUDGMENT DELIVERED THIS 9TH DAY OF MAY, 2018

C. S. JALLOW QC, JSC

Introduction

The Plaintiffs, by a Writ of Summons filed on 27th April, 2017 and issued on 9th May, 2017, sought certain declarations and reliefs from this Court. These relate to:

(a) a declaration that sections 178, 179, 180 and 181A of the Criminal Code (Cap. 10:01) are unconstitutional and made in excess of legislative authority and therefore null and void;

(b) a declaration that sections 178, 179 and 180 of the Criminal Code which relate to criminal defamation are void;

(c) an order striking out sections 178, 179, 180 and 181A of the Criminal Code on the ground that they are unconstitutional; and

(d) such further or other relief the Court may deem fit to make.

2. This Court notes that while reference is made in the heading of the Writ of Summons to section 173A (1) (a) and (c) of the Information and Communications (Amendment) Act, 2013 whose constitutionality was presumably intended to be challenged, this has not specifically been prayed for in the Writ of Summons. Rather, the subject has been prayed for and argued in the Plaintiffs' Statement of Case. This cannot equate to a prayer in the Writ of Summons for which specific relief is being sought. A party filing a Writ in Court must be specific as to the relief or reliefs being sought from the Court; it is not for this Court to make a presumption in that regard. The general relief being sought from the Court as the Court may deem fit to make has to be consequential on the specific reliefs contained in the Writ of Summons. A challenge that questions the validity of an Act of Parliament cannot qualify as being consequential. The challenge has to be specific so as to put this Court and the Defendant on notice as regards what the Plaintiffs' real complaint is.

3. That said, this Court has considered the import and effect of section 173A (1) (a) and (c) of the Information and Communications (Amendment) Act, 2013, coupled with the fact that the Defendant had in its Statement of Case and during oral hearing before this Court conceded the Plaintiffs' argument that the said section is not in good accord with the relevant provisions of the Constitution of the Republic of The Gambia. It is on these bases and in the interest of justice that this Court allowed learned Counsel for both the Plaintiffs and the Defendant to make oral submissions on this section of the Information and Communications (Amendment) Act, 2013. This must be viewed as an exception and is not to serve as a precedent for any court.

4. Accordingly, this judgment considers the matters specifically prayed for in the Writ of Summons along with section 173A (1) (a) and (c) of the Information and Communications (Amendment) Act, 2013, which are challenged as having been enacted in excess of parliamentary authority and therefore unconstitutional. In that context, the declarations and reliefs sought can be merged into a single relief, namely seeking a declaration that sections 178, 179, 180 and 181A of the Criminal Code and section 173A (1) (a) and (c) of the Information and Communications (Amendment) Act, 2013 are inconsistent with the Constitution and therefore void and unconstitutional.

5. The First and Second Plaintiffs are journalists and media practitioners in The Gambia and are both members of the 3rd Plaintiff. The Third Plaintiff is duly registered under the laws of The Gambia and represents journalists and media practitioners in The Gambia. By the nature of their profession and the Union representing members of the profession, the Plaintiffs have interest in the laws that relate to and affect mass communication and the practice of journalism in The Gambia, particularly those laws that criminalise certain aspects of "free speech".

6. The sections of the Constitution of the Republic of The Gambia that the Plaintiffs claim are traversed by the named sections of the Criminal Code and the Information and Communications (Amendment) Act, 2013 are section 25 (1) (a) and (b) and (4) and sections 207 and 209. The sections of the Criminal Code in issue essentially criminalise defamation against a person. The section in the Information and Communications (Amendment) Act, 2013 makes similar provision including other specified offences, but only in relation to the use of the Internet. Section 25 of

the Constitution protects, amongst other things, freedom of speech and conscience and outlines the circumstances in which such freedom may be abridged. Section 207 of the Constitution guarantees (amongst other things) the freedom and independence of the press and other information media, while section 209 thereof outlines the limitations relative to that guaranteed freedom.

Issues

7. Essentially, the Plaintiffs' application before this Court elicits the following issues:

(a) whether sections 178, 179, 180 and 181A of the Criminal Code meet the test for restriction under section 25 (4) and section 209 of the Constitution and can therefore be considered to be valid; and

(b) whether section 173A (1) (a) and (c) of the Information and Communications (Amendment) Act, 2013 is consistent with section 25 (1) (a) and (b) of the Constitution and whether the sanction applicable to a conviction under the section of the Act is justified and proportionate.

8. This Court had, in the case of *Gambia Press Union and 2 Ors v. The Attorney General [2018]* delivered by this Court on 9th May, 2018, upheld the constitutionality of section 181A of the Criminal Code.This Court does not see the need to revisit that decision and accordingly affirms the decision with respect to section 181A as it relates to this case. Thus the issues will be considered without reference to section 181A of the Criminal Code.

Summary of Submissions by Counsel for the Plaintiffs

9. Learned Counsel for the Plaintiffs, submitted that sections 178 (defining "libel"), 179 (defining "defamatory matter"), and 180 (defining "publication") of the Criminal Code and section 173A (1) (a) and (c) of the Information and Communications (Amendment) Act, 2013 (relating to offences committed over the Internet) are vague and fail to provide guidelines on how one may avoid offending against the provisions. According to her, a vague provision of law is susceptible to broad interpretation and may be abused by those who seek to enforce it for purposes other than for the legitimate aim the provision was originally intended to achieve.

10. Furthermore, freedom of speech, including freedom of the press and other media should not include limitations that are not justifiably acceptable or, to use the language of section 25 (4) of the Constitution, *"necessary in a democratic society"*. The limitations contained in the Code and the Act affect the Plaintiffs' work as journalists and media practitioners and as ordinary citizens in relation to their interaction with members of the public, as they do not know what specific utterances or remarks would attract arrest and prosecution. The continued existence of the legal restrictions to their exercise of free speech impede their work and threaten their liberty.

11. Learned Counsel also submitted that, in particular, the provisions of the Act in issue are remnants of the colonial era and have no place in a constitutional democracy such as ours. In any case, the provisions impose strict criminal liability even for unintentional publication of incorrect information. The burden placed on the accused is a heavy one of proving the truth of what he or she writes or speaks about and also proving lack of guilty knowledge. This presents vagueness in the law as the decision to prosecute depends on the prosecutor's perception of the impact an expression or a speech is likely to have on members of the public or on an aggrieved person. It is unclear what utterances a person may not make to avoid prosecution. She relied on the case of *The Sunday Times v. United Kingdom, 26 April, 1979, 2 EHRR 24 para. 49* in which the European Court of Human Rights, in considering the phrase "prescribed by law" held that:

> *"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 entails."*

12. In addition, according to learned Counsel, considering the strict liability provision of section 173A (a) and (c) of the Act, coupled with the stiff penalty applicable therewith, the law does not afford the accused the traditional defences to defamation such as truth, justification, qualified privilege and fair comment. Considering the purport of the section of the Act, learned Counsel submitted that the

Constitution does not envisage the idea of inducing respect for the Government and public officials and/or shielding them from condemnation through statutory means. The Common Law offers protection to all persons, both private and public, in defamatory actions and in that context the section of the Act is redundant. Accordingly, any attempt to protect what learned Counsel termed "undeserved reputations" is arbitrary and does not pursue a legitimate aim and cannot therefore qualify as a justification for restricting freedom of expression.

13. Learned Counsel has also relied on international treaties in urging this Court to consider and apply those treaties in protecting and advancing the cause of free speech. In particular, reference has been made to the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights. She also referred this Court's attention to its decision in *Ousman Sabally v. Inspector General of Police and Ors, Civil Reference No: 2/2001* in which the Court referenced a decision of the African Commission on Human and Peoples' Rights as a guide in interpreting domestic legislation and urged a similar approach in relation to this case. She also referenced the case of *Minister of Home Affairs v. Fisher (1980) A C 319* in which international law was recognised as a relevant guide to domestic constitutional provisions.

14. In sum, learned Counsel submitted that the sections of the Criminal Code and the Information and Communications (Amendment) Act, 2013, the constitutionality of which are the subject of challenge before this Court, are neither reasonably justified nor necessary in a democratic society. The Constitution permits only restrictions which pursue a limited list of legitimate aims (as are outlined in sections 25 (4) and 209 thereof) that are reasonably required in a democratic society.

Summary of Submissions by Counsel for the Defendant

15. Learned Counsel for the Defendant, both in the Defendant's Statement of Case and in his oral submission before this Court, conceded that sections 178, 179 and 180 of the Criminal Code and section 173A (1) (a) and (c) of the Information and Communications (Amendment) Act, 2013 are inconsistent with the freedoms prescribed in sections 25 and 207 of the Constitution and therefore invalid. He took issue with only section 181A of the Criminal Code which he vigorously defended as

intra vires the Constitution. However, as already noted earlier in this judgment, the decision of this Court in *Gambia Press Union and 2 Ors v. The Attorney General [2018]* upholding the constitutionality of section 181A of the Criminal Code stands and abides this case equally.

Decision

16. This Court reiterates the decision of the Privy Council emanating from an appeal from The Gambia Court of Appeal in the case of *The AG of Gambia v. Momodou Jobe [1984] UKPC 10* in which Lord Diplock, on behalf of their Lordships, stated:

> *"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."*

17. Courts have always placed a premium on fundamental rights and freedoms provided for and guaranteed under national constitutions. Thus any attempt to circumscribe or in any way restrict the full exercise of those rights and freedoms must be founded on law and must have a legitimate aim. The Law must also be clear and certain and proportionate to the mischief it is guarding against. In the context of The Gambia, the principles or criteria to be applied are those enunciated by this Court in the case of *Ousainou Darboe & 19 Ors v. The Attorney General [2017]*.

18. A person who takes the step of challenging a statute or a provision thereof as being inconsistent with a provision of the Constitution bears the burden of establishing it. The burden does not shift in any form and discharging it is a heavy responsibility. This Court will presume, as a first rule of any constitutional challenge of a parliamentary measure, that the measure being challenged is valid and constitutional until determined otherwise by the Court (confirming this Court's most recent decision in *Gambia Press Union and 2 Ors v. The Attorney General [May 2018]*). This principle has been upheld in numerous other cases across the Commonwealth (see, for instance, *Steven Grant v The State [2006] UKPC 2 (16th January 2006) at page 10*, *Mootoo v The AG of Trinidad & Tobago [1979] 1 WLR 1334 at pages 1338-1339, and AG & Anor v. Antigua Times Ltd. [1976] AC 16 at page 32*) and this Court finds no compelling reason why it should depart from it.

19. Parliament does not engage in any futile act of passing laws that infringe the Constitution. In particular, with respect to fundamental rights and freedoms, section 17 (1) of the Constitution makes it obligatory for Parliament, amongst others, to respect and uphold the fundamental rights and freedoms enshrined in the Constitution. It is recognised, however, that the rights and freedoms created and guaranteed under the Constitution are, in the main, qualified. That means Parliament may in limited and defined circumstances restrict the exercise of those rights and freedoms. That requires a careful balancing act whereby Parliament, on the one hand, ensures respect for the enshrined rights and freedoms and, on the other hand, creates reasonable restrictions that are necessary in a democratic society to attain the overall objective of national cohesion, stability, peace, decency and fair administration of justice. Any intervention by this Court with regard to Parliament's exercise of its constitutional powers in that context is merely to determine whether Parliament has achieved that balancing act (see *Kenneth Surrat and Ors v. The AG of Trinidad & Tobago [2008] A C 655)*.

20. Learned Counsel for the Plaintiffs drew the attention of this Court to certain human rights treaties, namely the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights, and urged this Court to apply those treaties in interpreting the relevant provisions of the Constitution that protect the right to free speech and of freedom of the press and other media. Reference was also made to a number of judicial decisions from within and outside the Commonwealth and, although these decisions are not binding on this Court, they have been carefully considered. This Court has also considered the case of *Ousman Sabally v. Inspector General of Police &Ors* (cited earlier) that was decided by this Court.

21. This Court adopts the position it took in the case of *Gambia Press Union and Ors v. The Attorney General* (cited earlier) that:

> *"The fact that international human rights law serves as a relevant guide to the interpretation of domestic constitutional provisions is not in dispute. It is not in dispute either that foreign judicial decisions or other decisions by human rights bodies assume a persuasive nature with regard to this Court's*

determination of constitutional matters before it. However, international human rights law and foreign judicial or other decisions must be considered in the context of the language of the constitutional provisions this Court is confronted with, the circumstances of the country (namely, the prevailing political, social and economic circumstances) and the nature and scope of the right or freedom that is being restricted."

22. In the case of *Ousman Sabally v. Inspector General of Police & Ors* this Court made reference to a decision of the African Commission on Human and Peoples' Rights only as a guide to the interpretation of the retrospectivity of domestic legislation and vested rights under the Constitution. This Court is entitled to do that.

23. Since the close of arguments before this Court, a judgment has been rendered by the Community Court of Justice of the Economic Commission of West African States in the case of the *Federation of African Journalists & Ors v. The Republic of The Gambia [2018], Suit No: ECW/CC/APP/36/15, Judgment No: ECW/CCJ/JUD/04/18* which, amongst other laws, touched on the sections of the Criminal Code relative to criminal defamation. This Court notes that what was in issue in that Suit did not revolve around the subject of constitutionality of domestic laws. The issue there was whether the domestic laws concerned were consistent with international law that protected the right to free speech and of freedom of the press. In the case of *Gambia Press Union & Ors v. The Attorney General*, this Court, referring to the decision in the same Suit, stated the following:

"Indeed it is noteworthy that the Community Court of Justice specifically stated that:

> *"The Powers conferred on the Court, in the 2005 Supplementary Protocol should (sic) are 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."*

And then this Court indicated further:

"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."

24. In that context, therefore, this Court is of the view that the factors that should properly guide its decision in this case are those outlined in the Constitution as enunciated in the *Ousainou Darboe* case, coupled with the underlying principles regarding the lawfulness of the laws whose constitutionality is being challenged, whether they are clear and unambiguous, whether they serve a legitimate aim and whether they are proportionate to the mischief they are trying to prevent or guard against.

Sections 178, 179 and 180 of the Criminal Code

25. Sections 178, 179 and 180 of the Criminal Code, whose constitutionality is being questioned before this Court, essentially stipulate laws that criminalise defamation. In order to have a better appreciation of the nature and scope of these laws, it is necessary to outline them in full. Section 178 provides that:

"A person who by print, writing, printing, effigy, caricature, cartoon or depiction or by any means, otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person with the intent to defame that person, commits the offence termed "libel" and is liable on conviction to a fine of not less than fifty thousand dalasis and not more than two hundred and fifty thousand dalasis or imprisonment for a term of not less than one year or to both the fine and imprisonment."

26. The terms "unlawfully publishes" and "defamatory matter" used in the section are relevant in understanding the nature and scope of the section. Section 179 defines what constitutes "defamatory matter" in the following terms:

"Defamatory matter is matter likely to injure the reputation of a person by exposing him or her to hatred, contempt or ridicule, or likely to damage a person in his or her profession or trade by an injury to his or her reputation or

which is derogatory, contemptuous or insulting to a person. It is immaterial whether at the time of the publication of the defamatory matter the person concerning whom the matter is published is living or dead:

Provided that a prosecution for the publication of defamatory matter concerning a dead person shall not be instituted without the consent of the Attorney General".

27. Section 180, in relation to the definition of "publication", provides as follows:

"(1) A person publishes a libel if he or she causes the print, writing, printing, effigy, caricature, cartoon or depiction or other means by which the defamatory matter is conveyed, to be so dealt with, either by exhibition, reading, recitation, description, delivery, or otherwise, as that the defamatory meaning thereof becomes known is or likely to become known to either the person defamed or any other person.

(2) It is not necessary for libel that a defamatory meaning should be directly or completely expressed; and it suffices if such meaning and its application to the person alleged to be defamed can be collected either from the alleged libel itself or from any extrinsic circumstances, or partly by the one and partly by the other means."

28. Although section 178 was amended in 2004 by the Criminal Code (Amendment) Act (Act No. 18 of 2004) to expand the definition of "libel", section 179 amended to expand the definition of "defamatory matter", and section 180 amended to expand the definition of "publication", it is important to note that they all, in essence, predate the 1997 Constitution (the current Constitution). The Criminal Code in which these laws are embodied was enacted in 1933 by Act No. 25 of 1933. At the time of enacting these provisions, Parliament saw wisdom in having them on the statute books; there is embedded within them an element of what some may describe as a colonial-era approach to protecting citizens. At that time there was no specific constitutional provision, for instance, that guaranteed the rights and freedoms of the press and other media. Fundamental human rights and freedoms

were, save in the abrogated 1970 Constitution, recognised and protected under the *Magna Carta* and duly upheld by the courts. In that context, it is arguable that those sections of the Criminal Code served a purpose, irrespective of whether one recognised them as pursuing a legitimate aim or otherwise. The question is whether at this time in their current form and in the context of the current Constitution, they continue to serve a purpose that accords with constitutionality.

29. In determining this issue as it relates to restrictions on fundamental rights and freedoms protected under section 25 of the Constitution, this Court outlines and relies on the three fundamental principles or criteria enunciated by this Court in *Ousainou Darboe & 19 Ors v. The Attorney General &Ors [2017]* and confirmed in *Gambia Press Union &2 Ors v. The Attorney General [2018]* that must be collectively satisfied to establish constitutionality. In the *Ousainou Darboe* case, this Court stated that:

> *"Under the Constitution any restrictions must satisfy three conditions for them to be lawful. They must be:-*
>
> *i. reasonable;*
>
> *ii. necessary in a democratic society; and*
>
> *iii. imposed for one or more of the purposes set out in section 25 (4) of the Constitution."*

Considering the scope of this case, consistent with the scope outlined in the case of *Gambia Press Union & 2 Ors v. The Attorney General [2018]*, this Court will add that *"the restriction imposed must also meet one or more of the purposes set out in section 209 of the Constitution"*.

30. As part of the process of satisfying these stated principles or criteria, it is important that any parliamentary enactment restricting a citizen's exercise of a right or freedom must be clear, unambiguous, free from vagueness andproportionate to the mischief it is trying to prevent or guard against. The restriction must be lawful and validly enacted. It must also have a legitimate aim or purpose as circumscribed by the Constitution; in that context, the law need not necessarily specify the aim or

purpose set out in the Constitution if it is clear as regards its restriction. The aim or purpose can be discerned from the import of the law.

31. The sections of the Constitution that the cited sections of the Criminal Code are claimed to be inconsistent with are sections 25 and 207. The relevant part of section 25 reads as follows:

> *"(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;"*

32. The exercise of this right, however, is limited by section 25 (4) of the Constitution which provides that:

> *"(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."*

33. In interpreting this provision of the Constitution in the *Ousainou Darboe* case which related to the right to assembly vis-à-vis the Public Order Act (Cap. 22) but has equal application to the right to free speech and other similarly protected rights, this Court stated that:

> *"The right to assembly, as with other individual or collective rights, is usually exercised within the public space. As a result its exercise by one may conflict with the exercise of the same right by others or with the exercise or enjoyment*

of other rights by other persons or with the needs for the maintenance of public order and security. Hence the need for some regulation or restrictions on the exercise of the right. Such restrictions on the grounds set out in section 25 (4) of the Constitution and section 5 of the Act are thus reasonably justifiable in a democratic society. So long as they remain restrictions or limitations only and not purported abolitions of the right or are not such as would render illusory the enjoyment of the protected right." [Emphasis added]

34. Section 25 of the Constitution specifically recognises every person's right to free speech, which includes freedom of the press and other media under section 207 of the same Constitution. These freedoms are considered sacrosanct and are well-protected. They may, however, be restricted in a limited manner by an Act of Parliament. The restrictions must be reasonable, they must be necessary in a democratic society and they must relate only to matters concerning *"the interests of the sovereignty and integrity of The Gambia, national security, public order, decency or morality, or in relation to contempt of court"*. Any law that seeks to abridge the right to free speech, including press freedom and other media, that cannot be justified within the confines of these circumstances or which in their purport and effect *"render illusory the enjoyment"* of that protected right or freedom, will necessarily fail the test of constitutionality.

35. Section 207 of the Constitution guarantees press and other media freedom in the following terms:

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

36. This guaranteed freedom may, however, be abridged by virtue of section 209 of the Constitution which 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."*

37. It is important to also note section 17 (2) of the Constitution which provides: *"Every person in The Gambia ... shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter, but subject to respect for the rights and freedoms of others and for the public interest."*

This is similar in approach to the limitation prescribed in section 209 of the Constitution in enacting legislation to circumscribe freedom of the press and other media *"for the purpose of protecting the reputations, rights and freedoms of others"*. Thus the importance of ensuring that one's exercise of his or her constitutionally guaranteed rights and freedoms are appropriately balanced against the equal rights and freedoms of others within the society cannot be over-stressed. It is legitimate, therefore, that Parliament may choose to enact legislation to preserve respect and adherence to such a relationship, and the role of this Court, where a challenge has been mounted, is to determine whether Parliament has achieved the right balance.

38. The importance and the need for the freedom and independence of the press and other media is embodied within the Constitution as fundamental. In other words, this freedom is both essential and relevant to achieving transparency in the administration of government and ensuring good governance within society. It may only be abridged by a law that is considered to be reasonably required in a democratic society for the purpose of safeguarding *"the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of others"*. The guaranteeing and exercise of the right of freedom of the press and other media is the constitutional norm; any abridging of that constitutional norm must, therefore, be the exception and must be founded on a solid base as provided in section 209 of the Constitution.

39. In order to place matters in perspective and in appropriate context, it is important to consider the nature and scope of the work of journalists and other media practitioners generally. They perform a service to society. They inform and entertain. They provide warning on matters of public interest, such as drawing government and public attention to corrupt behaviour. They render opinions to advance individual, sectoral and national development. They serve as perhaps the best avenue for public sensitization and the promotion of peace and stability in society. They, in

essence, represent a significant pillar in advancing national cohesion by ensuring a well-informed citizenry. All of these are premised on professional conduct whereby journalists and other media practitioners understand and respect their role as responsible agents for change and national development.

40. There are many ways journalists and other media practitioners engage their audience. Some are palatable, some are not. People generally don't have any issue with the palatable ones. But consider political cartoons, for instance, that depict public functionaries in different lights. They are generally not making statements of fact; they are merely being critical in a humorous way by presenting an opinion. In a similar fashion, caricature is a form of expressing an opinion of a person without presenting it as a fact. It is designed to humour, albeit in a manner that may not be pleasing to the person who is the subject of the caricature.

41. In addition, it is generally recognised and accepted that persons who occupy public office or have become celebrities can expect to be the subject of public attention and criticism. The criticism is not about them in persona; it is about them in relation to the status they hold or occupy. The criticism may include ridicule or expression of fact or opinion in print or in writing that the subject of the ridicule or expression of fact or opinion is not welcoming of. But having regard to section 207 of the Constitution one cannot but realize that the law encourages free speech. However, because of the varying nature of facts or opinions which may be unjustly adverse to a person if publicly made to the extent of causing injury to the reputation of the person or affecting his or her means of livelihood, the Common law of defamation affords an avenue for an injured person to seek redress from the courts civilly. That by no means deprives Parliament of its constitutional authority to legislate to protect persons as it sees fit. The ultimate responsibility lies with this Court to determine whether Parliament, in so doing, has achieved the right balance to justify whatever restriction it has placed on the citizen's right to free speech or freedoms established by the Constitution.

42. One of the fundamental issues this Court has to consider is whether, having regard to the nature and scope of the restrictions on the exercise of specified constitutional rights and freedoms, there is justification for shielding a person, public

or private, from criticism, positive or negative. If there is, the further question is whether sections 178, 179 and 180 and the related provisions in the Criminal Code achieve that goal in a manner that is reasonable and necessary in a democratic society such as our sand is required to preserve any of the purposes set out in section 25 (4) or 209 of the Constitution. As already indicated, Parliament has the prerogative to act in accordance with section 25 (4) and/or section 209 of the Constitution to create limitations for the purposes required under those sections (see paragraphs 37 and 41 above).

43. Prior to the amendments effected to the Criminal Code in 2004, a number of safeguards were provided in defence against any prosecution for criminal libel. The safeguards provided in section 182 (cases in which publication of defamatory matter is absolutely privileged) may be aptly described as narrow and specific. The instances in which publication of defamatory matter is conditionally privileged under section 183 are much broader. However, the amendments narrowed the conditional privilege by removing publication of defamatory matter made in good faith in circumstances where:

> *"(a) ... the relation between the parties by and to whom the publication is made is such that the person publishing the matter is under some legal, moral or social duty to publish it to the person to whom the publication is made or has a legitimate personal interest in so publishing it;*
>
> *(d) ... the matter is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity, or as to his personal character so far as it appears in such conduct;*
>
> *(e) ... the matter is an expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his personal character so far as it appears in such conduct;*
>
> *(h) ... the matter is a censure passed by a person in good faith on the conduct of another person in any matter in respect of which he has authority, by contract or otherwise, over the other person, or on the character of the other person so far as it appears in such conduct;*

(j) *... the matter is published in good faith for the protection of the rights or interest of the person who publishes it, or of some person in whom the person to whom it is published is interested."*

44. Furthermore, the 2004 amendments deleted section 185 of the Criminal Code which read as follows:

> *"If it is proved, on behalf of the accused person, that the defamatory matter was published under such circumstances that the publication would have been justified if made in good faith, the publication shall be presumed to have been made in good faith until the contrary is made to appear, either from the libel itself, or from the evidence given on behalf of the accused person, or from evidence given on the part of the prosecution."*

45. These repealed provisions were enacted, in the considered view of this Court, to create a balance between the exercise of the right to free speech and ensuring respect for the rights and reputations of others. On the one hand, the challenged provisions of the Criminal Code criminalised conduct that would expose a person to hatred, contempt or ridicule or that would likely cause damage to a person in his or her trade or profession thereby injuring his or her reputation or which is simply derogatory, contemptuous or insulting to a person. Yet, on the other hand, the same Criminal Code provided the normal and common sense defences to defamation by providing instances in which the publication of defamatory matter may be justified on the grounds of absolute privilege or conditional privilege. The supposed balance originally established and enacted by Parliament was thus removed from the statute book.

46. The effect of the removal of these provisions from the Criminal Code was not only to narrow the scope of defences to a charge of criminal libel, it was to place a lid on free speech. That is equally evident from the expanded definition of "libel" in the 2004 amendments to criminalise caricature and cartoon and any other form of depiction. This, in the considered view of this Court, could hardly make a case for a reasonable restriction which is necessary or justifiable in a democratic society. It cannot qualify as pursuing a legitimate aim that is required in the interest of the

sovereignty or integrity of this country or for purposes of preserving national security, public order, decency or morality, or the administration of justice. It is an unnecessary and unjustified fetter on the citizens' right to exercise their right to freedom of speech and of the press and other media under section 25 (1) (a) and (b) and section 207 of the Constitution.

47. This Court cannot, and indeed it would be inappropriate for it to, consider sections 178, 179 and 180 of the Criminal Code in isolation of the other sections to which they relate, hence the reference to the repealed provisions of the sections of the Criminal Code concerned. The historical element in which criminal libel laws were used almost exclusively to shield public functionaries from scrutiny and criticism cannot be overlooked in determining the issue of whether those sections have a legitimate aim. To a large degree, the broad defences to a prosecution for criminal libel prior to the 2004 amendments provided meaningful safeguards that might have demonstrated a legitimate aim to the enactment of sections 178, 179 and 180. Once the defences of publishing a matter or expressing an opinion in good faith for a legitimate purpose or interest or even publishing a matter consequent upon a legal, moral or social obligation or to protect one's rights or interests were removed, it was not difficult to see the real aim of the amending law. It was to constrain the exercise of the right to free speech and of the press and other media and it did so in a manner that was disproportionate. The aim was primarily to protect the Government and its public officials from criticism and sound a death knell on transparency in good administration. This did not pursue a legitimate aim and, therefore, failed one of the fundamental tests for gauging the constitutionality of a parliamentary enactment.

48. This Court has addressed its mind to the question of whether any of the sections of the Criminal Code, the validity of which is being challenged, are severable and therefore able to stand on their own in the context of the Privy Council decision in *The Attorney General of The Gambia v. Modomou Jobe* and *Gambia Press Union &2 Ors v. The Attorney General* (both cited earlier in this judgment) and has come to the decision that the sections are not severable as one leads into the other by virtue of the definitions of "libel", "defamatory matter" and "publication" contained in the sections.

Section 173A (1) (a) and (c) of the Information and Communications (Amendment) Act, 2013

49. I now turn attention briefly to section 173A (1) (a) and (c) of the Information and Communications (Amendment) Act, 2013 whose constitutionality is also being challenged. That section provides:

> *"(1) A person commits an offence if he or she uses the internet to –*
>
> *(a) spread false news against the Government or public officials;*
>
> *(b) caricature, abuse or make derogatory statements against the person or character of public officials;"*

50. As already evident in this judgment, this Court can find no reasonable justification for shielding persons who hold or occupy public officeby criminalizing criticism against them without appropriate safeguards for legitimate criticism. A person should not be prosecuted for merely having the audacity to criticize his or her government or any public functionary for that matter. A vibrant, decent and responsive democracy should shun such behaviour.

51. Besides, the issue of spreading false news against the Government and public officials is too subjective, a matter left to the whims and fancies of an investigator and a prosecutor, and therefore incapable of providing certainty to any legitimate criticism of the Government and its public officials. Furthermore, section 173A is in the nature of a strict liability and does not even provide the minimum standard contained in the Criminal Code on absolute or conditional privilege. The issue of falsity of news is not constrained by any particular formula or qualification; it is open-ended and can, therefore, apply even in the most inconsequential matters. There is no protection even in circumstances where the publication of false news has not resulted in injury to a public official. This cannot by any stretch of constitutional interpretation be considered to be reasonable or necessary in a democratic society for any of the purposes set out in section 25 (4) and section 209 of the Constitution. The value placed on the exercise of the right to free speech and freedom of the press and other media is far too precious to be circumscribed or short-circuited by such strict liability.

52. In addition, section 173A criminalises the spread of false news over the Internet. This makes no distinction between the person that is the author of the false news and one who is a mere recipient and passes on that news innocently or with a view to seeking confirmation thereof. Thus if a member of a household who unknowingly receives false news through the Internet communicates by the same medium such news to a member of his or her household who in turn communicates it to another member of the household, they both commit an offence. In fact it can be envisaged that the entire household could become criminally liable. This consequence of the application or potential application of section 173A is woefully unreasonable, unnecessary and unjustified in a democratic society and cannot be treated as being reasonably required for any of the purposes outlined in sections 25 (4) and 209 of the Constitution.

53. Considering further the prescribed penalty of three million dalasis or 15 years imprisonment or both upon conviction for spreading false news or for caricaturing, abusing the character of, or making derogatory statements against, a public official,with absolutely no safeguard or qualification, section 173A qualifies as a classic section of parliamentary over-kill. The prescribed penalty is disproportionate to the mischief it is trying to guard against. It matters not that what is being restricted relates to use of the Internet or other form of publication. The prescribed penalty, when particularly compared to the penalties prescribed for similar offences (such as the ones in the impugned sections on criminal libel and publication of defamatory matter, including those for the offence of sedition), goes beyond the reasonable boundaries of necessity and legitimacy and cannot therefore be upheld as necessary in a democratic society and thus required in the interests of sovereignty and integrity of the country, or for national security, public order, decency or morality, or the administration of justice.

Conclusion

54. It is the decision of this Court, therefore, that:

(a) sections 178, 179 and 180 of the Criminal Code are inconsistent with the constitutional guarantees of free speech and freedom of the press and other media as respectively enshrined in section 25 (1) (a) and (b) and section 207

of the Constitution. The restrictions they place on the exercise of those rights and freedoms, absent all the necessary safeguards to protect the exercise of those rights and freedoms, are neither reasonable nor necessary in a democratic society, particularly in the context of the context of the Constitution. They fail to demonstrate a legitimate aim in preserving any of the interests outlined in sections 25 (4) and 209 of the Constitution. They are declared to be *ultra vires* the Constitution and therefore invalid;

(b) for the same reasons, section 173A (1) (a) and (c) of the Information and Communications (Amendment) Act, 2013 is inconsistent with the rights and freedoms enshrined or guaranteed under section 25 (1) (a) and (b) and section 207 of the Constitution. The prescribed penalty in relation to the section is disproportionate to the mischief it is trying to cure or prevent. The section is therefore declared to be also *ultra vires* the Constitution and therefore invalid.

55. It has not escaped the sight of this Court that sections 181, 182, 183 and 184 of the Criminal Code, whose validity has not been specifically questioned in this suit, relate to publication or broadcasting of defamatory matter, albeit in the form of definitions and defences to prosecution. The strength of the sections, however, is hinged on sections 178, 179 and 180 of the Criminal Code which have been declared unconstitutional. Their continued existence will therefore only be of academic value.

56. There is no order as to costs.

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

I AGREE (SGD.) THE HON. MR. 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