ARTICLE 19

The Gambia: Analysis of Selected Laws on Media - Overview

April 2012

Legal analysis

Executive summary

In January 2012, ARTICLE 19 reviewed the legislative framework governing the media in The Gambia against international standards for the protection of freedom of expression. In particular, this analysis outlines ARTICLE 19's key concerns regarding the constitutional protection of freedom of expression, the Newspaper Act 1944 (as subsequently amended); Sections 52, 178 and 181A of the Gambian Criminal Code; and the Information and the Communications Act 2009.

ARTICLE 19's conclusion is that the laws governing the Gambian media, reviewed in this analysis, are fundamentally flawed and incompatible with The Gambia's obligations under international and regional standards on freedom of expression. The most problematic features of these laws include: the registration requirements for newspapers under the Newspaper Act 1944; a number of speech-related offences (including seditious libel, criminal defamation, and publication of false news) in the Criminal Code in clear breach of international standards for the protection of freedom of expression; and the fact that the regulation of broadcasting is ultimately entrusted to the executive rather than an independent body, as required under international law. In addition, the Information and Communications Act 2009 contains a number of overly broad provisions in relation to intercept (section 138) and the publication of information which is obscene in electronic form (section 170).

ARTICLE 19's criticism of the state of freedom of expression in The Gambia is not limited to the legislation reviewed in this analysis. We remain concerned about the continuous violations of the right to freedom of expression in the country, in particular the lack of media independence as well as continuous harassment, arbitrary arrests and violence against journalists, human rights defenders and political opposition. These serious violations should be urgently addressed by the Gambian Government.

As a party to a number of international and regional human rights instruments, the Gambian Government is obliged to uphold the right to freedom of expression and information. ARTICLE 19 therefore calls on the Government to initiate comprehensive review and reform of the laws applying to the media to bring it in line with its international obligations.

Key recommendations

1. Engage in comprehensive review of the Gambian legislative framework related to freedom of expression, especially the laws applicable to the media;

2. Repeal the Newspaper Act 1944 and subsequent amendments in their entirety;

3. Repeal the provisions of the Criminal Code that unduly restrict freedom of expression in the Gambia, in particular Section 52 (seditious publication), Section 178 (criminal defamation), and Section 181A (dissemination of false news);

4. Bring the Information and Communications Act 2009 in line with international standards on freedom of expression, and in particular provide for independence of the telecommunications and broadcasting regulator.

Table of Contents

About ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at http://www.article19.org/resources.php/legal/.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.

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Introduction

This legal analysis examines the legislative framework governing the media in The Gambia against international standards for the protection of freedom of expression. In particular, it outlines the key concerns of ARTICLE 19 regarding the Newspaper Act 1944 (as subsequently amended); selected sections of the Gambian Criminal Code (in particular, Articles 52, 178, 179, 180, 181A, and 184 of the Code); and the Information and Communications Act 2009.[1]

ARTICLE 19 has extensive experience working towards legal and policy reform in The Gambia on matters concerning the protection of freedom of expression and freedom of information. In the past, we have analysed the Draft Gambian National Media Commission Bill 1999[2] and subsequently challenged the constitutionality of the National Media Commission Act 2002.[3] We have also previously engaged the Gambian Government on the topics of freedom of information and access to information.[4] ARTICLE 19 is, therefore, in a good position to assess the media legislative landscape in The Gambia.

ARTICLE 19's conclusion is that the laws governing the Gambian media are fundamentally flawed and incompatible with The Gambia's obligations under international law on freedom of expression. The most problematic features of these laws include: (1) newspapers are subject to registration requirements under the Newspaper Act 1944; (2) the Criminal Code provides for a number of speech-related offences, including seditious libel, criminal defamation, and publication of false news, in clear breach of international standards for the protection of freedom of expression; (3) under the Information and Communications Act 2009 (ICA), the regulation of broadcasting is ultimately entrusted to the executive rather than an independent body as required under international law. In addition, the ICA contains a number of overly broad provisions in relation to intercept (section 138) and the publication of information which is obscene in electronic form (section 170).

ARTICLE 19's concerns on the state of freedom of expression are not limited to the legislation reviewed in this analysis.[5] As we have highlighted on a number of occasions, the lack of media

[1] The analysis is based on the version of the respective laws as submitted to ARTICLE 19 in December 2011. The text of all this legislation is available on request from the ARTICLE 19 Law Programme (legal@article19.org) or ARTICLE 19 Senegal and West Africa.

[2] Memorandum on the Gambian National Media Commission Bill, 1999; available at http://www.article19.org/data/files/pdfs/analysis/the-gambia-media-law.pdf.

[3] Written Comments of ARTICLE 19, Global Campaign For Free Expression and the Open Society Institute Justice Initiative to the National Media Commission Act 2002; available at http://www.article19.org/data/files/pdfs/cases/gambia-comments-on-media-commission-act.pdf.

[4] Statement of ARTICLE 19 to Freedom of Information and Access to Information Act, 2009; available at http://www.article19.org/data/files/pdfs/conferences/gambia-freedom-of-information-and-access-to-information.pdf.

[5] See, for example, ARTICLE 19's statement The Gambia: Freedom of expression continued casualty, December 2011, available at http://www.article19.org/resources.php/resource/2903/en/the-gambia:-freedom-of-expression-continued-casualty; or Gambia: Free speech & journalist security still under threat, July 2011, available at

independence and harassment, arbitrary arrests and violence against journalists, human rights defenders and political opposition remain matters of serious concern and should be urgently addressed by the Gambian Government. As a party to a number of international and regional human rights instruments, the Gambian Government is obliged to uphold the right to freedom of expression and information. ARTICLE 19 therefore calls on the Government to initiate a comprehensive review and reform of the laws applying to the media to bring it in line with its international obligations. ARTICLE 19 makes a number of detailed and specific recommendations further below.

The analysis is divided into two parts. The first part sets out the applicable international standards on freedom of expression that The Gambia is obliged to respect and promote in the domestic law. The second part examines the laws applicable to the Gambian media, namely the provisions on freedom of expression in the Gambian Constitution, the Newspaper Act 1944 as amended, sections 52, 178 and 181A of the Criminal Code and the Information and Communications Act 2009.

http://www.article19.org/resources.php/resource/2341/en/gambia:-free-speech-&-journalist-security-still-under-threat.

International Standards on Freedom of Expression

Freedom of expression is a fundamental human right. The full enjoyment of this right is central to achieving individual freedoms and to developing democracy. Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of all other human rights.

The **Universal Declaration of Human Rights**[6] (UDHR) is generally considered to be the flagship statement of international human rights standards, binding on all States as a matter of customary international law. Article 19 of the UDHR guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Freedom of expression is protected under Article 19 of the **International Covenant on Civil and Political Rights** (ICCPR) 1966,[7] which The Gambia ratified on 22 March 1979. Article 19 provides as follows:

> 1. Everyone shall have the right to freedom of opinion.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

As a state party to the ICCPR, The Gambia is required to ensure that any piece of legislation imposing restrictions on freedom of expression complies with the requirements of Article 19 of the ICCPR.[8] This means that any such restriction must: (i) be defined by law in a sufficiently precise manner; (ii) pursue one of the legitimate aims recognised under Article 19(3); (iii) be necessary in

[6] Adopted by the UN General Assembly on 10 December 1948, Resolution 217A(III).

[7] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

[8] See for example, UN Human Rights Committee, General Comment no. 34, at para. 8: http://www.article19.org/resources.php/resource/2420/en/general-comment-no.34:-article-19.

a democratic society. The last requirement implies that a restriction on freedom of expression will be justified only if it is proportionate to the aim pursued. This means that if a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the least restrictive measure must be applied.

The UN Human Rights Committee (the Committee) recently issued its **General Comment No. 34**, which constitutes the most authoritative interpretation of the minimum standards guaranteed by Article 19 of the ICCPR.[9] In particular, the Committee highlighted the importance of a free, uncensored media as the bedrock of a democratic society. The Committee said:

> 13. A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.

The Committee also emphasised that laws designed to protect national security, such as treason and sedition laws, should not be used to illegitimately stifle free speech in breach of the requirements of Article 19(3) of the ICCPR. In the Committee's own words:

> 30. Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress. The Committee has found in one case that a restriction on the issuing of a statement in support of a labour dispute, including for the convening of a national strike, was not permissible on the grounds of national security.

In addition, The Gambia is also a party to the **African Charter of Human and Peoples' Rights** (the Charter),[10] which guarantees freedom of expression in Article 9. Article 9 of the African Charter on Human and Peoples' Rights states:

> 1. Every individual shall have the right to receive information.
>
> 2. Every individual shall have the right to express and disseminate his opinions within the law.

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[9] General Comment no. 34 was adopted on 21 June 2011 and is available here: http://www.article19.org/resources.php/resource/2420/en/general-comment-no.34:-article-19.

[10] Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

The **Declaration of Principles on Freedom of Expression in Africa** ('African Declaration')[11], adopted by the African Commission on Human and Peoples' Rights ('African Commission') in 2002, also promotes a number of standards applicable to the media. In relation to print media, for example, it states that '*any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression*.'[12] While reputation can legitimately be protected, the African Declaration further states that '*no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances*.'[13] In particular, public figures must tolerate a greater degree of criticism.[14]

[11] The Declaration of Principles on Freedom of Expression in Africa; adopted by the African Commission at its 32nd Session, 17 - 23 October, 2002, Banjul, The Gambia; available athttp://www.achpr.org/english/_doc_target/documentation.html?../declarations/declaration_freedom_exp_en.html.

[12] *Ibid*, Article VIII.

[13] *Ibid*. Article XII.

[14] *Ibid*.

Analysis of the Gambian media legislative framework

This part examines the laws applicable to The Gambian media, namely the Gambian Constitution, the Newspaper Act 1944, selected Articles of the Gambian Criminal Code and the Information and Communications Act 2009.

The Gambian Constitution

Freedom of expression is protected under Article 25 of the Gambian Constitution and, in its relevant parts, 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;
> (c) freedom to practise any religion and to manifest such practice;
> (d) freedom to assemble and demonstrate peaceably and without arms;
> (e) freedom of association, which shall include freedom to form and join associations and unions, including political parties and trade unions;
> (f) freedom to petition the Executive for redress of grievances and to resort to the Courts for the protection of his or her rights.
> (...)
> (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 restriction 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.

ARTICLE 19 is of the opinion that the constitutional guarantees of freedom of expression in The Gambia are generally satisfactory. Similar provisions can be found in a number of constitutions in other countries in the region and around the world.

The only concern in terms of constitutional protection is the text of **Article 25**, **paragraph 4,** which is problematic for two reasons.

- ARTICLE 19 observes that the reference to 'reasonable restriction' in Article 25, paragraph 4 suggests that the applicable test for legitimate restrictions on free speech is that of 'reasonableness.' Under international law, however, the test is a very strict one, namely that any restriction on freedom of expression must be 'necessary in a democratic society.'

- Moreover, some of the aims listed under Article 25, paragraph 4 do not correspond to those permitted under international law and are at best redundant. ARTICLE 19 points out that under international law, the restrictions on freedom of expression must serve a legitimate aim. This requirement is *not* open-ended; the list of legitimate aims provided in Article 19(3) of the ICCPR is exclusive, and governments may not add to these. It includes only the following legitimate aims: respect for the rights and reputations of others, protection of national security, public order (*ordre public*), and public health or morals.

Hence, ARTICLE 19 notes that the protection of the 'sovereignty and integrity' of a state is not recognised as a legitimate aim under international law, since it is already covered under the notion of 'national security.' Similarly, the reference to 'decency' serves no useful purpose as it already falls under the concept of 'public morals,' which is expressly acknowledged as a legitimate aim under international law.

Recommendations:

- Article 25, paragraph 4 of the Gambian Constitution should be amended to comply with the requirements of Article 19(3) of the International Covenant on Civil and Political Rights. The terms 'reasonable,' 'sovereignty and integrity of the Gambia' and 'decency' should be struck.

The Newspaper Act 1944

The Newspaper Act 1944, as subsequently amended, essentially provides for the compulsory registration of media practitioners in The Gambia. This registration procedure involves the registration of an affidavit and a bond with the Registrar-General. While the original 1944 Act only applied to print media, the Newspaper (Amendment) Act 2004 ('the 2004 Act') extended its application to broadcasting stations. In addition, the 2004 Act significantly increased the amount of the surety from 100,000 dalasis (approximately 2,000 GBP) under the original Act to 500,000 dalasis (approximately 11,000 GBP). The penalties for contravening the provisions of the Act were also heightened.

It should be stated at the outset that ARTICLE 19 tends to view regulation of the print media with caution as it is often used as a tool for governments to overly restrict, rather than protect, the right to freedom of expression and information. Given the importance of the press in a democratic society, it stands to reason that journalists and publications should not be subject to greater restrictions on the right to express themselves than ordinary people. Indeed, most advanced democracies have moved to abolish their press laws and regulate the print media through laws of general application, such as the civil code and business code, which apply without distinction to all citizens. In these countries, a newspaper which publishes a defamatory statement can simply be sued under the same section of the civil code as a private person making a similar statement. This prevents the government from using the press law as a means of selectively prosecuting critical newspapers and thus endangering free debate about politics and public figures, a cornerstone of democracy. Hence, careful consideration should be given to simply abolishing, or at a minimum greatly reducing the scope of, any laws on newspapers. ARTICLE 19 believes that this is entirely feasible; the print media would by no means be placed in a legal vacuum. The example of many countries around the world shows that such laws are not needed.

Technical registration requirements for the press do not *per se* offend guarantees of freedom of expression as long as they meet a number of conditions, noted below. However, ARTICLE 19 considers registration to be unnecessary, and it is not, in fact, required in many countries. The Human Rights Committee, which oversees the ICCPR, has noted that "effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression."[15] In particular, registration regimes should respect the following

[15] General Comment 10 (19) in Report of the Human Rights Committee (1983), 38 GAOR, Supp. No. 40, UN Doc. A/38/40.

conditions: (i) the authorities should have no discretion to refuse registration once the requisite information has been provided; (ii) registration should not impose substantive conditions on the press; and (iii) the registration system should be administered by bodies which are independent of government. Registration requirements which do not respect these conditions offend freedom of expression principles because they cannot be justified on the grounds listed in the ICCPR, such as the rights or reputations of others, national security, or public order, health or morals.

In ARTICLE 19's view, the whole registration scheme in The Gambia under the Newspaper Act 1944 is deeply flawed and fails to meet the above standards and the requirements of Article 19 of the ICCPR. As the UN Human Rights Committee recently noted in its General Comment no. 34:

> 44. Journalism is a function shared by a wide range of actors, including professional full time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and **general State systems of registration or licensing of journalists are incompatible with paragraph 3.**(...) [emphasis added]

Similarly, the special mandates for the protection of freedom of expression stated in their 2003 Joint Declaration on International Mechanisms for Promoting Freedom of Expression[16]:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.

There is no doubt, therefore, that any compulsory registration scheme is highly likely to be incompatible with international standards for the protection of freedom of expression. In particular, the requirement to provide a surety in the exorbitant amount set by the Newspaper (Amendment) Act 2004 is almost certain to have chilling effect on the Gambian media and therefore, to be in breach of those standards.

Moreover, by imposing the same registration system on both print and broadcasting media, the Newspaper (Amendment) Act 2004 fails to recognise the distinctive nature of their work. In this regard, the Special mandates on Freedom of Expression have repeatedly emphasised that the same rules cannot be applied to the print media, broadcasting and the Internet. For example, in their 2003 Joint Declaration cited above, they said that '*Regulatory systems should take into account the fundamental differences between the print and broadcast sectors, as well as the Internet.*'[17]

As already noted above, in ARTICLE 19's view, the print media should not be made subject to any registration or licensing requirements. While the broadcasting sector may be regulated, for example by requiring broadcasters to obtain a licence, it should not be required to both register and obtain a licence, in line with the Special Rapporteurs' recommendations.[18] Unfortunately, this

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[16] The 2003 Joint Declaration is available at http://www.osce.org/fom/28235.

[17] *Ibid.*

[18] *Ibid.* The Special Rapporteurs have recommended that '*Broadcasters should not be required to register in addition to obtaining a broadcasting licence.*'

is exactly the situation Gambian broadcasters find themselves in under Gambian law. Indeed, under the Information and Communications Act 2009, broadcasters are required to obtain a licence in order to operate in The Gambia. However, since the provisions of the Newspaper (Amendment) Act 2004 also apply to broadcasting stations, Gambian broadcasters are effectively required to both register and obtain a licence.

In light of the above, ARTICLE 19 recommends that the Newspaper Act should be repealed. In particular, the print media should not be made subject to any registration or licensing requirements.

Recommendations:

- Repeal the Newspaper Act 1944 (as amended) in its entirety and allow for functioning of the media independently and without interference.

The Gambian Criminal Code

A number of provisions of the Gambian Criminal Code engage the right to freedom of expression. In particular, ARTICLE 19 has reviewed the provisions concerning seditious offences, criminal defamation, and dissemination of false news. In ARTICLE 19's view, these provisions are the most problematic as they are recurrently used by the Government to silence its critics. They are also in clear breach of international standards for the protection of freedom of expression and must be immediately repealed.

It should also be made clear that this analysis is not exhaustive. ARTICLE 19 is also concerned by a number of other provisions of the Gambian Criminal Code, which are listed at the end of this section and include, *inter alia*, the power of the Minister and of the President under Section 47 to prohibit the importation of publications they deem contrary to the public interest. ARTICLE 19 therefore generally recommends a wholesale review of all speech-related provisions contained in the Gambian Criminal Code to bring them more closely in line with international standards of freedom of expression.

i) Seditious offences

The Gambian Criminal Code provides for various seditious offences. In particular, Section 52 of the Gambian Criminal Code criminalises the publication and distribution of seditious material as well as the mere uttering of seditious words. This provision has been amended on two occasions: 2004 and 2005. These amendments essentially provide for harsher fines and prison terms. Under the Criminal Code Amendment Act 2005, the offence of seditious publication is now punishable with a fine between 50,000 and 250,000 dalasis (approximately 1,000-5,000 GBP) and/or a minimum term of one year imprisonment.

Under Section 46 of the Gambian Criminal Code, a seditious publication is a publication with a seditious intention. Section 51 of the Gambian Criminal Code defines seditious intention as an intention to bring into hatred or contempt or to 'excite disaffection' against the President, his government and the judiciary. It also includes raising *"discontent or disaffection among the inhabitants of the Gambia"* and promoting "*feelings of ill-will and hostility between different classes of the population of the Gambia.*"

In ARTICLE 19's view, the Gambian sedition provisions are fundamentally flawed and must be repealed. Sedition essentially criminalises 'the conduct or speech inciting people to rebel against the authority of a state or monarch.'[19] Its basic purpose is to criminalise political violence. However, sedition laws are typically overbroad and used to stifle political speech in breach of the three-part test under international law.

The Gambian seditious offences are no exception. In particular, the definition of 'seditious intention' is incredibly vague, potentially criminalising mere expression of discontent with government policies. Indeed, far from being used to protect national security, the Gambian seditious offences have ostensibly being employed to silence political dissidents and government critics. For example, seven activists and journalists were recently charged with treason and sedition for distributing t-shirts with the slogan, "Coalition for Change - The Gambia: End Dictatorship Now."[20]

ARTICLE 19 is also deeply concerned that the heavy-handed use of sedition provisions has led to the widespread practice of media self-censorship. The net effect of these laws therefore starkly contradicts the UN Human Rights Committee's recommendation that sedition laws should be carefully applied so as to comply with Article 19(3) of the ICCPR.[21] It is clear that the Gambian government has relied on seditious offences in ways far beyond what is necessary in a democratic society.

Moreover, sedition laws are largely anachronistic. While sedition provisions can be found on the statute book of a large number of common law countries as part of the colonial legacy of the British Empire, these provisions are now for the most part defunct or have been rescinded. For instance, the UK recently abolished the offence of seditious libel, which was in any event largely obsolete, with the Coroners and Justice Act 2009.[22] Similarly, the Constitutional Court of Uganda ruled that Uganda's seditious libel provisions were unconstitutional in 2010.[23]

In summary, ARTICLE 19 believes that sedition laws are both undemocratic and antiquated. As highlighted above, the Gambian sedition provisions plainly fail to meet the requirements of international law for the protection of freedom of expression. For all these reasons, ARTICLE 19 recommends that section 52 of the Gambian Criminal Code should be repealed.

ii) Criminal defamation

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[19] See http://oxforddictionaries.com/definition/sedition.

[20] See IFEX, *Critical activists and journalists detained under "bogus charges"*, 27 July 2011, available at: http://www.ifex.org/the_gambia/2011/07/27/bogus_charges/.

[21] See Internationals Standards section above.

[22] See ARTICLE 19's submissions to the UN Universal Periodic Review on the UK, November 2011, available here: http://www.article19.org/resources.php/resource/2864/en/uk:-article-19%E2%80%99s-submission-to-the-un-universal-periodic-review.

[23] See http://www.mediadefence.org/article/uganda-using-law-fight-media-freedom.

Section 178 of the Gambian Criminal Code provides for the offence of libel, which is punishable by a minimum term of one year imprisonment and/or a fine between 50,000 and 250,000 dalasis,(approximately 1000 to 5000 GBP). Libel has traditionally been applied to defamatory statements made in permanent form, as opposed to slander, which is concerned with transient words. Section 178, however, clearly covers both 'written' and 'spoken' defamatory statements. It would therefore be more accurate to describe it as providing for criminal defamation.

Under Section 178, the publication, with intent to defame, of defamatory statements in the form of written words, 'cartoon,' 'effigy,' 'depiction' or 'any others means' is criminalised. In addition, defamatory statements made by means of 'gestures' or 'sounds' are also criminalised.

Equally relevant to the offence of criminal defamation under Section 178 is Section 180 which defines 'publication' by reference to the ways in which a defamatory matter may be published and the fact that the 'defamatory meaning' becomes known or is likely to become known to the person concerned. Section 180 further provides that a 'defamatory meaning' need not be directly or entirely expressed for libel to take place, extrinsic circumstances can also be referred to as evidence of libel. In addition, Sections 181 to 184 contain a number of defences to criminal defamation.

ARTICLE 19 has long advocated against criminal defamation. In our view, defamation is a private matter between two individuals which does not warrant the intervention of the state through the use of the criminal law, which almost by definition provides for harsher penalties, including the threat of imprisonment. This can obviously have a serious chilling effect on the peaceful exercise of freedom of expression. Our position therefore is that all criminal defamation laws are in breach of international guarantees for the protection of freedom of expression and must be abolished. The same obviously applies to the Gambian provisions on criminal defamation.

Similarly, international bodies such the UN, the ACHPR and the OSCE have long recognised the dangers posed by criminal defamation laws and have thus recommended their abolition. The UN Human Rights Committee thus recently said that:[24]

> States parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.

Indeed, a large number of country reports issued by the UN Human Rights Committee and other regional bodies (e.g., the case-law of the European Court of Human Rights) strongly suggest that the imposition of criminal sanctions, especially imprisonment, for criminal defamation offences is never justified under international law.[25] The special Rapporteur on Freedom of Expression in Africa has echoed the same position calling on African governments to repeal criminal defamation provisions[26]

[24] See UN Human Rights Committee, General Comment No. 34 mentioned at n 4 above, para. 47,see also: http://www.achpr.org/english/resolutions/Resolution169_en.htm

[25] See, for example, Concluding observations of the Human Rights Committee: Azerbaijan, UN Doc. CCPR/CO/73/AZE, 12 November 2001; *Cumpana and Mazare v Romania,* no. 33348/96, [GC], 17 December

Equally, a global trend towards the decriminalisation of defamation in countries as diverse as the Ghana, Togo, the UK, Ireland, Sri Lanka and the Maldives can be observed. In addition, a number of countries have partially decriminalised defamation, such as the Central African Republic which removed imprisonment for criminal libel.

There is therefore a strong argument to be made that the Gambian criminal defamation provisions are in and of themselves in breach of international law. Furthermore, , section 178 of the Gambian Criminal Code fails to meet the requirements of legal certainty and proportionality under Article 19(3) of the ICCPR for the following reasons.

- *First,* Section 178 is overbroad, allowing the criminalisation of expression in entirely unpredictable circumstances, which in any event go far beyond what would be deemed necessary in a democratic society. In particular, Section 178 does not define what 'defamation' means. This is in no way remedied by Section 180, which merely seeks to define 'publication' rather than 'defamation' and worryingly provides that a 'defamatory meaning' need not be directly or entirely expressed for libel to take place. The meaning of a 'defamatory statement' is therefore entirely left to the subjective and potentially widely inconsistent interpretation of the Gambian courts. Section 178 further criminalises defamatory cartoons and caricature, despite the fact that such forms typically rely on distortion and exaggeration for political and/or artistic purposes. Section 178 goes even further by potentially criminalising innocuous 'sounds' and 'gestures' deemed defamatory of a person. In other words, the most trivial behaviour, such as a misinterpreted grin, could land you in jail.

- *Secondly*, while Section 178 seeks to provide for criminal intent by reference to 'intent to defame,' it is not clear what level of intent is required. In particular, no reference is made to intent to cause harm to someone's reputation or intent to make a false statement.

- *Thirdly*, under Section 178, criminal defamation is punishable with imprisonment. Indeed, the Criminal Code (Amendment) Act 2005 increased the penalties for this offence. As noted above, however, imprisonment is always disproportionate under international standards of freedom of expression.

- *Finally,* in addition to the shortfalls of Section 178 identified above, the subsequent criminal defamation provisions in the Gambian Criminal Code entirely fail to provide for appropriate defences. In particular, under Section 181 of the Criminal Code, the defence of truth is not a complete defence to a libellous publication since it is also necessary to show that it was in the public interest that the matter should be published. Moreover, Section 184 of the Criminal Code effectively negates the defence of good faith 'if it is made to appear that the matter was untrue.'

2004.

[26] See report 2009 http://www.achpr.org/english/Commissioner's%20Activity/46th%20OS/Special%20Mechanisms/freedom_expression.pdf; http://www.achpr.org/english/resolutions/Resolution169_en.htm

In light of the above, ARTICLE 19 urges the Gambian government to repeal Section 178 and related provisions of the Gambian Criminal Code. Instead, we recommend that the government adopt civil provisions to address defamation concerns. We stand ready to provide further details as to how such provisions should be drafted in future.

iii) Dissemination of false information and broadcasting

Section 181A of the Criminal Code provides for the offence of 'false publication and broadcasting.' Under Section 181A, the negligent dissemination of false news or information is punishable by a minimum of one year imprisonment and/or a fine between 50,000 and 250,000 dalasis (approximately 1000 to 5000 GBP). Lack of knowledge that the information was false is not a defence, unless it is proven that adequate measures were taken to verify the accuracy of the information.

In ARTICLE 19's view, Section 181A falls short of international standards of freedom of expression. Criminalising the dissemination of false news is objectionable for three main reasons.

- *First*, while journalists strive on the quality and accuracy of the information they provide, in an environment where news travels at an incredible pace, facts may be difficult to check. If journalists, or indeed bloggers and other social media users, are faced with the prospect of a prosecution for publishing false information, they are much less likely to share information, including news that is clearly in the public interest. Ultimately, therefore, false news laws can have a serious chilling effect on the free flow of information.

- *Secondly*, facts are not always easily separated from opinions. It would therefore be unfair to criminalise journalists and users of new media for failing to differentiate between the two. Moreover, it is easy enough to see how a ban on false news could be used as a cover for shunning opinions not favoured by the authorities. Equally, whether something is true or false cannot always be confidently established because it may depend on prevailing social views or scientific progress. To convict an individual on the back of such vague a notion as 'truth' is therefore unlikely to comply with the requirement of legal certainty under international law.

- *Thirdly*, and in any event, the criminal law, and especially imprisonment, cannot be a proportionate response to the harm caused, if any, by the circulation of false information. In this regard, the Human Rights Committee stated in relation to the domestic legal system of Cameroon that "*the prosecution and punishment of journalists for the crime of publication of false news merely on the ground, without more, that the news was false, [is a] clear violation of Article 19 of the Covenant.*"[27] Similarly, the UN Special Rapporteur has said that "*In the case of offences such as … publishing or broadcasting "false" or "alarmist" information, prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights.*"[28]

[27] Concluding Observations of the Human Rights Committee: Cameroon, CCPR/C/79/Add.116, 4 November 1999, para. 24.

[28] Annual Report to the UN Commission on Human Rights, Promotion and protection of the right to freedom of

In light of the above, it is obvious that the provisions of the Gambian Criminal Code, criminalising the dissemination of false news, fall short of international standards of freedom of expression. We therefore strongly encourage the Gambian government to follow the example of other African countries, such as Uganda,[29] which have decriminalised false news laws.

iv) Miscellaneous

ARTICLE 19 is also concerned by the following provisions in the Gambian Criminal Code:

- Section 47 gives the Minister and the President an incredibly broad discretionary power to prohibit importation of publications which they deem contrary to the 'public interest.' ARTICLE 19 believes it is wholly inappropriate for a government minister, let alone the President, to have the power to prohibit publications in this manner, particularly on such vague grounds. Instead, if it is thought necessary, Parliament should carefully define the exact circumstances in which the publication of any material may be restricted. Moreover, any proposed limitations should conform strictly to those already identified by international standards on freedom of expression.[30]

- Under Section 48, importing a publication in breach of a prohibition order issued under Section 47 is punishable by up to two years imprisonment. Under international law, however, any restriction on freedom of expression must meet the three-part test. In particular, it must be proportionate to the aim pursued. A prison sentence for a speech-related offence is highly unlikely to meet this requirement. For example, the European Court of Human Rights has said that imprisonment for press offences may be compatible with journalists' freedom of expression only in the most exceptional circumstances, notably where other fundamental rights have been seriously impaired, as in case of hate speech or incitement to violence.[31] In the absence of any reference to such exceptional circumstances, ARTICLE 19 believes that Section 48 is in breach of international standards on freedom of expression.

- Section 60 makes it a separate offence to defame 'foreign princes,' including ambassadors and other foreign 'dignitaries.' However, there is no reason in principle why such public figures should benefit from special protection against defamation. Under international law,

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opinion and expression, 18 January 2000, UN Doc. E/CN.4/2000/63, para. 205.

[29] See http://www.article19.org/data/files/pdfs/press/uganda-supreme-court.pdf.

[30] For an analysis of similar provisions, see ARTICLE 19' Statement on Malawi dated 11 April 2011: http://www.article19.org/data/files/pdfs/press/malawi-high-court.pdf.

[31] *Mahmudov and Agazade v. Azerbaijan*, Judgment of 18 December 2008, Application no. 35877/04, para. 50.

all public officials are required to tolerate a higher degree of criticism than other individuals. By virtue of their public position, they must be subject to closer public scrutiny. The more senior the position, the more tolerance a public servant ought to display. This also applies to foreign officials. Moreover, as already noted above, the criminal law is wholly inadequate to deal with what is essentially a matter between private individuals.

In light of the above, ARTICLE 19 strongly recommends a comprehensive review of all speech-related provisions in the Gambian Criminal Code with a view to bringing them more closely in line with international standards on freedom of expression.

Recommendations:

- Repeal section 52 of the Gambian Criminal Code;
- Repeal criminal defamation provisions and replace them with appropriate private law remedies. Pending their abolition, the law enforcement authorities and judiciary should cease from applying criminal defamation provisions in practice and refrain from imposing disproportionate civil sanctions in cases concerning the exercise of freedom of expression;
- Repeal section 181A of the Criminal Code;
- Review all speech-related provisions.

The Information and Communications Act 2009

The Information and Communications Act 2009 ('ICA') was adopted with a view to addressing the convergence of the telecommunications, broadcasting and other new information technology sectors, including the Internet. The ICA spans 252 provisions and is divided into five chapters: preliminary matters (Chapter 1), the regulation of information and communication systems and services (Chapter 2), information society issues (Chapter 3), regulatory provisions for broadcasting content (Chapter 4) and miscellaneous matters (Chapter 5). In addition to telecommunications and broadcasting regulation, the Act also effectively deals with cybercrime and the processing of personal data.

This analysis does not purport to cover the ICA in detail. Rather, we highlight our key concerns with the Act. Should the Act come under review, which we recommend, we stand ready to provide a more detailed analysis of its provisions.

i) Lack of independent oversight in the licensing procedure

The ICA places the regulation of the telecommunications and broadcasting sectors under the authority of the Public Utilities Regulation Authority ('PURA'). PURA was established in 2004 under the Public Utilities Regulation Authority Act 2001. In addition to the broadcasting telecommunications sectors, PURA also regulates transportation, water and electricity services.

ARTICLE 19 notes at the outset that entrusting the same entity with the regulation of sectors as widely different as water and electricity services and the telecommunications sector is confusing and undesirable. We therefore recommend the creation of a separate public authority with powers to regulate the telecommunications and broadcasting sectors.

Our main concern with the ICA, however, is that the ultimate authority in respect of telecommunications and broadcasting licensing is the Minister, i.e., the executive. This is clear

from a number of provisions scattered throughout the Act, in particular sections 7(2), 22, 23, 27, 215, 226, 230 and 232 to 236. Section 230(1), for example, provides that '*the Minister, on the advice of the Authority, shall issue broadcasting licences in sufficient numbers to meet the public demand for broadcasting services.*'

Similarly, sections 232 to 236 provide that upon recommendation by the Authority, the Minister '*may'* renew, revoke or suspend a broadcasting licence. PURA therefore merely has an advisory role whilst the ultimate decision-making power rests with the Minister. This, however, is in flat contradiction with international standards on freedom of expression, which require that all public bodies exercising powers in the areas of broadcast and/or telecommunications regulation be institutionally independent so as to protect them from undue political or commercial interference.[32]

Recommendations:

- Any decision of such public authority should clearly be made subject to judicial review in the courts;
- A public authority separate from PURA should regulate the telecommunications and broadcasting sectors
- Such public authority should be given ultimate responsibility for telecommunications and broadcasting licensing instead of the Minister;
- The institutional independence and autonomy of such a body should be guaranteed and protected by law.

ii) Overly broad intercept provision

ARTICLE 19 is concerned with Section 138 of the ICA, which gives sweeping powers to the national security agencies and investigating authorities to monitor, intercept and store communications in unspecified circumstances. Section 138 further provides that the Minister may require information and communication service providers to 'implement the capability to allow authorised interception of communications.'

Whilst Section 138 essentially raises issues of privacy of communications, and the protection of private life more generally, it has important implications for freedom of expression as well. Indeed, even in places such as The Gambia where Internet penetration is more limited than in more developed countries, the ability of individuals freely to communicate on the Internet, using emails, social media networks or other web platforms has become an essential aspect of freedom of expression. In this context, unchecked Internet surveillance or 'monitoring' is perhaps one of the greatest dangers to freedom of expression online. Therefore, any restriction on such freedom must meet the strict three-part test laid down under international law, i.e., it must be clearly defined by law, pursue a legitimate aim and be proportionate to the aim pursued. In particular, the power to

[32] See ARTICLE 19, *Access to the Airwaves, Principles on Freedom of Expression and Broadcast Regulation,* March 2002, which encapsulates international and comparative law standards in this area: http://www.article19.org/data/files/medialibrary/2633/11-08-08-STANDARDS-access-to-airwaves-EN.pdf.

http://www.achpr.org/english/_doc_target/documentation.html/declarations/declaration_freedom_exp_en.html

intercept private communications should be limited only to the investigation of serious criminal activity.

Even having regard to the need to investigate serious crime, however, there is an obvious danger that such powers may be abused if not constrained by law. In this regard, ARTICLE 19 believes that Section 138 entirely fails to meet the requirements of international law outlined above.

- First, in breach of the requirement of legal certainty, it is impossible to predict under Section 138 in which circumstances the authorities may intercept or monitor communications. The only exception to this is perhaps sub-section 2, which bizarrely provides that a user or subscriber fearing for his life or physical integrity may authorise such interception, rather than a judicial authority.

- Secondly, Section 138 fails to provide that any monitoring or interception should only be authorised by a judge and should comply with the requirement of necessity or proportionality. Against this background, the fact that information and communication service providers may be required by the Minister to 'implement the capability to allow authorised interception' is less than ideal.

In ARTICLE 19's view, the legal framework for Information and Communication Technologies ('ICTs') should not allow State authorities to assume sweeping powers over ICT operators and providers – in particular their equipment or content going through their networks – in undefined circumstances, including in an emergency.[33] Accordingly, section 138 should be reviewed and amended to bring it more closely in line with international standards for the protection of human rights.

Recommendations:

- Section 138 should be reviewed and amended. In particular, it should be made clear that interception can only be authorised by a judge for the purposes of investigating serious crime and subject to the requirement of proportionality.

iii) Miscellaneous

Other areas of concern to ARTICLE 19 include:

- Under section 8(e) of the ICA, the Frequency Plan (National Plan for Frequency Assignment and the National Register of Frequencies) is devised by the Authority in conjunction with members of the Armed forces and security services contrary to international law which requires open and participatory processes;

- The offence of publishing obscene information in electronic form (Section 170) is overly broad, allowing the criminalisation of legitimate speech by reference to such vague terms as 'lascivious' material that tends to 'deprave' or 'corrupt' persons exposed to such material;

[33] See Principle 4 of the Access to the Airwaves Principles; *supra note* 30.

- A number of provisions give powers to the Minister to suspend a licence to provide information and communication services or revoke a broadcasting licence 'if it is in the public interest to do so,' e.g., sections 27(3)(e) and 235(1)(e) respectively: given the lack of independence of the Minister, there is an obvious danger that such powers may be used to unduly restrict freedom of expression, in particular content or opinions unfavoured by the incumbent government.

Recommendations:

- The Frequency Plan should be designed following a participatory process;
- Section 170 should be reviewed to bring it more closely in line with international standards of freedom of expression. In particular references to 'lascivious' materials that 'deprave' and 'corrupt' should be dropped
- The power to suspend, revoke or amend the terms and conditions of a licence should lay with an independent authority specifically responsible for the regulation of the telecommunications and broadcasting sectors;
- The circumstances in which a licence may be revoked, suspended or amended should be clearly and specifically defined in primary legislation.