

The 1997 Constitution of The Gambia

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I. Origins and Historical Development of the Constitution

A. Brief historical background

The Gambia undoubtedly ranked, for many years, as one of the most valuable yet interesting of the British colonies. The River Gambia, which is one of the most navigable waterways, was used from the mid-1400s by Europeans engaged in trade with the inhabitants around its banks, mostly trading in slaves. Over the years it attracted interest from many European countries.¹

The founding of the island of Bathurst (Banjul) in 1816, nine years after the abolition of the slave trade, marked the beginning of British settlement and subsequent control of the entire territory around the River Gambia. Bathurst as a settlement was established 'primarily as [a] fort to prevent the river from being used by other nations for the export of slaves.'² British and French merchants interested in legitimate trade soon began to settle on St. Mary's Island under the protection of the fort, and the military post grew into a town. The settlement became a Crown Colony in 1821 and formed part of British West African settlements under the jurisdiction of the Governor of Sierra Leone.³ It was assumed in colonial times that The Gambia would be absorbed into surrounding French possessions, but Britain held on to it.

In 1888, The Gambia became a colony separate from the administrative control of Sierra Leone. The main features of political dispensation in The Gambia under colonial rule was in the form of direct rule of the colony (which was Bathurst and its immediate environs) headed by the Governor of the British central government, and indirect rule of the Protectorate (which were the other territories in the hinterland) administered by recognised chiefs. Under this system of 'indirect rule', there was some continuity of the political and social systems before colonial rule.⁴

The Gambia, mainland Africa's smallest state, achieved independence on 18 February 1965 as a constitutional monarchy within the Commonwealth. On 24 April, 1970, The Gambia became a republic following a majority-approved referendum after decades of colonialism.

Until a military coup on 22 July 1994, The Gambia was led by President Dawda Kairaba Jawara of the People's Progressive Party (PPP), which dominated political life from independence to 1994. The relative stability of the Jawara era was broken first by a violent and

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¹ A. Hughes and D. Perfect, *Historical Dictionary of The Gambia* (2008) 13.

² T. Southorn, 'The Gambia: Background for Progress' (Jan. 1944) 43 (170) *Journal of the Royal African Society* 10; available at [<http://www.jstor.org/stable/717787>] (accessed 9 November 2015).

³ Hughes (n 1), 21.

⁴ *Ibid.*, 43 and 44.

bloody coup attempt in 1981, led by Kukoi Samba Sanyang, who on two occasions had unsuccessfully sought election to parliament. After a week of violence, which left several hundred dead, Jawara, who was in London when the attack began, appealed to Senegal for help. Senegalese troops defeated the rebel force and restored the Jawara government to power.

In the aftermath of the attempted coup, Senegal and The Gambia signed the 1982 Treaty of Confederation. The result, the Senegambia Confederation, aimed eventually to integrate the two sovereign countries into one political and economic union with cooperation in many areas. The confederation came to an end in 1989. Former President Jawara stated in his book, *Kairaba*, that

[o]n Wednesday 23 August 1989, President Diouf went on national television and told his people that the Confederation was not working. He said the meetings of the Council of Ministers, the Confederal Parliament and other formal meetings were a waste of time if no real progress was being made in ironing out the real issues that hampered the integration of the two states. ... Therefore the Confederal treaty was being suspended and Senegalese troops were being withdrawn.⁵

On 22 July 1994, Yahya A.J.J Jammeh, a young army lieutenant, led a *coup d'état* which overthrew the Jawara government and suspended the 1970 Constitution,⁶ marking the end of the first republic. A military junta known as the Armed Forces Provisional Ruling Council (AFPRC) supplanted the elected government of Jawara, with Jammeh as head of the Council.

Following the coup, Jammeh announced that elections would be held in September 1996. The new constitution was drafted and a constitutional referendum took place on 8 August 1996. More than 70 per cent of voters were reported to have endorsed the proposed draft constitution. Thus the Constitution entered into force on 16 January 1997. A presidential decree shortly thereafter lifted the ban on party political activity for all but three pre-coup parties: the People's Progressive Party (PPP) of former President Jawara, the National Convention Party (NCP), and the Gambian People's Party (GPP). These parties were banned from contesting the forthcoming elections under Decree 89, as were all holders of executive office in the 30 years prior to the 1994 military takeover. The only pre-coup parties authorized to contest the elections were the PDOIS and the People's Democratic Party (PDP).

A presidential election was held in September 1996. The 22 July Movement (formed in 1995 to mark the anniversary of the coup) transformed itself into an official political party – the Alliance for Patriotic Reorientation and Construction (APRC) – to support Jammeh's campaign for the presidency. Jammeh emerged as the winner of the 1996 election, subsequently ushering in civilian rule and becoming The Gambia's second elected President in 31 years of independence. Twenty-one years later, President Jammeh still remains in power.

The Gambia is a common law country, having been a former British colony. According to The Gambia 2013 Population and Housing Census Preliminary Results, the population is estimated

⁵ D.K. Jawara, *Kairaba* 355.

⁶ Act No 1 of 1970.

at 1.8 million.⁷ The preliminary results indicate that women make up 50.5 per cent of the population and males comprise 49.5 per cent.⁸

II. Fundamental principles of the Constitution

The Constitution of The Gambia is based on the fundamental principles of supremacy of the Constitution, the rule of law, separation of powers, and fundamental rights and freedoms.

A. Classification of the 1997 Constitution

The Constitution recognises The Gambia as a sovereign secular republic.⁹ The sovereignty of The Gambia resides in the people of The Gambia. Section 1(2) of Constitution states that ‘[t]he Sovereignty of The Gambia resides in the people of The Gambia from whom other all organs of government derived their authority and in whose name and those welfare and prosperity the powers of government has to be exercised in accordance with this constitution.’

B. Supremacy and defence of the Constitution

The Constitution is the supreme law of the land and any other law enacted and found to be inconsistent with its provisions shall, to the extent of its inconsistency, be void, as provided in section 4.

The jurisdiction of the Supreme Court is set out in Section 127(1)(b) of the Constitution, which provides that the Supreme Court shall have an ‘exclusive original jurisdiction ... on any question whether any law was made in excess of the powers conferred by [the] Constitution or any other law upon the National Assembly or any other person or authority.’ In several cases, such as *IEC v. AG*¹⁰ and *Jammeh v. AG*,¹¹ the Supreme Court per Jallow JSC (as he then was) held that

[g]iven the supremacy of the Constitution over all other laws and acts or omissions of public authorities, it is important for those involved in the exercise of legislative authority of the state to exercise due care and caution to ensure that such legislation is consistent with the provisions of the Constitution and that it is enacted with regard to the requirements and procedures of the Constitution.¹²

The supremacy of the Constitution is further buttressed by section 5, which permits anyone who alleges that any Act of the National Assembly or anything done under the authority of an Act of the National Assembly, or any act or omission of a person or authority, is inconsistent with or is in contravention of a provision of this Constitution, to bring an action in a court of competent jurisdiction for a declaration to that effect. Any declaration by a court shall be duly

⁷ Gambia Bureau of Statistics (GBOS) ‘The Gambia 2013 Population and Housing Census Preliminary Results (2014), p. 6, available at <http://www.gbos.gov.gm/CENSUS/The%20Gambia%202013%20Population%20and%20Housing%20Census%20Preliminary%20Results.pdf> (accessed 20 August 2015).

⁸ *Ibid.*, p. 8.

⁹ Section 1 of the Constitution.

¹⁰ (1997-2001) GR 630.

¹¹ (1997-2001) GR 639.

¹² *Ibid.*, 842.

obeyed and carried out as stated in such a declaration. Consequently, the failure to carry out or obey any order made pursuant to section 2 of the Constitution shall constitute the offence of violating the Constitution and can, in the case of the President or Vice President, be a ground for her or his removal from office in accordance with section 67 of the Constitution.¹³

C. Sources of laws

The Gambia has a tripartite legal system consisting of common law, customary law, and Islamic Sharia law. Section 7 provides for the sources of laws in the Gambia, in addition to the Constitution. These are:

- a. Acts of the National Assembly and subsidiary legislation;
- b. Orders, rules, and regulations made by a person with lawful authority to do so pursuant to an Act or the Constitution;
- c. Existing laws, including all decrees passed by the AFPRC;¹⁴
- d. Common law and principles of equity;
- e. Customary law of members of the community to which it applies;¹⁵ and
- f. Sharia law on matters relating to marriage, divorce, and inheritance concerning members of the community to which it applies.

The different bodies of laws, especially customary and Sharia law, create contradictions and inconsistencies in terms of personal law. The Gambian customary law is unwritten and consists of orally transmitted rules.¹⁶ There are many discriminatory provisions in all these different sources of law, particularly in the areas of family and property law. The application of both customary law and Sharia law is not absolute. Section 5(1) of the Law of England (Application) Act, section 11(a) of the District Tribunals Act, and section 13(4) of the Evidence Act require the courts to observe and enforce the rules of customary law that are not repugnant to natural justice, equity, good conscience, and morality, nor incompatible either directly or indirectly or by necessary implications with any law for the time being in force, or contrary to public policy. These terms have not been defined by these laws or by the courts.

Sharia law is primarily derived from the Quran and the Sunnah of Prophet Mohammed (Peace be upon him). The Mohammedan Law Recognition Act No. 10 of 1905, as amended by Act No. 17 of 1925, Act No. 9 of 1933, and Act No.15 of 1946, was enacted for the establishment of Mohammedan courts. Section 137(4) of the Constitution provides that the Cadi Court shall only have jurisdiction to apply the Sharia in matters of marriage, divorce, and inheritance where the interested parties are Muslims. By virtue of sections 33(2) and 5c of the Constitution, Sharia personal law overrides the fundamental rights of a Muslim to be treated equally and not to be discriminated against in terms of adoption, marriage, divorce, or devolution of property. However, section 37 of the Constitution provides that any person who alleges that any of these provisions of Chapter IV has been, is being, or is likely to be contravened in relation to himself or herself by any person, he or she may apply to the High Court for redress.

¹³ See section 5(3) of the Constitution.

¹⁴ The AFPRC made laws by Decrees from 25 July 1994. The AFPRC Establishment Decree legitimized members of the Council as executive autonomy to make laws and exercise territorial administration.

¹⁵ See *Jaiteh v. Jaiteh (No 2)* 1997-2001 GR, in which the Gambian Supreme Court, per Jallow JSC (as he then was), re-stated the constitutional and statutory basis for the applicability of customary law in The Gambia.

¹⁶ E.A. Agim, *The Gambia Legal System* (rev. ed.) 13.

III. Fundamental Rights Protection

The promulgation of the 1997 Constitution of the Republic of The Gambia heralded a new dispensation for the recognition and upholding of the dignity of the individual. The Preamble recognizes that ‘the fundamental rights and freedoms enshrined in this Constitution, will ensure for all time respect for and observance of human rights and fundamental freedoms for all, without distinction as to ethnic considerations, gender, language and religion.’

Section 17(1) of the Constitution provides that the ‘fundamental human rights and freedoms’ enshrined in the Constitution ‘shall be respected and upheld by all organs of the Executive and its agencies, the Legislature and, where applicable to them, by all natural and legal persons in The Gambia, and shall be enforceable by the Courts in accordance with this Constitution.’

The Constitution contains a comprehensive catalogue of rights and freedoms under Chapter IV. These include the right to life (section 18), the right to personal liberty (section 19), protection from slavery and forced labour (section 20), protection from inhuman treatment (section 21), protection from deprivation of property (section 22), the right to privacy (section 23), freedom of speech, conscience, assembly, association, and movement (section 25), political rights (section 26), the right to marry (section 27), rights of women (section 28), rights of children (section 29), the right to education (section 30), rights of the disabled (section 31), culture (section 32), and protection from discrimination (section 33).

For the purpose of this discussion, the rights to life, fair trial, personal liberty, freedom of speech and assembly, political rights and equality will be examined in depth.

A. Right to life

Section 18(1) of the 1997 Constitution provides for the right to life. It states that:

(1) No person shall be deprived of his or her life intentionally except in the execution of a sentence of death imposed by a court of competent jurisdiction in respect of a criminal offence for which the penalty is death under the Laws of The Gambia as they have effect in accordance with subsection (2) and of which he or she has been lawfully convicted.

This same section provides for the death penalty, which limits the right to life sanctioned by law. The death penalty is thus not outlawed in The Gambia even though it constitutes ‘inhuman and degrading treatment’.

The Criminal Code,¹⁷ the Gambia Armed Forces Act,¹⁸ and the Anti-Terrorism Act¹⁹ set out a number of offences that are punishable by death, including treason, murder, aiding the enemy, offences by persons in command when in action, offences relating to security, offences relating to prisoners of war, offences relating to convoys, mutiny with violence, and acts of terrorism. The Special Rapporteur on Torture noted during his mission to The Gambia that ‘the imposition of the death penalty for crimes that are not intentional and do not result in death, or

¹⁷ Sections 35 and 188 of the Criminal Code.

¹⁸ Sections 36-39, 41, and 45.

¹⁹ Section 3(1).

following trials that do not meet the most stringent guarantees of due process, are incompatible with international standards and may constitute an arbitrary execution.²⁰

On 27 August 2012, nine death row inmates – eight men and one woman – were removed from their prison cells and executed. According to the news report, ‘all persons on death row have been tried by the Gambian courts of competent jurisdiction and thereof convicted and sentenced to death in accordance with the law. They have exhausted all their legal rights of appeal as provided by the law.’²¹ The government’s justification for the executions was that The Gambia was witnessing a high crime rate and becoming a safe haven for criminals. The executions were the first in The Gambia since 1985, although the military *junta* reinstated the death penalty in 1995. In September 2012 President Jammeh announced a ‘conditional’ moratorium on executions, which would be ‘automatically lifted’ if crime rates increased. The UN Special Rapporteur on extra-judicial executions stated in his 2015 report that ‘the only difference between those who lived and those who died seems to be pure luck. The killings were, in other words, arbitrary and thus unlawful.’²²

On 30 December 2014, military and ex-military officers attempted to stage a *coup d’état*, but were repelled by forces loyal to the President. Three alleged plotters were killed during the attacks and one was injured and captured.²³ Up to thirty persons, including family members of insurgents, were arrested and held in incommunicado detention, with some being subjected to torture.²⁴ Following the failed coup, on 30 March 2015 a court martial handed down death sentences to three soldiers (Lieutenant Colonel Sarjo Jarju, Private Modou Njie, and Lieutenant Buba Sanneh) and three were sentenced to life imprisonment (Captain Buba Bojang, Lieutenant Amadou Sowe, and Captain Amadou Jobe). These individuals stood trial at a court martial on charges of treason, conspiracy, mutiny, and assisting the enemy following the attempted coup of December 2014. The trial was held in secret; media and independent observers were barred from observing the proceedings.²⁵ The government denied a request from the United Nations Office for West Africa (UNOWA) to assist with an investigation into the events surrounding the December 2014 coup attempt.²⁶ Notwithstanding legal requirements for court martial hearings to be public, control was reportedly tight, independent observers were barred from attending, and access to the media was banned, all of which gave rise to concerns about the fairness of the trial. The accused were reportedly represented at the trial by lawyers sent by the National Agency for Legal Aid (NALA). Reports also indicated that the three soldiers were detained incommunicado and were subjected to torture while in custody before the court martial.²⁷

²⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, ‘Mission to The Gambia’, A/HRC/28/68/Add.4. (16 March 2015), para 22.

²¹ This was officially announced on Gambia Radio and Television Services (GRTS) News, available at [\[https://www.youtube.com/watch?v=IHxZZ6eKj8o\]](https://www.youtube.com/watch?v=IHxZZ6eKj8o) (accessed 10 October 2015).

²² Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to The Gambia A/HRC/29/37/Add.2 (11 May 2015), para. 25.

²³ ‘Gambia says former presidential guard chief led coup attempt’, *Reuters*, 7 January 2015.

²⁴ Amnesty International, ‘Gambia: Charge or release family members of alleged failed coup plotters’, available at [\[https://www.amnesty.org/en/latest/news/2015/01/gambia-charge-or-release-family-members-alleged-failed-coup-plotters/\]](https://www.amnesty.org/en/latest/news/2015/01/gambia-charge-or-release-family-members-alleged-failed-coup-plotters/) (accessed 10 October 2015).

²⁵ Amnesty International, ‘Gambia: Soldiers sentenced to death in secret trial must not be executed’, available at [\[https://www.amnesty.org/en/press-releases/2015/04/gambia-soldiers-sentenced-to-death-in-secret-trial-must-not-be-executed/\]](https://www.amnesty.org/en/press-releases/2015/04/gambia-soldiers-sentenced-to-death-in-secret-trial-must-not-be-executed/) (accessed 10 October 2015).

²⁶ Human Rights Watch, ‘State of fear: arbitrary arrest, torture and killings’ (2015), p. 24, available at [\[https://www.hrw.org/sites/default/files/report_pdf/gambia0915_4up_0.pdf\]](https://www.hrw.org/sites/default/files/report_pdf/gambia0915_4up_0.pdf), (accessed 15 October 2015).

²⁷ *Ibid.*

The Constitution further provides under section 18(3) that the National Assembly shall within ten years from the date of the coming into force of the Constitution review the desirability or otherwise of the total abolition of the death penalty in The Gambia. At the time of writing, it is now 18 years after the coming into force of the Constitution, and the National Assembly has not fulfilled this obligation. The Gambia rejected recommendations from the Universal Periodic Review (UPR) by other states to maintain the moratorium on executions and abolish the death penalty through the ratification of the Optional Protocol to the International Covenant on Civil and Political Rights.²⁸ Recently, President Jammeh warned that death row inmates should expect to have their sentences implemented. The President said in a meeting with religious leaders, broadcast on state television on 17 July 2015, that the move was a response to the spiralling murder rate. This might be a sign of the end of the three-year unofficial moratorium on execution.²⁹

B. Right to personal liberty

Section 19 of the Constitution guarantees the right to personal liberty and security of the person. No one shall be deprived of this right except on such grounds and in accordance with such procedures established by law. International standards provide not only that arrest and detention must not be arbitrary, but they must also be carried out on grounds and according to procedures established by law.³⁰ Section 19(2) further provides that an arrested or detained person must be informed of the reason for such arrest, in a language that he or she understands, and has a right to consult a lawyer. This information is essential to allow the person to challenge the lawfulness of their arrest or detention and if they are charged, to start the preparation of their defense.

However, these rights have often been violated and people have been subjected to punitive and arbitrary regulations without due process. In a 2008 report, *Gambia: Fear Rules*, Amnesty International noted that

human rights violations in Gambia are perpetrated by the National Intelligence Agency (NIA), army and police against real and perceived opponents of the government on a routine basis. It demonstrates that once people are in the custody of the government, they are susceptible to a whole range of human rights violations including unlawful detention, torture while in detention, unfair trials, enforced disappearance and extrajudicial executions.³¹

The reality of the status quo is the spate of attacks, arrests, and detention of activists, journalists, and religious and community leaders, which have become common practice. A notable case includes the arbitrary detention from December 2012 to May 2013 of the Kanifing

²⁸ Report of the Working Group on the Universal Periodic Review* Gambia Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (24 March 2015) 2.

²⁹ 'Gambia to reinstate firing squads: president', *Yahoo News*, 18 July 2015.

³⁰ Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

³¹ Introduction to 'Gambia: Fear Rules', report by Amnesty International in 2008. This report documents human rights violations that took place following the March 2006 foiled coup attempt, when at least 63 perceived and real opponents were rounded up. The report also includes human rights violations that have taken place in the post coup period.

Housing Estate Imam Baba Leigh,³² the most outspoken religious leader for human rights and good governance in the country. He now lives in the United States.³³

The recent case of Sait Matty Jaw and two other men, who were arrested on 5 November 2014 by the National Intelligence Agency (NIA) for their involvement in a poll survey on ‘good governance and corruption’ undertaken for Gallup and were held without charge for a week, shows the level of arbitrariness in The Gambia. Sait was released on bail on 12 November 2014 but was rearrested on 10 December 2014 and arraigned, along with the other two. He was then remanded by Magistrate Samsideen Conteh at the notorious Mile II Central Prison with a bail bond of 5 million dalasi (D) (about USD 125,000). All three were charged with ‘conspiracy to commit a misdemeanour’, ‘failure to register a business’, and two counts of ‘disobedience of statutory duty’.³⁴ The second and third accused were convicted and sentenced to pay a fine of D 200,000 each (approximately USD 5,000), or in default to serve a four-year imprisonment term. This development came after the two convicts changed their plea. However, Sait did not plead guilty. In April 2015, Magistrate Conteh upheld the no case to answer submission made by the defense counsel of Mr Sait Matty Jaw.³⁵ Before the state could appeal the case, Sait left the country.

In July 2015, five senior staff of the Ministry of Agriculture were arrested by the police after being asked to report to the Serious Crimes Unit. Despite Banjul’s Magistrate Court granting them bail, they remained in detention at the police headquarters in Banjul. The five were first arrested and charged with economic crimes and abuse of office in October 2014, and detained at the NIA until January 2015.³⁶

It is important to note that in some cases people who have been acquitted and discharged by a court are rearrested by state agents, such as the NIA. A case in point is that of the ex-Finance Minister, Mambury Njie. On 3 July 2014 he was acquitted and discharged by the Special Criminal Division (SCD) of the High Court in Banjul on two counts, namely economic crime and neglect of official duty. He was later arrested and detained on 9 October.³⁷

C. Freedom of speech and assembly

Section 25 of the Constitution guarantees a wide range of rights, including freedom of speech and expression, and freedom of thought, assembly, and association. However, this section of the Note will focus on freedom of speech and expression, which includes freedom of the press and other media, and freedom to assemble and demonstrate peacefully without arms.

1. Freedom of speech

³² Imam Leigh was detained incommunicado for more than 5 months between November 2012 and May 2013, only to be released and paraded before national television to apologize to the President for releasing him.

³³ US Department of State, ‘The Gambia 2012 Human Rights Report’ (2012) p. 3, available at <http://www.state.gov/documents/organization/204335.pdf> (accessed 10 August 2015).

³⁴ Amnesty International, ‘Gambia: Human rights defender facing possibility of jail: Sait Matty Jaw’, available at <http://www.refworld.org/docid/549924994.html> (accessed 1 August 2015).

³⁵ ‘State to appeal against Sait Matty Jaw acquittal’, *The Point*, 30 April 2015.

³⁶ ‘Wife of Former Agric Official Laments Ordeal of Husband’, *Foroyaa Newspaper*, 10 July 2015,

³⁷ ‘Ex-Finance Minister held for 86 days at NIA’, *Foroyaa* 5 December 2014.

One of the fundamental human rights provided in the Constitution is set out in section 25(1)(a), which states that ‘every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media’. Section 207(1) further states that the ‘freedom and independence of the press and other information media’ are ‘guaranteed’.

Section 208 of the Constitution states that ‘[a]ll state owned newspapers, journals, radio and television shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinion’, yet the public media, comprising the Gambia Radio and Television Services (GRTS), is currently completely controlled by the regime and supporters of the ruling party, with the total exclusion of members of the opposition and those who hold views contrary to the ruling party, in complete contravention of the section.

These rights are not absolute and are capable of lawful limitation pursuant to sections 25(4) and 209 of the Constitution. Section 25(4) provides that freedom of speech and expression is to 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.

Further, section 209 provides that the freedom and independence of the media guaranteed by section 207 is ‘subject to laws which are reasonably required in a democratic society in the interests of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of others.’ The Constitution does not provide further detail or guidance as to the meaning of the substantive rights of freedom of expression and freedom of the media, and nor does it define the precise scope of the lawful limitations allowed with regard to them.

Fundamentally, President Jammeh is the foremost exponent of this anti-media attitude and message, which appears to have been absorbed and acted upon by the rest of his government, particularly by the security agencies. Over the years, the President has issued several direct and veiled messages which have threatened freedom of the press and the lives of journalists in the country. Reacting to the growing criticism of his newly imposed military regime in 1994, President Jammeh stated that ‘journalists are the illegitimate sons of Africa. Citizens should not buy newspapers so that journalists can starve to death.’³⁸ In May 2004, while responding to reports that some media houses and chiefs objected to the extension of the compulsory registration of media houses and practitioners as demanded by the now repealed Media Commission, the President retorted: ‘[Y]ou either register with the Commission or go to hell. I see no reason why local journalists should not register with the commission; and in fact, the deadline should not have been extended. But you give the fool a long rope to hang himself.’³⁹ The President has continued to make statements that put human rights workers, media practitioners, and opposition figures in fear. In a meeting with Muslim religious leaders in October 2009 on the occasion of the Eid-el-fitr prayers, President Jammeh echoed his usual

³⁸ Quoted by the Media Foundation for West Africa in its seminal report ‘Press Freedom Violations in the Gambia: 1994 – 2006.’

³⁹ The late Deyda Hydara provided a counter-response to this position on the same day: ‘The utterances are totally repugnant and reprehensible and we reject them in the most vehement manner’.

attack on human rights workers and threatened to kill rapists and murderers who may hide behind human rights defenders.⁴⁰

The environment in which the media operates is a precarious one which is characterized by draconian laws and arbitrary arrests, detentions, and physical assaults against journalists, as well as the closure and burning down of media houses. The government of The Gambia is in the habit of arbitrarily closing down newspapers and other media houses without a court order. Citizen FM, a private radio station, was closed down in 1999 by the state and the proprietor was charged with ‘operating without a license’. The Magistrate Court convicted him but this was reversed by the High Court in 2000. The High Court held that the proprietor had not committed any crime and closing down the radio station was a violation of his right to freedom of expression. The Court held that the work of the media to freely seek and disseminate information is a cornerstone of a democratic system in a civilized country.⁴¹

In recent years, the courts have seen a number of cases in which journalists, including members of the Gambian Press Union, have faced imprisonment for publications made in the course of their work. Most notably, in 2009 six journalists were sentenced to imprisonment by the High Court, and were only saved from serving time in prison by a Presidential pardon.⁴²

Changes in the laws

Several changes in the laws, as shown below, are in clear breach of international standards for the protection of freedom of expression, for example the regulation of broadcasting, which is ultimately entrusted to the executive rather than to an independent body.

a) National Media Commission Act

In 2002, the National Media Commission Act was enacted to regulate the registration of media houses and to establish the National Media Commission. Section 34 of the Act, on false publication and broadcasting, which is now repealed, was challenged in the Supreme Court in the case of *Gambia Press Union and Four Others v. National Media Commission and Two Others*.⁴³ The provisions of that law were repealed, however, before the Court was able to deliver a final ruling on its validity. Section 181A of the Criminal Code reflects the now-repealed former section 34 of the National Media Commission Act.

b) Seditious publication

Section 52 of the Criminal Code (Amendment) Act 2004, as amended in 2005, makes any written or verbal statement that is critical of the government an offence. It provides stiff penalties in the form of fines and imprisonment even for first-time offenders, and in some cases there is not even an option of a fine. A major case involving this law was the trial of US-based

⁴⁰ This statement generated a strong international reaction, as many believe the President equates human rights with crime and criminals, as well as threatening human rights workers.

⁴¹ Article 19 ‘Freedom of expression still under threat the Case of Citizen FM’ (June 1999). In addition to Citizen FM Radio, the government also closed down *The Independent* newspaper in 2006, as well as *The Standard and Daily News* in 2012. It has also arbitrarily closed down Teranga FM radio station on at least two occasions without any legal authority. While *The Standard* and Teranga FM were later allowed to resume operations, *The Independent* and the *Daily News* are still closed down.

⁴² *The State v. Ebrima Sawaneh & Six Others*, HC/209/09/CR/046/AO.

⁴³ Civil Suit No. 5/2003.

Gambian journalist Ms. Fatou Jaw Manneh,⁴⁴ who was charged with seditious publication for an interview she gave to a newspaper in 2007 in which she was critical of President Jammeh and the government. *The Point* newspaper reported that on 18 August 2008, Magistrate Buba Jawo convicted and sentenced Manneh on a four-count charge: sedition, publication of seditious words, publication of false information, and uttering seditious words. She was fined D 250,000 (approximately USD 6,000) or in default to serve a one-year imprisonment for each of the four charges.

On 25 September 2013, the treasurer of the opposition United Democracy Party (UDP), Amadou Sanneh, two other UDP party members, Malang Fatty and his brother Alhagie Sambou Fatty, and Bakary Baldeh, a commissioner of oaths, were detained incommunicado for one month at the NIA before being tried and found guilty on sedition charges for their involvement in a letter written on UDP letterhead supporting the political asylum application of Malang Fatty.⁴⁵

More recently, Alagie Abdoulie Ceesay, the manager of Teranga FM, has been in detention since July 2015, charged with ‘seditious intention’ for allegedly distributing pictures that authorities said were designed to ‘raise discontent, hatred, or disaffection among the inhabitants of the Gambia’.⁴⁶ He has been refused bail as well as denied visits by his family.

c) *False information and news*

Section 41 of the Criminal Code creates the offence of publishing false news with intent to cause fear or alarm to the public. For instance, in April 2014, journalist Sanna Camara was arrested and charged with false publication for writing an article on human trafficking in *The Gambia*. This is a widely recognised problem in the country.⁴⁷

Fatou Camara, a former state house press secretary and broadcast TV journalist, was first picked up from her home in Bijilo by state house guards on 15 September 2013 and held for two days at NIA headquarters without charge. Shortly after her release, Camara was re-arrested and held incommunicado for 25 days at the NIA headquarters. She was eventually charged with the crime of ‘spreading false news and publication of false news with intent to tarnish the image of the President’, and accused of providing information to the editor of *Freedom* newspaper, a diaspora online news site. She was later granted bail and fled the country.⁴⁸

In June 2015, a Gambian newspaper reported that a former NIA staff member, Babucarr Beyai, was found guilty of ‘publishing false information’ after he was heard in conversation over the telephone saying that the NIA director had been dismissed. He was fined D 50,000 (approximately USD 1,250).⁴⁹

⁴⁴ Fatou Jaw Manneh was arrested at the airport as soon as she landed in The Gambia to pay her respects to her late father.

⁴⁵ Amnesty International, ‘The Gambia must Immediately Release Three Opposition Members Convicted of Sedition’ (18 December 2012), available at [www.amnesty.org/en/latest/news/2013/12/gambia-must-immediately-release-three-oppositionmembers-convicted-sedition/] (accessed 10 August 2015).

⁴⁶ ‘Teranga FM MD charged with seditious intention’, *The Point*, 5 August 2015.

⁴⁷ ‘Police Admit ‘Problems’ with Human Trafficking’, *The Standard*, 27 June 2014.

⁴⁸ US Department of State, ‘The Gambia 2014 Human Rights Report’ (2014) p. 8, available at [<http://www.state.gov/documents/organization/236574.pdf>] (accessed 10 August 2015).

⁴⁹ ‘False Information Publisher Fined D50,000’, *The Point*, 5 June 2015.

The Criminal Code Amendment Act also increased the punishment for providing false information to a public servant from six months to five years imprisonment and/or a fine of D 50,000 (approximately USD 1,650). The law previously provided for a jail term of not more than six months or a fine of D 500 (about USD 17), or both.

Further changes to the law also brought the President, Vice President, parliamentarians, and ministers under the category of public officers. The significance of this change is found in the practice of charging citizens with ‘giving false information to a public officer’ when one submits a petition to government officials expressing a grievance and seeking redress. The question of who is a public officer became a contentious matter during the 2012 court case of Dr. Gumbo Touray, a University of The Gambia lecturer who sent a petition to the President in 2011 highlighting nepotism by the Vice Chancellor. Until then, public officers included all government employees except members of the cabinet and lawmakers. Thus, during the trial, defense lawyers argued that the charge was misplaced because the addressee of the petition, i.e. the President, was not a public officer as defined by the Constitution.

Following Touray’s acquittal and discharge, amendments were made to section 114 of the Criminal Code in April 2013 to expand the definition of ‘public officer’. Tabling the bill before lawmakers, the then Minister of Justice Lamin Jobarteh, who was dismissed in May 2013, said the bill was intended ‘to reflect the current socio-political realities’ in the country. He stated that section 114 of the Criminal Code, which created the offence of giving false information to a public officer, was found to be grossly inadequate to the extent that sections 166(4) and 167 of the Constitution excluded the President, the Vice President, the Speaker, the Deputy Speaker of the National Assembly, ministers, or members of the National Assembly from the definition of ‘public officer’ and therefore outside the contemplation of section 114 of the Criminal Code.⁵⁰ Jobarteh was a victim of this very amendment seven months later. The Special Criminal Court convicted him, with two others, for giving false information to a public officer and abuse of power.⁵¹

d) *The Official Secrets Act*

The Official Secrets Act contains provisions which are in conflict with the right of the media to report freely. Under section 3, it is an offence for anyone to make a ‘sketch, plan, model or note’ or to publish or communicate ‘any secret official code, word, sketch, plan, article, note or other document’ which may be useful to an enemy. Journalists reporting on security issues run the risk of contravening the Official Secrets Act without any criminal intention on their part.

e) *Information Act (amended) 2013*

In response to the growing internet activism that is not only highly critical of the government and public officials but also widespread and varied around the world, the National Assembly passed an amendment to the Information Act in April 2013 that provided a 15 year jail term for any person found guilty of using the internet to spread ‘false news’ about the regime or public officials. The amendment also imposed a fine of D 3 million (approximately USD 86,000) on persons found guilty of publishing ‘false news’ online against the regime or public officials. Observers were quick to point out that this move by the government was merely intended to target online newspapers and bloggers and social networking users in and outside the country.

⁵⁰ ‘Criminal Code Act amended “to reflect political realities”’, *The Point*, 17 April 2013.

⁵¹ ‘Njogu Bah, Jobarteh, Pa Harry Jammeh jailed 2 years’, *The Point*, 20 December 2013.

Given the constitutional provisions on freedom of the media, it is clear that these new or revised laws only seek to subvert the Constitution, as their inconsistency with the supreme law of the land is more than obvious. In view of the foregoing, the impact of these laws and practices on the work of the media is far-reaching. Essentially, these laws and practices limit the capacity of the media to play its rightful role in peace building, promoting good governance, and holding the government to account, as well as promoting the respect and protection of human rights in the country, a function carved out for the media by The Gambia's Constitution. This was aptly captured by a 2013 study on the 'Plight of Gambian Exiled Journalists' commissioned by the Doha Centre for Media Freedom:

The regular occurrence of threats and attacks against journalists in The Gambia has forced journalists to engage in self-censorship, led their families to pressurize them to abandon the profession because of the imminent dangers, or forced media professionals to go into exile. This fear is given more credence by the prevailing impunity relating to crimes perpetrated against journalists such as murder, disappearances and arson attacks.⁵²

2. Freedom of assembly

The right to freedom of assembly as guaranteed by the Constitution includes the right to take part in peaceful demonstrations. However, people are deterred from organising and participating in such demonstrations. Section 18(4) allows for the use of force in the 'suppression of a riot, insurrection or mutiny'. This affords law enforcement officials with immunity when a person dies under circumstances in which reasonable force was used.

On 10 and 11 April 2000, the Gambia Student Union (GAMSU) organised a large-scale protest that threatened the Jammeh administration. The demonstration was a protest against the beating to death of Ebrima Barry at the hands of fire service officers in Brikama, Western Region, and the rape of a thirteen-year-old schoolgirl by a uniformed paramilitary officer at the Independence Stadium, where an annual inter-school sports competition was taking place. The GAMSU requested a police permit to hold a public protest but it was denied. Realising that it was their constitutional right to protest, the student leadership called its members to march peacefully toward the capital city of Banjul. They were stopped violently by a mix of police and military officers. Sixteen people died, including a Red Cross volunteer/radio journalist and a three-year-old child (who was killed by what was reported to be a stray bullet). Upon viewing the violent response of the government to the protest by their colleagues in the city, students in the country's only boarding high school and several other rural towns launched their own protests on 11 April and, like their colleagues, they were repressed and several hundreds of students were detained country-wide.⁵³

Due to this event and the impunity that followed, there have been limited numbers of demonstrations that have taken place since then. Fifteen years on, the authorities have failed to ensure justice and hold the security officers accountable for their use of excessive force to suppress the students' demonstration. Instead, in 2001 the Indemnity Act⁵⁴ was passed which allowed the security officers accused of abuse of force during the demonstration to be

⁵² This is a project aimed to assess the situation of Gambian exiled journalists, conducted by the Dakar-based Inter African Network for Women, Media, Gender and Development (FAMEDEV) with key Gambian journalists, among them Amie Joof Cole, DA Jawo, and Baba Galleh Jallow, serving as researchers.

⁵³ See *Gambia Student's Association v. The Inspector General of Police & Anor.*, 26/04/2000.

⁵⁴ No. 5 of 2001.

indemnified. Additionally, the Public Order Act⁵⁵ established the requirement of authorization for the organization of rallies or demonstrations.

In April 2010, Femi Peters, the campaign manager of the main opposition party, the United Democracy Party (UDP), was convicted for holding a political rally without a police permit to use a public address system. He was arrested in October 2009 after the UDP held a rally in Serrekunda without prior police authorisation. The police alleged that Peters had ‘convoked a political meeting and used a loudspeaker without a permit issued by the Inspector General of Police, under section 5 of the Public Order Act.’⁵⁶ He was sentenced to 12 months imprisonment and his appeal was rejected by the High Court and the Court of Appeal.

Following the execution of the nine inmates of Mile 2 Central Prison in August 2012, two journalists, Babucarr Ceesay and Abubacarr Saidykhan, sought a police permit to hold a demonstration against the execution but were turned down and arrested on 6 September 2012. Baboucarr Ceesay was charged with sedition, incitement of violence, and conspiracy to commit a felony, and Abubacarr Saidykhan was charged with incitement of violence and conspiracy to commit a felony. The two journalists were released on 10 September 2012 and the charges were eventually dropped, reportedly on orders of the President.⁵⁷

This raises fundamental questions about the respect for a right that is guaranteed by the Constitution, while limited by an Act that abrogates that specific right.

D. Political rights

The Gambia has a multi-party system.⁵⁸ Section 26 provides for political rights. It states that

[e]very citizen of the Gambian of full age and capacity shall have the right without unreasonable restrictions

- a) to take part in the conduct of public affairs directly or through freely chosen representatives;
- b) to vote and stand for elections at genuine periodic elections for public office, which elections shall be by universal and equal suffrage and be held by secret ballot.
- c) To have access on general terms of equality, to public service in the Gambia.

Part 7 of the Constitution focuses on political parties. Section 60 prohibits the formation of a party based on ethnic, sectional, religious, or regional bases and emphasizes the need for the parties to conform to democratic principles. Currently there are at least eight registered political parties⁵⁹ including the ruling Alliance for Patriotic Re-orientation and Construction (APRC) party, which has won each and every election (held in 1997, 2001, 2006, and 2011) amidst

⁵⁵ The 1961 Act came into force on 31 October 1961. It has since been amended by the Amendments Act, 2009 and 2010.

⁵⁶ *Peters (Femi) v. the State*, HC 195/10/CR/075/BO (Crim. Appeal).

⁵⁷ Joint statement by ARTICLE 19, Commonwealth Human Rights Initiative and Amnesty International, 21 December 2012, available at [<https://www.article19.org/resources.php/resource/3575/en/the-gambia:-government-must-stop-intimidation-and-harassment-of-human-rights-defenders,-journalists,-lawyers-and-government-critics>] (accessed 28 November 2015).

⁵⁸ For a critical analysis of the political system of The Gambia, see S. Taal, ‘Public Perspective and understanding of human rights and governance in The Gambia’ (2012), a study conducted for TANGO.

⁵⁹ These are the APRC, the GMC, the GPDP, the NADD, the NCP, the NDAM, the NRP, the PDOIS, the PPP, and the UDP.

claims of unfairness⁶⁰ by the opposition.⁶¹ It is worth noting that the Constitution makes no provision for the financing of political parties and election campaigning. Thus campaign financing is unregulated and does not easily lend itself to equity. Consequently, the dominance of the ruling political party over an extended period has given the APRC the advantage of incumbency.⁶²

Furthermore, the President has made it clear during and after elections that public services and facilities, including roads and electricity, will only be provided for communities that vote for him and the ruling party. As a result, several communities were noted to have been openly denied such services and facilities, with the Kiang districts in the Lower River Region (LRR), as a stronghold of the opposition, being the most deprived. It was the only part of the country without paved roads along the trans-Gambia highway for many years until recently, when most of the area along the highway was paved. Many attributed the change of heart of the regime to the fact that the ruling party won a seat in Kiang West for the first time in the 2011 presidential elections.⁶³

Section 42 of the Constitution establishes the Independent Electoral Commission (IEC), which is responsible for the supervision of all public elections, registration of political parties, and the conduct and supervision of the registration of voters.⁶⁴ Since 1996, three Chairpersons have been removed from office (one of them twice), and three members of the Commission have also been removed, apparently without following due process.⁶⁵

The Gambia has witnessed a major shrinking of the political space over the years. First, the Elections (Amendment) Act, 2015⁶⁶ was passed on 7 July 2015 and assented to by the President on 20 July 2015. Section 43 of the Act stipulates the deposit that candidates for election must make. Candidates for President must pay D 500,000 (approximately USD 12,500) which was previously D 10,000 (approximately USD 250); candidates for the National Assembly must deposit D 50,000 (approximately USD 1,000) which was previously D 5,000 (approximately USD 125); and candidates for local council offices must pay about D 10,000 (about USD 200). Opposition political parties not only regard the increases as unreasonably high but also as a ploy by the government to drastically limit the participation of the opposition in elections.

Section 105 of the Elections Amendment Act places further restrictions on political parties, requiring that all executive members of such parties reside in The Gambia, have offices in all the regions of the country, hold bi-annual congresses, and report to the IEC annually on their finances. The number of signatures needed to register a political party has been increased from

⁶⁰ A coalition of CSOs, which has been observing elections since the 2006 presidential elections, has always contended that the ground is not level for free and fair elections. The ruling party has total control over national media, while security forces and civil servants as well as public enterprises have been used for electioneering purposes in favour of the APRC.

⁶¹ The US government and several Western governments rejected the results of the 1997 presidential elections outright, claiming vote rigging and intimidation by the regime.

⁶² See Report of the Commonwealth Expert Team: The Gambia Presidential Election (24 November 2011), available at [<http://thecommonwealth.org/sites/default/files/new-items/documents/TheGambiaPresidentialElection2011Final.pdf>] (accessed 20 October 2015).

⁶³ The elected MP for the constituency Yaya Dibba was, however, dismissed from the ruling party by the President in September 2013, thus making him lose his seat also.

⁶⁴ Section 43. Election issues are further governed by the Elections Act (Decree No. 78, 1996, as last amended by Act No. 7, 2009).

⁶⁵ n 56, 12.

⁶⁶ Act No. 6 of 2015.

500 to 10,000 registered voters with at least 1,000 from each of the administrative areas, in addition to the requirement that a party post a bond of more than D 1 million (USD 24,000).

The new fees and other changes have been widely criticised by experts and opposition party leaders. Mai Ahmad Fatty, of the opposition Moral Congress Party, criticised the changes as unconstitutional, citing section 26 of the Constitution. He stressed that the phrase ‘without unreasonable restrictions’ was inconsistent with the financial and other requirements of the amended law. He added that the amendment ‘introduces feudalism into national politics – the haves against the haves-not [sic] – creating political dynasties of the rich and the powerful. It puts elected public office up for sale and beyond the reach of the ordinary citizen.’⁶⁷ The leader of the main opposition party, Ousainou Darboe, argued that the change was designed to benefit the ruling party. He stated that ‘the Gambian people want a bill that will make electioneering easy; laws that will expand the democratic space, and laws that put contestants on the same level. That is what the Gambian people want. Not a law that puts a certain contestant over the others.’⁶⁸

It is clear that the new fees set by the Act will further shrink the political space, threaten ‘multiparty democracy’, and discourage people from vying for elected office, thereby further entrenching a *de facto* one-party system. Moreover, the provision that calls for all executive members of political parties to reside in the country is seen as a strategy to disenfranchise diaspora Gambians.

There have also been court cases dealing with political rights. In June 2005, the controversial murder case of *The State v. Ousainou Darboe and others*,⁶⁹ against the main opposition leader, was dismissed by the High Court. Mr. Darboe and his co-defendants were accused of murdering a supporter of the ruling party while campaigning for the 2001 presidential elections. Despite the fact that it was a highly sensitive case, the High Court did not hesitate to dismiss it because the prosecution failed to establish a case against them.

In September 2005, the High Court delivered a landmark ruling in the case of *Halifa Sallah and three others v. the State*,⁷⁰ which involved the leaders of four opposition parties in the country. The Court nullified the rule of the IEC which was to allow voters whose names did not appear on the list of the main register of voters to vote at the by-elections if they came with valid voters cards. The Court held that such a practice would not ensure a genuine election as guaranteed by section 26(b) of the Constitution.

a. Equality of men and women

i. Rights of women

Section 28 of the Constitution ensures that women are accorded dignity of the person fully and equally with men and have the right to treatment equal with men, including equal opportunities in political, economic, and social activities. This constitutional provision recognises the equality of men and women in all spheres. It is also in line with the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW), the African Women’s

⁶⁷ ‘GMC has strategic response to Elections Act amendment: Mai Fatty’, *The Point*, 15 July 2015.

⁶⁸ ‘Darboe Says He Will Challenge the Election Laws Amendment’, *Gambia Affairs*, 14 July 2015.

⁶⁹ *The State v. Ousainou Darboe & others* (2000) High Court Criminal Case No 14.

⁷⁰ *Halifa Sallah & Others v. State* (2003) SC No 1/2005.

Protocol, and other international and regional obligations, as it seeks to eliminate discrimination against women. Due to the patriarchal nature of society, women are not treated equally with men in all areas of their lives. This is more prominent in the political sphere.⁷¹

ii. Equality before the law and protection against discrimination

Under section 17(2) of the Constitution, every person is entitled to the enjoyment of rights without discrimination on the grounds of race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status.

Although the Constitution makes express provision for equality before the law and protection against discrimination, the same Constitution, by way of a claw-back clause, makes exceptions in relation to personal law which negate the essence of the same section. Section 33 provides that ‘all persons shall be equal before the law.’ Subsections (2) and (3) state as follows:

Subject to the provisions of subsection (5), no law shall make any provision which is discriminatory either of itself or in its effect.

Subject to the provisions of subsection (5), no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any public authority.

Subsection (5) states as follows:

Subsection (2) shall not apply to any law in so far as that law makes provision - (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.

Subsection (5) amply shows that where customary and Sharia laws are in conflict with the Constitution on any issue or matter which borders on discrimination, the two aforementioned laws will apply over the Constitution, as it will not be subjected to the consistency test under section 4. Section 33, which is contained in the entrenched fundamental human rights chapter, implies that a person’s personal or customary law may allow for him or her to be discriminated against and such a person shall have no recourse under the Constitution or under any law. This greatly infringes women’s rights as most violations and discrimination against women occur within the ambit of adoption, marriage, divorce, burial, and devolution of property. This provision of the Constitution is contrary to Articles 2 and 16 of the CEDAW and Article 2 of the African Women’s Protocol, which require states parties to eliminate all forms of discrimination against women. The CEDAW Committee recommended the ‘amendment of section 33(5) of [the] 1997 Constitution, which explicitly exempts from prohibition of discrimination on grounds of gender areas governing personal status, particularly with regard to adoption, marriage, divorce, burial and devolution of property on death’.⁷²

iii. Right to marry

⁷¹ For a comprehensive study on women’s political participation and representation in The Gambia, see S. Nabaneh, ‘Women’s Political Participation and Representation in The Gambia: One step forward or two back?’ (2013) commissioned by TANGO.

⁷² CEDAW, 33rd Session, 22 July 2005, CEDAW/C/GMB/CO/1-3.

Section 27(2) of the Constitution mandates the state to guarantee the right to freely consent to marriage. The right to marry and start a family is accorded to men and women of full age and capacity and it shall be based on the free and full consent of both parties. This means that only persons of full age and capacity can enter into a legally valid marriage. There is no exception to this constitutional provision. However, ‘full age’ and ‘capacity’ are not defined in the Constitution, although the Children’s Act, 2005 defines a child as any person below 18 years.⁷³ The Act failed to peg 18 years as the minimum age of marriage.

In addition, under section 127 of the Criminal Code, which has been amended by the Children’s Act, 2005, ‘defilement’ of unmarried girls under 18 is a criminal offence.⁷⁴ However, ‘defilement’ of married girls under 18 years is not an offence, making it acceptable under customary or personal law for girls as young as 13 to be married off without committing a crime. The debates over Female Genital Mutilation (FGM), early marriage, and other harmful traditional practices have been justified under such customary practices and there is no statutory law which prohibits them *per se*.

IV. Directive principles of state policy

Chapter 20 of the Constitution provides for state directive principles on political, economic, social and educational objectives, foreign relations, and duties of citizens. The directive principles in the 1997 Constitution form part of the public policy of The Gambia for the establishment of a just, free, and democratic state. The primary distinction between the fundamental rights and the directive principles as visualised by the drafters of the Constitution was with regard to the question of enforceability. Section 211 of the Constitution expressly states that it does not confer legal rights and cannot be enforced in any court. However, it provides that the courts are entitled to have regard to these principles in interpreting any laws based on them.⁷⁵ Unlike the courts of India, no Gambian courts have interpreted the directive principles as legally binding.

V. Separation of powers

A. The executive

Unlike the 1970 Constitution, which had a hybrid system in which cabinet ministers were either elected or nominated members of Parliament, the 1997 Constitution under Part 6 provides for an executive presidential system. The Constitution vests executive power in the President. The President holds office for a term of five years,⁷⁶ and he or she may be removed by the process of impeachment.⁷⁷ In 2001, key amendments to the Constitution included the removal of the previous two-term limit on the presidency and of the provision for a second ballot if a presidential candidate fails to obtain 50 per cent of the votes cast on a first ballot. Currently, presidential elections take place under a simple majority system (‘first-past-the-post’), with the

⁷³ Section 2 of the Children’s Act.

⁷⁴ See Schedule (section 241) of the Children’s Act.

⁷⁵ Section 211(b) of the Constitution.

⁷⁶ Section 63(1) of the Constitution.

⁷⁷ Section 63(3) of the Constitution.

whole country effectively serving as a single constituency.⁷⁸ The absence of term limits leads to a lack of accountability in government. Leaders remaining in office for so long results in a loss of touch with the grassroots and with them not responding to the needs and wishes of their people.⁷⁹ Thus, the absence of term limits in the Gambian Constitution and the requirement for a simple majority greatly hinders the progress and development of democracy in the country. This is further compounded by the fact that ‘state institutions are weak and under the influence and control of the executive power, namely the President.’⁸⁰

The cabinet is made up of the President, Vice President, and ministers.⁸¹ The cabinet is responsible for advising the President with respect to the policies of the government. Pursuant to section 71(4) of the Constitution, a minister is appointed by the President, who may terminate his or services. The President is well-known for regularly reshuffling his cabinet and dismissing his ministers without explanation.⁸²

Section 77 of the Constitution ensures that the National Assembly can hold the executive accountable. For example, the President is required to attend National Assembly sessions at least once a year to outline his policies. However, the oversight provided by the National Assembly is weak because the majority of members are from the President’s party, thereby entrenching partisan allegiance. This affects the underlying confidence and respect for the impartiality of the National Assembly.

B. The legislature

The National Assembly of The Gambia is vested with legislative powers that are to be exercised through the enactment of bills.⁸³ It is to be comprised of not more than forty-eight elected members and five members nominated by the President.⁸⁴ The Speaker and Deputy Speaker are elected from the nominated members. However, the election of the Speaker and the Deputy Speaker from amongst the nominated members goes against the spirit of parliamentary democracy, since they are not accountable to the National Assembly or a constituency but to the President who nominates them. This system also calls into question their longevity in office, as the President can remove them if they fail to do his bidding. Even though the President has the power to nominate a National Assembly member, he should not have the power to remove someone from the office of Speaker. In 2010, the President revoked the nomination of the Speaker. This act was inconsistent with the underlying principles of separation of powers due to the fact that election to the office of Speaker was a legislative act performed by members of the National Assembly, irrespective of party affiliation.

In addition, National Assembly members can also lose their seats if they are dismissed from their parties. The President has, on several occasions, expelled parliamentarians from his party

⁷⁸ Report of the Commonwealth Expert Team: The Gambia Presidential Election (24 November 2011) p. 14, available at [<http://thecommonwealth.org/sites/default/files/new-items/documents/TheGambiaPresidentialElection2011Final.pdf>] (accessed 20 October 2015).

⁷⁹ C. Fombad and N.A. Inegbedion, ‘Presidential term limits and their impact on constitutionalism in Africa’, in C. Fombad and C. Murra, *Fostering Constitutionalism in Africa* 15.

⁸⁰ Report of the Special Rapporteur, Heyns (n 22), para 10.

⁸¹ Section 73 of the Constitution.

⁸² It has been estimated that since 1994, more than eighty cabinet ministers have been hired and fired, some multiple times, and others were fired even before they ever set foot in their new offices.

⁸³ Section 100 of the Constitution.

⁸⁴ Section 88 of the Constitution.

as its chairman. The dismissals of Pa Malick Ceesay,⁸⁵ Borry Kolley,⁸⁶ and Yaya Dibba⁸⁷ are cases in point. The effect of their expulsions was the loss of their seats as well as the electorates being robbed of their choices, since by-elections had to be conducted in those constituencies.

It is important to note that in the exercise of its duties, the National Assembly can only amend the Constitution in accordance with the procedure stipulated by the Constitution. Section 226(3) provides that entrenched clauses⁸⁸ can only be amended through a referendum in which not less than 50 per cent of qualified voters in The Gambia have voted and 75 per cent of such voters support the proposed amendment. Any purported amendment made otherwise is null and void and of no effect whatsoever and cannot be part of the Constitution. This is to prevent the National Assembly from making amendments to the Constitution which would defeat the purpose of the fundamental principles and the rights enshrined in it. The National Assembly cannot, therefore, pass any law outside the powers that the Constitution confers on it.

All other bills for amendment of the Constitution must comply with the provisions of section 226(2), which also requires that before a bill for amendment is presented for first reading, it must be published in at least two issues of the Gazette, the latest publication being not less than three months after the first. The bill should also be introduced into the National Assembly not earlier than ten days after the latest publication and must be supported on the second and third reading by votes of not less than three-quarters of all the National Assembly members.

The doctrine of constitutional supremacy is clearly demonstrated in many decided cases, including *Sabally v. Inspector General of Police*.⁸⁹ In this case the Gambian Supreme Court dealt with the validity of the Indemnity (Amendment) Act which had been assented to by the President on 2 May 2001, but was backdated to 1 January 2000. The Act further ousted the jurisdiction of the regular court in favour of the Claims Commission, which was to be established to receive and hear claims and make recommendations to the President for compensation for deserving claimants. The case was a constitutional reference stated by a Judge of the High Court requesting the Supreme Court to determine ‘whether the Indemnity (Amendment) Act No. 5 of 2001 was made in excess of powers conferred by the Constitution or any other law upon the National Assembly or any other person or authority.’

The plaintiff, a school teacher, issued a writ of summons in the High Court seeking, *inter alia*, damages for assault and injuries allegedly occasioned to him by state security personnel during disturbances that occurred on 10 April 2000. The trial started in the High Court on 1 March 2001 and while the plaintiff was still proving his case, the said Act was amended by the National Assembly and assented to by the President. The plaintiff then filed a motion before the High Court on the ground that by virtue of the amended Act, his cause of action against the defendant was extinguished. Before the Supreme Court, the plaintiff’s counsel submitted that the Act retroactively purported to take away a vested right of the plaintiff to pursue his pending civil suit in contravention of section 100(2) of the Constitution. Counsel for the plaintiff further contended that the amendment was unconstitutional and in excess of the powers of the National

⁸⁵ ‘Pa Malick Ceesay expelled from APRC’, *Foroyaa*, 12 May 2015.

⁸⁶ ‘Gambia: Electoral Commission Announces Foni Jarrol By-Election’, *AllAfrica*, 23 October 2013.

⁸⁷ ‘Kiang West NAM arrested after APRC expulsion’, *The Point*, 9 September 2013.

⁸⁸ These entrenched provisions as provided in section 226(7) are sections 1, 79(2), 4, 5(1), 6(2), 8, 13(4), 39(1), 42(1), 47(3), 63(1), the first sentence of section 71(2), the whole of chapter IV, 85(4), 160(7), 87, 100, 120(1)(a), (2), and (3), 121(1), 123, 126, 127, 128, 130, 132, 133, 135(1) and (2), 136, 138(1),(4),(5) and (6), 149(1), 151(1), 193(1) and 226: see section 226(7).

⁸⁹ Supreme Court, Civil Case No 2, 2001.

Assembly. Counsel for the defendants, on the other hand, argued that deprivation of the vested right was justified by the public interest provision in section 17(2) of the Constitution. By virtue of this provision, the enjoyment of the fundamental rights and freedoms guaranteed in the Constitution are subject to the rights and freedoms of others and the public interest.

In a unanimous judgment, the Supreme Court held that the application of the Act to terminate the legal proceedings instituted by the plaintiff at the time constituted a contravention of the provisions against retroactive deprivation of a vested right as provided for by section 100(2)(c) of the Constitution and exceeded the competence of the National Assembly. The Court held that access to an independent and impartial court for the determination of one's rights and obligations is acknowledged as a fundamental human right, which also lies at the heart of the enforcement of other rights. In other words, the National Assembly had acted in excess of its powers.

In *Hon. Kemesseng Jammeh v. the Attorney General*,⁹⁰ the Supreme Court invalidated a substantial part of the Constitution Amendment Act⁹¹ which aimed at amending several provisions of the Constitution. The procedural requirements for amending the Constitution as provided in section 226(7) of the Constitution were not followed.

These cases illustrate that the National Assembly can be prevented from arbitrarily changing laws or policies to suit its own convenience.

C. The judiciary

1. The courts

Sections 120 to 148 of the Constitution provide for the structure, composition, and jurisdiction of the courts in The Gambia. The Constitution recognises the widely acclaimed notion of judicial independence. Judicial power is vested in the courts.⁹² Section 120(3) of Constitution states that

[i]n the exercise of their judicial functions, the courts, the judges and other holders of judicial office shall be independent and shall be subject only to this Constitution and the law and, save as provided in this Chapter, shall not be subject to the control or direction of any other person or authority.

Accordingly, the courts are not to be subjected to the control of any person or authority outside the judiciary.

The Constitution also places a positive duty on all organs of the state to accord such assistance as the courts may require to protect their independence, dignity, and effectiveness. The head of the judiciary is the Chief Justice who is responsible for the administration and supervision of the courts.⁹³

2. Judicial independence

⁹⁰ *Hon. Kemesseng Jammeh v. the Attorney General*, (2001) Supreme Court, Civil Case No 4.

⁹¹ No. 6 of 2001

⁹² Section 120(2).

⁹³ Section 121(1).

Appointment

The appointment of judges in a transparent manner is of utmost importance to judicial independence. Section 138 of the Constitution mandates the President to appoint the Chief Justice after consultation with the Judicial Service Commission (JSC). Generally, the President appoints senior court judges on the recommendation of the JSC,⁹⁴ while the JSC has the power to appoint magistrates and members of the subordinate courts.⁹⁵ The JSC is also mandated to appoint judges of the Special Criminal Court subject to the approval of the National Assembly.⁹⁶ The JSC consists of the Chief Justice; a judge of a superior court; the Solicitor General; a legal practitioner of at least five years standing at the Gambia Bar nominated by the Attorney General in consultation with the Gambia Bar Association (GBA); a presidential appointee; and one person nominated by the National Assembly.⁹⁷ The President has complete control over the appointment of the Chief Justice, with the JSC having a mere consultative role.⁹⁸

It must be noted that the majority of judges in The Gambia are appointed on contracts from other African Commonwealth countries, mainly under the UK Department for International Development/Commonwealth Secretariat ('DFID/CS scheme'), and Ghanaian and Nigerian technical assistance schemes.⁹⁹ Under the DFID/CS scheme, contract judges are nominated by their respective governments and are interviewed by a panel comprising members of the DFID/CS, the Chief Justice, and the Attorney General of The Gambia at the Commonwealth Secretariat in London. Consequently, there is uncertainty as to whether the constitutional appointment process is being respected, as there is no provision for the appointment of expatriate judges in the Constitution, which provides for Gambians only, as well as the extent of the involvement of the JSC in the process.¹⁰⁰

Security of tenure

a) Tenure of judicial office

Section 141 of the Constitution provides for both optional and mandatory retirement of serving judges. Section 141(2)(a) provides that a judge may retire after attaining the age of 65 years, while section 141(2)(b) makes it mandatory for a judge of the Superior Court to retire upon attaining the age of 70. These constitutional provisions are generous and can safeguard security of tenure. However, section 142(2)(c) threatens this as it provides that judges may have their appointment terminated by the President in consultation with the JSC. The distinction between the use of 'in consultation with' and 'upon the recommendation of' would seem to indicate that the President is obliged to follow the decision of the JSC. The power of the President to appoint senior court judges and to terminate their appointments severely undermines the independence of the judiciary, as it provides for unnecessary dependence on the executive.

Recent Chief Justices have not lasted long. Ghanaian-born Chief Justice Mabel Yamoah Agyemang, the first woman in the role, who was sworn in in August 2013, was dismissed

⁹⁴ Section 138(2).

⁹⁵ Section 147.

⁹⁶ Section 134(3).

⁹⁷ Section 145(3).

⁹⁸ Section 138(1).

⁹⁹ International Bar Association (IBA), 'Under Pressure: a report on the rule of law in The Gambia' p. 6 (August 2006).

¹⁰⁰ *Ibid.*, 27.

without explanation on 3 February 2014. Agyemang replaced a Nigerian, Joseph Wowo, who became mired in a bribery scandal in July 2012 and was jailed on a string of corruption charges in January 2014.¹⁰¹ Her replacement, the Pakistani national Justice Ali Nawaz Chowhan, was removed from office on 12 May 2015. He was sworn in on 6 March 2014. No official reason was advanced for his removal. However, six days before his dismissal, a panel of five judges headed by Chief Justice Chowhan quashed the conviction of the erstwhile commander of the naval staff, Rear Admiral Sarjo Fofana. He was acquitted and discharged on four treason-related charges.¹⁰² He was replaced by Justice Emanuel Fagbenle, President of the Gambia Court of Appeal, as acting Chief Justice.¹⁰³

b) *Disciplinary and removal grounds*

In addition to the power of the President to dismiss judges, section 141(4) to (9) of the Constitution subjects dismissal by the JSC to the approval of the National Assembly. Section 141(4) to (9) provides a comprehensive and rigid procedure for the removal from office of a superior judge on grounds of inability to perform the functions of his or her office, whether arising from infirmity of body or mind or for misconduct. A superior court judge may be removed from his or her office if notice in writing signed by not less than half of all voting members of the National Assembly is given to the Speaker setting out a motion that the judge concerned is unable to exercise his or her duties on any of the grounds cited above, which should be investigated.¹⁰⁴ A tribunal will be appointed consisting of three persons who will further investigate the matter and report to the National Assembly on whether the allegations are substantiated.¹⁰⁵

This section could have served as a safeguard against arbitrary dismissal of judges, as the procedure is very clear. However, since the President's party commands an absolute majority in the National Assembly, such a scenario can become highly politicized. Interestingly, the JSC has never tabled the dismissal of a judge before the National Assembly for approval.

Judges have risked being dismissed when they have presided over sensitive cases. In 2003, Justice Hassan Jallow, a Supreme Court judge, had his appointment terminated by the President under suspicious circumstances.¹⁰⁶ This move came after Justice Jallow presided over high-profile constitutional cases in the Supreme Court in which several provisions of controversial Acts of the National Assembly were invalidated for contravening the Constitution and the African Charter.¹⁰⁷

Following the dismissal of the Chief Justice in June 2015, President Jammeh dismissed two judges of the Supreme Court, Raymond Sock and Gibou Janneh, without any explanation from the government. However, their dismissal came on the heels of the Court's move to commute

¹⁰¹ 'Gambian President sacks Ghanaian-born Chief Justice', *Ghana Web*, 7 February 2014.

¹⁰² 'Supreme Court passes verdict on Lang Tombong, Sarjo Fofana Appeal', *Foroyaa*, 7 May 2015.

¹⁰³ 'Gambia's chief justice dismissed', *The Point*, 13 May 2015.

¹⁰⁴ Section 141(5) of the Constitution.

¹⁰⁵ Section 141 (8) of the Constitution.

¹⁰⁶ 'Gambia: Bar Association's Protest to Jammeh', *All Africa*, 12 August 2002.

¹⁰⁷ See A.A. Senghore, 'The judiciary in governance in The Gambia: the quest for autonomy under the second republic' (2010), available at

[<http://www.thefreelibrary.com/The+judiciary+in+governance+in+the+Gambia%3A+the+quest+for+autonomy...-a0280557949>] (accessed 20 August 2015).

several death sentences of his former Chief of Defence Staff, Lieutenant General Lang Tombong Tamba, and six others to life sentences in prison.¹⁰⁸

These occurrences illustrate the threats to The Gambia's adherence to the rule of law, as well as to the independence of the judiciary, and the risks to respect for the separation of powers.

VI. Decentralisation

There are currently five regional administrative areas – the North Bank Region (NBR), the Central River Region (CRR), the Upper River Region (URR), the Lower River Region (LRR), and the West Coast Region (WCR) – headed by governors. Banjul City Council and Kanifing Municipal Council are the two municipalities that are headed by mayors who are elected by the residents of those areas.

Section 193 of the Constitution provides the legal basis for decentralization of power through the establishment of local government administration. In addition, the Local Government Act, 2007¹⁰⁹ provides for municipalities and area councils, which complement the central government authorities including the Ministry of Local Government and Regional Governors. The Local Government Authorities (LGA), which are made up of city councils, municipalities, and area councils, are determined by the IEC. Members of the LGAs are elected every four years.

A drawback of this system is that while people are empowered to elect their own local representative, they are also disempowered through the control of these elected councillors by unelected executive functionaries, including the Minister for Local Government and the regional governors. This invariably affects the autonomy and the ideals of decentralisation. A case in point is *Pa Sallah Jeng v. Minister for Local Government and Lands and the Attorney General*.¹¹⁰ Pa Sallah, the former mayor of the city of Banjul, received a letter of suspension from the Permanent Secretary (PS) in the Ministry of Local Government. The applicant alleged that this was beyond the legal power of the PS as provided in section 40(a) of the Local Government Act, which empowers the minister to suspend the mayor. Justice Ahmed Belgore (as he then was) delivered the landmark ruling in which he declared the purported letter of suspension written by the PS as null and void and of no consequence.

The above case illustrates the contentious issue of the autonomy and status of elected local government officials. It is clear that on one hand, communities are empowered to elect their own representatives, while on the other hand, the executive retains the power to dismiss those elected officials, thereby undermining their autonomy.

VII. International Law and Regional Integration

The Gambia has signed and ratified many international and regional legal instruments.¹¹¹ At the regional level, The Gambia is a party to the African Charter on Human and Peoples' Rights

¹⁰⁸ 'Gambian President sacked Supreme Court judges: lawyer, *Yahoo News*, 28 June 2015.

¹⁰⁹ As amended by Act No 7 of 2015.

¹¹⁰ MSC App No 33005/MF/114/F/2005 (unreported).

¹¹¹ The International Covenant on Economic, Social and Cultural Rights, ratified on 29 December 1978; the International Covenant on Civil and Political Rights, ratified on 22 March 1979; the Convention on the Elimination of All Forms of Discrimination against Women, signed on 29 July 1980 and ratified on 16 April 1993; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,

(African Charter), the African Charter on the Rights and Welfare of the Child (African Children's Charter), and the Protocol on the Rights of Women in Africa (African Women's Protocol). The Gambia is also a member of the Economic Commission for West Africa (ECOWAS).

The Gambian legal system is based on English common law. It thus follows the dualist approach as a common law rule. This is based upon the perception of two quite distinct systems of law, operating separately, and maintains that before any rule or principle of international law can have any effect within the domestic jurisdiction it must be expressly and specifically 'transformed into municipal law by the use of the appropriate constitutional machinery, such as an Act of Parliament.'¹¹²

There is a strong presumption in common law systems that statutes and the common law will be read so as to be compatible with international law, save where the provisions of a statute or common law clearly preclude such an interpretation. This principle was specifically recognised in Gambian law by Moshood Adio J, on behalf of the pre-1994 Supreme Court (now the High Court), in the case of *Abdulrasheed Mohamed v. the State*.¹¹³ This approach is also in keeping with the principle of Gambian constitutional interpretation set out by the Privy Council in the case of *Attorney General v. Jobe (No 2)*¹¹⁴ whereby the Constitution, 'in particular that part of it which protects and entrenches fundamental rights and freedoms to which persons in the State are to be entitled, is to be given a generous and purposive construction.'¹¹⁵

The Gambian Constitution vests in the President the power to negotiate and conclude treaties and other international agreements. The President may exercise the power personally or through his ministers. Ratification of such treaties and international agreements is the prerogative of the National Assembly of The Gambia.¹¹⁶ In transmitting treaties, the Ministry of Justice receives the resolution of ratification from the National Assembly and prepares the instrument of ratification for the signature of the President. After signature, the instrument is deposited through the Ministry of Foreign Affairs.¹¹⁷

After ratification, the first step to using these instruments effectively as tools for the enforcement of human rights is to have their provisions fully incorporated into national law, so that it can create legally enforceable obligations to which the government can be held accountable.¹¹⁸ An Act of the National Assembly is ideally enacted in order for that particular law to have force locally. For example, the CEDAW and the African Women's Protocol were given the force of law nationally in April 2010, when the Women's Act was passed. The Women's Act, in its long title, states that it was enacted to incorporate and give effect in The

supplementing the United Nations Convention against Transnational Organized Crime Preamble, supplementing the United Nations Convention against Transnational Organized Crime, signed on 14 December 2000 and ratified on 5 May 2003; the Convention on the Rights of the Child, ratified on 9 August 1990; the Minimum Age Convention, ratified on 4 September 2000; the African Charter On Human And Peoples' Rights, ratified on 8 June 1983; the African Charter on the Rights and Welfare of the Child, ratified on 14 December 2000; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, ratified on 25 May 2005; and the African Youth Charter, signed 24 December 2003 and ratified 30 April 2009.

¹¹² M.N. Shaw, *International Law* (1997) 100.

¹¹³ Unreported decision of the then Supreme Court, 1993, as cited in O.A.S. Jammeh, *The Constitutional Law of The Gambia, 1965-2010* (2011).

¹¹⁴ [1960-1963] GLR 226.

¹¹⁵ *Ibid.*, 241.

¹¹⁶ Section 79(1)(c) of the Constitution of The Gambia.

¹¹⁷ Email from Cherno Marenah, Solicitor General and Legal Secretary, on 30 October 2015.

¹¹⁸ J. Sallah and S. Jahateh, 'Desk review of the national laws, international conventions, treaties and best practices, relating to Gender based violence (GBV)' 2011.

Gambia to the provisions of the CEDAW and the African Women's Protocol.¹¹⁹ The Act however does not limit or restrict the incorporation and enforcement of any provision of these two instruments. Thus, where there is a gap, or where a particular provision is not provided for, there is a presumption that recourse will be had to the original text of these two instruments.

Section 216(3) of the Constitution obligates the state to be guided by international human rights instruments in making policies for the protection of fundamental rights and freedoms. Section 211(b) further empowers the courts to have regard to these state policies in interpreting any laws based on them. Section 219(c) and (d) of the Constitution also provides that '[t]he State shall endeavour to ensure that in international relations it ... fosters respect for international law, treaty obligations ... and ... is guided by the principles and goals of international and regional organizations of which The Gambia is a signatory.'

As directive principles of state policy, these provisions do not confer legal rights and are not enforceable, but all organs of government should be 'guided by and observe them.'

There have been several decided cases in which the Gambian courts have invoked the decisions of the African Commission and the obligations of The Gambia under the African Charter have been examined. In *Ousman Sabally v. IGP and 2 Others*, Jallow JSC referred to the decision of the African Commission in *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v. Nigeria* in interpreting the right to freedom of expression.¹²⁰ In *Mariam Denton v. the Director General of the NIA and 5 Others*,¹²¹ Justice Monageng made reference to the obligations of The Gambia under the African Charter. This was also the case in *Garrison v. the Attorney General*.¹²²

A. State reporting obligations to treaty bodies

The Gambia's record of fulfilling its state obligation of submitting reports is extremely poor. The Ministry of Justice is responsible for reporting to treaty bodies. The country submitted its initial, second, and third reports to the CEDAW Committee in 2005. It submitted its fourth and fifth combined periodic reports on the CEDAW in 2010.

The Gambia submitted its initial report on the African Charter on Human and Peoples' Rights (African Charter) in 1992. In accordance with Article 62 of the African Charter, states parties are required to submit a periodic report every two years. The first periodic report was submitted in 1994 and no more have been submitted since.¹²³ Since its ratification of the African Children's Charter and the African Women's Protocol, The Gambia has never submitted an initial report or any periodic report.

It is important to note that the government of The Gambia gives more priority to reporting under the United Nations than the African human rights system. There is clear manifestation of this. For instance, the country submitted its combined initial, second, and third periodic reports to the CEDAW Committee in 2003, which was examined in 2005, while the combined fourth and fifth periodic report due in 2010 was submitted in 2012 and was considered in 2013. The government submitted its initial report to the Convention on the Rights of the Child (CRC)

¹¹⁹ See Long Title, Women's Act of 2010.

¹²⁰ (2000) AHRLR 227 (ACHPR 1999).

¹²¹ HC/24/06 MF/087/F1.

¹²² Initial Report of the Gambia to the UN Committee on the Rights of the Child, 1992.

¹²³ Available at [www.achpr.org/states/gambia] (accessed 24 August 2015).

Committee in 1999. In 2011, it submitted its second and third periodic report. The Committee's concluding observations were issued on 4 January 2015.

In October 2014, the Human Rights Council (HRC) reviewed The Gambia's 2014 Universal Periodic Report (UPR), in which it issued 171 recommendations. In March 2015, the government submitted its written response to 78 of the 171 recommendations, including on the maintenance of the moratorium on executions and the abolition of the death penalty, and on cooperation with special procedures. The Gambia also rejected recommendations concerning the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the non-criminalization of sexual orientation or gender identity, and the removal of restrictions on freedom of expression.

B. Special mechanisms

There have been limited promotional or fact-finding missions to The Gambia by special procedures mandate holders, both at the regional and international levels, due to the non-cooperation of the government of The Gambia. In November 2014, the UN Special Rapporteur on Torture and the Special Rapporteur on Extra-Judicial Executions visited The Gambia. This was the first-ever visit to the country by any of the special procedures of the Human Rights Council. However, the visit was greatly compromised by the unwillingness of the government to grant the Special Rapporteurs freedom of movement and inquiry in all areas of detention facilities. During their mission they were refused access to the Security Wing of Mile 2 Central Prison in the capital Banjul, where death row prisoners are held.¹²⁴

In addition, the UN Working Group on Enforced or Involuntary Disappearances transmitted seven cases under its urgent action procedure to the Gambian government in respect of five people reportedly abducted on 1 January 2015, one man reportedly abducted on 4 January 2015, and one man reportedly abducted on 9 or 10 January 2015, by men believed to be members of the NIA.¹²⁵

It is important to note that of the fourteen communications sent by UN special procedures mandate holders since 2007, not one has received a substantive response from the government.¹²⁶

At the regional level, non-governmental organisations (NGOs) sent a letter to the African Commission requesting a fact-finding mission to The Gambia. This was discussed during its 17th Extra-Ordinary Session in February 2015 in The Gambia.¹²⁷ During the same session, through a Resolution on the Human Rights Situation in the Republic of The Gambia, the Commission called on the government to invite it to undertake a fact-finding mission to The Gambia.¹²⁸ There are no indications yet as to whether the government of The Gambia will extend an invitation.

¹²⁴ n 15 above, para. 4.

¹²⁵ Report of the Working Group on Enforced or Involuntary Disappearances (4 August 2014) A/HRC/27/4, 12.

¹²⁶ n 17 above, para. 14.

¹²⁷ Final Communiqué of the 17th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, available at [<http://www.achpr.org/news/2015/03/d167/>] (accessed 24 August 2015).

¹²⁸ ACHPR/Res.299 (EXT.OS/XVII) 20, available at [<http://www.achpr.org/sessions/17th-eo/resolutions/299/>] (accessed 24 August 2015).

C. Communications involving the State

The Gambia has accepted individual complaints by ratifying the Optional Protocol on the Convention on the Rights of Persons with Disabilities on 7 June 2015 and the Optional Protocol on the International Covenant on Political, Civil and Political Rights (CCPR-OP1) on 9 June 1988. There has not been any communication brought at the international or the UN level against The Gambia.

The Gambia also has not made a declaration under Article 34(6) of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol) accepting the competence of the Court to receive cases under Article 5(3) of the Protocol from NGOs with observer status before the African Commission on Human and Peoples' Rights that have standing. Therefore, the Court cannot entertain any application under Article 5(3) involving a state party which has not made such declaration.

However, a total of ten communications have been submitted to the African Commission against The Gambia. Of these, seven were dismissed for non-exhaustion of local remedies pursuant to Article 56(5) of the Charter. This rule ensures that 'the responsible state must first have an opportunity to redress by its own means within the framework of its own domestic system the wrongs alleged to be done to the individual'.¹²⁹ One case was settled amicably and two were decided on the merits.

In *Sir Dawda Jawara v. The Gambia*,¹³⁰ the communication was brought by the former head of state alleging violation of the following rights by the military junta; fair trial, freedom of expression, political participation, movement, and self-determination. The African Commission found The Gambia to be in violation of Articles 1, 2, 6, 7(1)(d) and (2), 9(1) and (2), 10(1), 11, 12(1) and (2), 13(1), 20(1), and 26 of the African Charter and recommended that The Gambia should bring its laws into conformity with the provisions of the Charter.

In *Purohit and Another v. The Gambia*,¹³¹ The Gambia was found to be in violation of various Articles of the African Charter.¹³² The African Commission recommended that The Gambia repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in The Gambia compatible with the African Charter and international standards and norms for the protection of mentally ill or disabled persons; and that it create a body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment. It was also recommended that the state provide adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia. As a way to follow-up on progress in implementing the decision, it was recommended that The Gambia report back to the African Commission, when it submits its next periodic report, on the measures taken to comply with the recommendations of the African Commission.

There have been several decided cases before the Economic Community of West African States (ECOWAS) Community Court of Justice (ECOWAS Court) dealing with violations of

¹²⁹ *Interhandel case (Switzerland v. United States.)*, I.C.J. Reports (1959), para. 9.

¹³⁰ (2000) AHRLR 107 (ACHPR 2000).

¹³¹ (2003) AHRLJ 96 (ACHPR 2003).

¹³² *Ibid.*

provisions of the African Charter against The Gambia. However, it is important to note the non-compliance with judgments of the Court by the Gambian government.

In 2008 the ECOWAS Court, in the case of *Manneh v. The Gambia*,¹³³ ordered the government of The Gambia to release Chief Ebrima Manneh, a journalist who had been missing since July 2006, and pay his family damages of USD 100,000. This followed a declaration that Manneh's arrest on 11 July 2006 and his continual detention since then without trial was unlawful and a violation of his rights as guaranteed by Articles 4, 5, 6, and 7 of the African Charter. In the absence of the Gambian government's failure to establish that the arrest and detention of the plaintiff was in accordance with the provisions of any previously laid-down law, the Court held that such action was clearly contrary to the provisions of Articles 2 and 6 of the African Charter and that the plaintiff was entitled to the restoration of his personal liberty and the security of his person.¹³⁴ July 2015 marked nine years since the arrest of Chief Manneh, whose whereabouts remain unknown, and the government has not released him or paid the mandated compensation ordered by the Court seven years ago.

In *Musa Saidykhan v. The Gambia*,¹³⁵ the plaintiff filed an application against The Gambia at the ECOWAS Court in 2007 in which he complained of violation of his human rights to personal liberty, dignity of his person, and fair hearing guaranteed by Articles 1, 5, 6, and 7 of the African Charter. According to the plaintiff, who was the editor of *The Independent* newspaper based in The Gambia, his newspaper published the names of alleged coup plotters on 21 March 2006 and six days later he was arrested at night by a combined team of armed soldiers and policemen, without a warrant of arrest. They took him to a detention centre in the headquarters of the NIA in Banjul. He claimed he was held totally incommunicado for the next 22 days. In December 2010, having regard to Article 4(g) of the ECOWAS Revised Treaty (which enables the Court to apply the African Charter), and Articles 5 (prohibition against torture), 6 (prohibition against unlawful arrest), 7(b) (presumption of innocence until proven guilty), and 7(d) (the right to be tried within a reasonable time) of the Charter, and to the findings of fact made, the Court decided that the plaintiff had established his case that he was arrested, detained, and tortured by the defendant's agents for 22 days, without any lawful excuse and without trial.¹³⁶ The Court granted the following relief: (a) a declaration that the arrest of the plaintiff in Banjul, The Gambia, on 27 March 2006 by the armed agents of the defendant was illegal and unconstitutional as it contravened his human right to personal liberty as guaranteed by Article 6 of the African Charter; (b) a declaration that his detention by the defendant's agents at the NIA detention centre for 22 days without trial was illegal as it violated his right to personal liberty and a fair hearing as guaranteed by Articles 6 and 7 of the African Charter; and (c) a declaration that the torture inflicted on him by the defendant's agents during his 22 days of detention was illegal as it violated his right to personal dignity as guaranteed by Article 5 of the Charter. The Court further awarded the plaintiff damages in the sum of USD 200,000.00.

In *Etim Moses Essien v. The Gambia*,¹³⁷ the ECOWAS Court did not find any violation with regard to the plaintiff's rights as enshrined in Article 5 (on inherent human dignity) and Article 15 (on the right to work under equitable and satisfactory conditions with equal pay for equal work) of the African Charter.

¹³³ (2008) AHRLR 171 (ECOWAS 2008).

¹³⁴ *Ibid.*, paras. 27 & 28.

¹³⁵ ECW/CCJ/JUD/08/10.

¹³⁶ *Ibid.*, paras. 46 and 47.

¹³⁷ ECW/CCJ/JUD/05/07.

On 10 June 2014 the ECOWAS Court delivered judgment in *Deyda Hydara Jr. and Others v. The Gambia*,¹³⁸ finding that the government had failed to conduct a proper investigation into the death of Deyda Hydara, the co-founder, publisher, and editor of *The Point* newspaper, who was killed on 16 December 2004 in The Gambia. The Court held that The Gambia had allowed a culture of impunity to prevail in the country. The Court further held that Deyda's death violated the right to life as guaranteed by Articles 1 and 4 of the Charter, as well as the right to freedom of the press as provided under Article 9 of the Charter and Article 66 of the Revised Community Treaty. The Court awarded damages of USD 50,000 for the failure to properly investigate the assassination as requested by the claimant.

There is no evidence to show that the government has complied with the rulings of the Court, which are binding on them as a state party. This was reiterated by Christof Heyns, who has reported that the government has failed to implement the three decisions of the ECOWAS Court.¹³⁹

VIII. Conclusion

The 1997 Constitution of The Gambia reflects the aspirations of the Gambian people. It confers sovereignty on the people of The Gambia, spells out the functions of the three arms of government, and guarantees the fundamental human rights of all people. However, there is a big gulf between these constitutional provisions and their enjoyment in reality. The country is marred by infringements of fundamental human rights and freedoms, lack of respect for the rule of law, and interference with the independence of the judiciary. There is also the existence of repressive state institutions such as the NIA, which is accountable only to the President. It arrests and detains perceived opponents of the government without following due process. In addition, amendments made to the Constitution on the whims of the President have robbed it of its powers and the guarantees it gives the people. The executive is not accountable to the legislature or the judiciary, and thus the separation of powers that the Constitution envisages is but on paper only.

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¹³⁸ ECW/CCJ/PP/30/11,judgment available at <https://www.opensocietyfoundations.org/sites/default/files/Hydara%20Judgment.pdf> (accessed 30 September 2015).

¹³⁹ Report of the Special Raporteur, Heyns (n 22), para. 15.

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