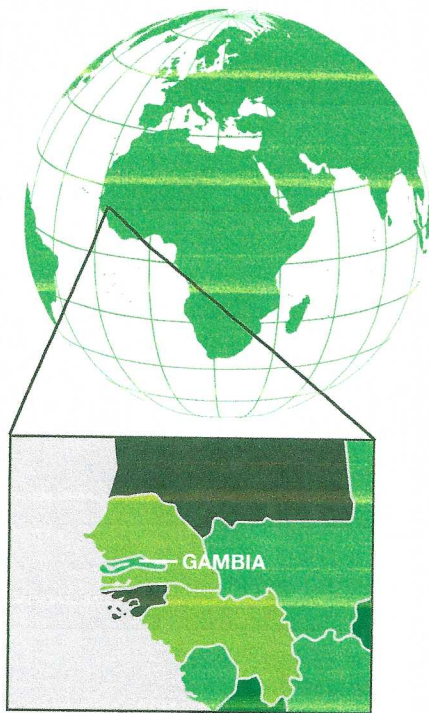


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Gambia

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I. INTRODUCTION

The year 2019 saw The Gambia move from setting up key institutions such as the Constitutional Review Commission (CRC); Truth, Reconciliation, and Reparations Commission (TRRC); and National Human Rights Commission (NHRC) to actualising the key transitional justice standards required to restore the rule of law and democracy to the country. The year also saw the introduction of laws and policies that would arguably ensure that human rights are fully respected and protected. Looking back, most of the major constitutional developments in The Gambia were marked by ongoing transitional justice reforms taking place since 2017.

This report will discuss in brief the constitutional developments in relation to the CRC, major constitutional law cases, and, lastly, draw up some conclusions from 2019 and the way forward for The Gambia.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Dealing with past human rights violations

After a year of public hearings, and as we enter into the second and possibly final year of hearings, it can no longer be ruled out that gross human rights violations were committed in The Gambia between July 1994 and January 2017 under former President Yahya Jammeh, and that those identified by the TRRC will face certain prosecution in the

most serious form.

Meanwhile, the Government continues to demonstrate its commitment to the welfare of the victims by making an initial payment of 50 million Gambian dalasis (approximately \$100,000) to the TRRC Victims' Trust Fund, part of which was used to provide overseas medical treatment for some victims.

2. Draft CRC Constitution

The Constitutional Review Commission of The Gambia, established under the Constitutional Review Commission Act 2017, submitted its first draft Constitution in November 2019.¹ The draft constitution contains 20 chapters, three chapters less than what is in the 1997 Constitution, and a total of 315 clauses.

The Commission, under Section 21 of the CRC Act, is mandated to submit a draft Constitution and report to the President upon completion of its work. After delivering the draft, the Commission was involved in public consultations which lasted for about a month. This gave the people and concerned stakeholders the opportunity to make comments and further submit their observations and contributions on the Draft Constitution to the Commission before it was finally submitted to the President.

The Draft Constitution brought in new developments when compared to the 1997 Constitution. It contained provisions on the following:

¹ See full Draft Constitution <https://crc220.org/wp-content/uploads/2015/12/CRC-DRAFT-CONSTITUTION.pdf> (accessed 20 December 2019).

Term of office of President

Unlike the 1997 Constitution, the Draft Constitution introduces a two-term limit for the President. Section 100(1) states “Subject to subsection (3), the President shall hold office for a term not exceeding five years.” Subsection (2) goes further to state that “No person shall hold office as President for more than two terms of five years each, whether or not the terms are consecutive.”

Immunity of President from legal proceedings

Section 103 of the Draft Constitution gives the President immunity from any legal proceedings during their tenure in office in their personal capacity or in relation to their performance or function in office.² The immunity granted does not, however, extend to unofficial acts or omissions while in office.³ The 1997 Constitution, on the other hand, restricts the courts from entertaining any action against the President in any civil proceedings in respect of any act done in their capacity as President after they have vacated the office.⁴ Also, a criminal court shall only have jurisdiction to sue a President after they have vacated the office in respect to acts or omissions alleged to have been perpetrated by them while holding office if the National Assembly has resolved in a motion that is supported by not less than two-thirds of all the members that such proceedings are justified in the public interest.⁵

Appointment of Vice President and Ministers

In the Draft Constitution, the President is mandated to nominate and appoint a Vice President within thirty days of assuming office and Ministers of Government within sixty days, but subject to the confirmation of the National Assembly.⁶ Here we see a shift from the 1997 Constitution, where the President appoints the Vice President and Ministers without confirmation from the National Assembly.⁷

Inclusion of economic, social, and cultural rights (ESCRs)

Section 60 of the Draft Constitution guarantees the economic, social, and cultural rights of every person in The Gambia. It states, *inter alia*, that every person has a right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; accessible and adequate housing; and to reasonable standards of sanitation, etc. Subsection (2) buttresses that a person shall not be denied emergency medical treatment. In addition, there have been great strides on the right to education⁸ and the right to development, which gives every person the right to enjoy economic, social, cultural, and political development.⁹

Section 31(5) of the Draft Constitution provides guidelines on the application of the ESCRs. It states, *inter alia*, that the right to education guaranteed under Section 55; economic, social, and cultural rights under Section 60; and the right to development un-

der Section 64 shall be implemented in the absence of resources by a court, tribunal, and other tribunal using the guidelines laid down in Section 31(5)(a)(b) and (c).

The issue of secularism

In *Hon. Kemesseng Jammeh v. the Attorney General*,¹⁰ the Supreme Court invalidated a substantial part of the Constitution Amendment Act,¹¹ which aimed at amending several provisions of the Constitution. The procedural requirements for amending the Constitution as provided in Section 226 (7) were not followed. Nevertheless, one change stayed despite the Supreme Court judgement finding it unconstitutional. This was the insertion of the word “secular” in Section 1 of the Constitution, which states “The Gambia is a Sovereign Secular Republic.”

Upon the publication of the Draft Constitution, the exclusion of the word “secular” sparked a major debate and has divided the country into two camps. The anti-secularism camp argues that inclusion of the term would mean acceptance of same-sex relations, inability to practice Islam as it should, and destruction of mosques.¹² On the other hand, the pro-secularism camp argue that the exclusion of the term would make The Gambia somewhat of an Islamic State with the majority of decisions being in favour of Muslims.¹³ This comes on the heels of former President Jammeh’s unilateral declaration of The Gambia as an “Islamic Republic” on 11 December 2015, which has since been rescinded.¹⁴

² Section 103 of the CRC Draft Constitution.

³ Section 103(3) *ibid*.

⁴ Section 69(3)(a) Constitution of The Gambia, 1997.

⁵ Section 69(3)(b) of the Constitution of The Gambia, 1997.

⁶ Sections 108 and 113 of the CRC Draft Constitution.

⁷ Section 70 of the Constitution of The Gambia, 1997.

⁸ Section 55 of the CRC Draft Constitution.

⁹ *Ibid* Section 64.

¹⁰ *Hon. Kemesseng Jammeh v. the Attorney General* (2001), Supreme Court, Civil Case No 4.

¹¹ Act No. 6 of 2001.

¹² Gainako, Gambia Supreme Islamic Council (GSIC) Response to the Draft Constitution, <http://www.gainako.com/gambia-supreme-islamic-counsel-gsic-response-to-the-draft-constitution/>. (last accessed 5 February 2020).

¹³ Foroyaa Newspaper, Christian Council Gives Position Paper in New Draft Constitution, December 11, 2019. Article available here: <http://www.foroyaa.gm/christian-council-gives-position-paper-on-new-draft-constitution/> (accessed 5 February 2019).

¹⁴ A Vines, ‘The Gambia: Africa’s new Islamic republic’, *BBC*, 26 January 2016 <https://www.bbc.com/news/world-africa-35359593> (accessed 5 January 2020).

The CRC plans on submitting the final Draft Constitution not later than March 2020.¹⁵

3. Continued debate on the validity of Section 5 of the Public Order Act

Gambians continue to debate on the legality of Section 5 of the Public Order Act, which gives the Inspector General of Police discretionary powers to grant and deny permits to citizens who want to demonstrate and assemble in The Gambia. In 2017, the Supreme Court of The Gambia, in the case of *Ousainou Darboe & 19 Others v. the Inspector General of Police and Others*, ruled that the limitations or restrictions under Section 5 of the Public Order Act on the exercise of the right to assemble and demonstrate are reasonable, constitutionally legitimate, and permissible under Section 25(4) of the Constitution, and that such limitations or restrictions are reasonably justifiable in any democratic society.¹⁶

In August of 2016, the case was filed at the ECOWAS Court, asking for among other things a declaration that Section 5 of the Public Order Act of The Gambia was in violation of Article 11 of the African Charter on Human and Peoples' Rights.

The Constitution grants every person in The Gambia the freedom of speech, conscience, assembly, association, and movement, but they shall only be exercised subject to the laws of the country, which impose reasonable restrictions on the exercise of rights and freedoms that are necessary in a democratic society and are required in the interest of the sovereignty and integrity of The Gambia. Whether or not the restriction of a right guaranteed by the Constitution should be decid-

ed on or left in the hands of the Inspector General of Police with discretionary powers continues to be a major hindrance on the enjoyment of Section 25 of the Constitution.

4. Legislative reforms

In 2019, the government tabled for enactment before the National Assembly much transformative legislation that included an Access to Information Bill, an Anti-Corruption Commission Bill, a Women's Amendment of Discriminatory Laws Bill, a Sexual Offences Amendment Bill, and a Mutual Legal Assistance in Criminal Matters Bill.

5. Review of The Gambia's human rights record by the Universal Periodic Review (UPR)

The Universal Periodic Review (UPR) provides a unique opportunity to assess states' compliance with their international obligations.¹⁷ The Gambia went through its first and second reviews in February 2010 and October 2014, respectively. On 5 November 2019, The Gambia was reviewed for the third time during the 34th session of the Working Group.¹⁸

In its first complementary report to the Human Rights Council, the National Human Rights Commission (NHRC) made submissions to the Working Group on the UPR relating to human rights of specific categories of people, namely women, children, persons with disabilities, LGBT, prisoners etc.¹⁹ The NHRC is a permanent, independent body with a mandate to promote and protect human rights and fundamental freedoms in The Gambia, investigate human rights violations, and provide re-

dress and remedial actions to victims.²⁰ Civil society also submitted complementary reports on issues around freedom of speech and assembly and same-sex relations.

Quite a number of the recommendations from the UPR have constitutional implications, including the following.²¹

Accepted Recommendations

- 127.18 Prioritize completion of the Constitutional Review process, taking into account the need for inclusive consultations (Uganda)

On freedom of expression:

- 127.28 Bring national legal provisions into line with international standards on freedom of expression under the International Covenant on Civil and Political Rights, *inter alia*, by repealing Section 173A of the Information and Communications Amendment Act (2013), and by amending Sections 25 (4) and 209 of the Constitution (Netherlands);
- 127.31 Pass legislation that promotes and guarantees freedom of expression, access to information, and media pluralism (Namibia).

On the death penalty

- 127.91 Abolition of death penalty in the legal system (Spain);
- 127.92 Abolish of the death penalty (Timor-Leste);

¹⁵ Constitutional Review Commission Newsletter, December 2019-January 2020. Issue 7, Vol 7. Available here: <https://crc220.org/wp-content/uploads/2015/12/CRC-NEWSLETTER-VOL-7-DEC-2019-JAN-2020.pdf>. (accessed 5 February 2020).

¹⁶ Civil Suit No. SC 003/2016.

¹⁷ See UN Office of the High Commissioner for Human Rights, 'UN Human Rights Council: Universal Periodic Review' <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> (accessed 10 December 2019).

¹⁸ Human Rights Council, Universal Periodic Review, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Gambia', A/HRC/WG.6/34/GMB/1 (22 August 2019).

¹⁹ National Human Rights Commission 'Report on state of compliance with international minimum standards of human rights by The Gambia under the Universal Periodic Review mechanism, third cycle' (2019).

²⁰ See G Sowe & S Nabaneh, 'The Gambia: The state of liberal democracy', in R Albert et al., *The I-CONNECT-Clough Center 2017 Global Review of Constitutional Law* (2018) 97-101.

²¹ See Human Rights Council Working Group on the Universal Periodic Review, 'Report of the Working Group on the Universal Periodic Review: Gambia', A/HRC/43/6 (19 December 2019).

- 127.93 Continue to strengthen measures towards abolishing the death penalty in its national legislation (Argentina).

Noted Recommendations

- 128.1 Adopt comprehensive anti-discrimination legislation, including on the basis of sexual orientation and gender identity, and repeal any discriminatory laws (Iceland);
- 128.2 Amend legislation to decriminalize abortion in all circumstances as well as ensure that safe and legal abortion services and post-abortion care are available (Iceland);
- 128.3 Review national laws, including the personal law and the Women's Act of 2010, with a view to removing all provisions that are discriminatory towards women (Croatia);
- 128.4 Review the personal law and the Women's Act, with a view to removing the provisions that are discriminatory towards women with regard to marriage, divorce, inheritance, marital property, adoption, and burial (Honduras);
- 128.5 Amend discriminatory laws against lesbian, gay, bisexual, transgender, and intersex people (Myanmar);
- 128.6 Repeal all legislation that criminalizes same-sex activities, including Criminal Code Article 144 (Netherlands).

While merely noting recommendations is a good step, it does not go so far as signifying the state's political commitment to the protection of human rights of sexual minorities in the country and the full protection of women's rights.

III. CONSTITUTIONAL CASES

1. Ya Kumba Jaiteh v. Clerk of the National Assembly and Others: Removal of Nominated National Assembly Members

In *Ya Kumba Jaiteh v. Clerk of the National Assembly and Others*,²² the plaintiff, Ya Kumba, challenged the revocation by the President of the Republic of her nomination to the National Assembly as invalid and sought various restraining orders against the defendant.

The plaintiff sought the following orders from the Supreme Court: to restrain the Speaker of the National Assembly from administering the oath of office onto the 3rd defendant, Foday Gassama, who had been nominated by the President to replace the plaintiff/applicant Ya Kumba Jaiteh in the National Assembly; to restrain the Clerk and the Speaker of the National Assembly from bestowing any right, privilege, or role on Foday Gassama as a member of the National Assembly; and an order restraining Foday Gassama from representing himself in any way as a member of the National Assembly.

Without having to deal with the legality or illegality of the revocation, the Supreme Court ruled that orders applied for by the plaintiff should not be granted. Having considered the submission of both parties, the Court ruled that the plaintiff should not interfere with the process or execution by the 3rd respondent of his duties. It also stated in its ruling that the reasons for the dismissal of the application will be incorporated in the final judgement of the Court.

2. Emil Touray & 6 Others (Represented by IHRDA) v. The Republic of The Gambia: Freedom of Expression, Association, and Speech

In 2018, the plaintiffs submitted a Communication to the African Commission on Human and Peoples' Rights (African Commission).²³ In it, the plaintiffs averred that the Public Order Act unlawfully restricted the scope of freedom of expression (Article 9(2)); freedom of association (Article 10); and freedom of assembly (Article 11) as protected under the African Charter on Human and Peoples' Rights (African Charter).²⁴ They requested the African Commission to seize the Communication and it was seized.²⁵

In 2019, the case was withdrawn before the African Commission and a new Communication was prepared to be submitted at the African Court on Human and Peoples' Rights, alleging violations of Articles 1, 9(2), and 11 of the African Charter and Articles 19(2) and 21 of the International Covenant on Civil and Political Rights (ICCPR).²⁶

IV. LOOKING AHEAD

2020 Prospects

Constitutional reform processes started in 2019 are expected to be completed in 2020, including the new Gambian Constitution. The constitutional reform process is envisaged to provide the country with a new constitutional framework to deal with perennial ills such as dictatorship, repression, human rights violations, corruption and mismanagement of state property, and poverty.

More legislation is also expected to be tabled in the course of this year, including comprehensive amendments to the Criminal Code and Criminal Procedure Code in order to sanitize the criminal justice system and bring it in line with modern criminal justice norms and practices.

²² S.C. No 001/2019.

²³ Communication 705/18, *Emil Touray v. Saikou Jammeh (Represented by IHRDA & Sagarr Jahateh) v Republic of The Gambia* (2018). See also S Nabaneh & G Sowe, 'The Gambia: The state of liberal democracy', in R Albert, D Landau, P Faraguna & S Drugda, *The I-CONnect-Clough Center 2018 Global Review of Constitutional Law* (October 21, 2019), p. 107-111.

²⁴ The Gambia ratified the African Charter on 8 June 1982.

²⁵ Communication 705/18 (n 21 above), para 12.

²⁶ Ratified on 22 March 1979.

On addressing human rights violations, the Truth, Reconciliation, and Reparations Commission (TRRC) is expected to submit its report and recommendations to the state in 2020, as the Act mandates that it shall operate for a period of two years unless it is extended further by the President.

The Supreme Court is also expected to deliver a judgement on the *Ya Kumba Jaiteh v. Clerk of the National Assembly & Others* on whether or not her removal from the National Assembly was constitutional or not.

The Gambia has a historic moment looming to adopt a transformative constitution, as South Africa did. Transformation of Gambian society should include the dismantling of a plethora of sexist laws and institutions, redressing their legacy,²⁷ healing the divisions of the past, and building a new society committed to social justice and improvement in the quality of people's lives.

The key question in 2020 is whether The Gambia is capable of giving itself a constitution that will usher in a new society of democracy and good governance that will ensure social and economic justice and affirm the democratic values of human dignity, equality and freedom.

V. FURTHER READING

T Isbell & SM Jaw 'The Gambia's draft Constitution reflects citizens' preference for term limits, gender quota' *Afrobarometer Dispatch* No. 338 (2020)

Video: *Constitutional reform process in Gambia*, Centre on Law & Social Transformation, Christian Michelsen Institute (CMI), University of Bergen, Norway, November 27, 2019. Available at <https://www.law-transform.no/news/video-constitutional-reform-process-in-gambia/>

S Nabaneh & G Sowe 'The Gambia: The state of liberal democracy', in R Albert, D Landau, P Faraguna & S Drugda, *The I-CONnect-Clough Center 2018 Global Review of Constitutional Law* (October 21, 2019), 107-111

S Nabaneh 'The Gambia: Commentary', in R Wolfrum, R Grote & C Fombad (eds.) *Constitutions of the World* (Oxford University Press, 2017)

S Nabaneh 'The Gambia: Constitution', in R Wolfrum, R Grote & C Fombad (eds.) *Constitutions of the World* (Oxford University Press, 2017)

²⁷ See S Nabaneh, 'The Gambia's Political Transition to Democracy: Is Abortion Reform Possible?' (December 2019), 21(2) *Health and Human Rights Journal*, 167-179.