



I·CONnect-Clough Center

2017 Global Review of Constitutional Law

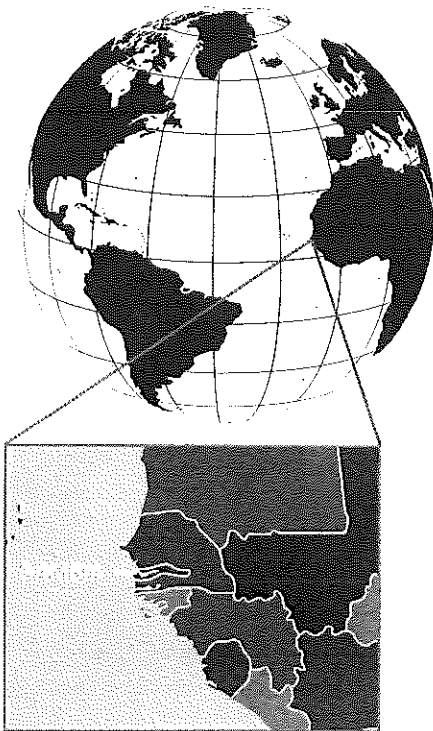
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Electronically published by I•CONnect and the Clough Center
for the Study of Constitutional Democracy at Boston College.

www.iconnectblog.com | www.bc.edu/cloughcenter

ISBN: 978-0-692-15916-3



Gambia

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

2017 witnessed unprecedented political events in The Gambia that resulted in a transition from a dictatorship to a democratic state. Yahya Jammeh's 22 years of dominance ended abruptly after the December 2016 presidential elections when he lost to opposition coalition candidate Adama Barrow. Initially, Jammeh accepted the results on 2 December 2017, only to reverse his position a week later rejecting the election results as fraudulent. His refusal to step down plunged the country into a political stalemate. The about-turn generated widespread local and international condemnation.

In response to the recalcitrant position of Jammeh, the Economic Community of West African States (ECOWAS) mobilised troops with the mandate to enter the country and forcefully oust him in case diplomatic efforts failed.¹ Consequently, Barrow was sworn in as President of The Gambia on 19 January 2017 at the Gambian Embassy in Dakar, Senegal. Two days later, Jammeh succumbed to diplomatic pressure and left the country for exile in Equatorial Guinea. On 26 January 2017, The Gambia's new President returned to the country amidst widespread celebrations.

The new democratic dispensation has led to several amendments to the 1997 Constitution,² promulgation of new laws, establishment of a Commission of Inquiry, and *Gambianisation* of the judiciary system. While these positive strides are encouraging, some

of the questionable constitutional amendments (in terms of procedure and motivation) and the immensely unpopular decision of the Supreme Court on the freedom of assembly are seen as regressive steps underscoring the need for vigilance. The new government has a critical opportunity to reengage with constitutional protections and see through its numerous campaign commitments.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

1. Political impasse: Inability of the Supreme Court to sit and declaration of a state of emergency

On 13 December 2016, Jammeh instituted an election petition to contest the validity of the presidential election results, subsequently triggering new elections. He further filed an injunction to prevent the chief justice from swearing Barrow into office. The Gambian Supreme Court, the only court competent to deal with this matter, could not hear the case due to a lack of a quorum.³ The inability to have a full bench (five judges) to hear the petition arose because Jammeh on 24 June 2015 sacked two Gambian Supreme Court judges. This followed the resignation of Chief Justice Chohan after the government expressed displeasure over a Supreme Court decision to acquit former Chief of Navy Staff Commodore Sarjo Fofana, who was serving a life sentence.

¹ The United Nations Security Council expressed support for ECOWAS and African Union Peace and Security Council efforts to negotiate the transition of the presidency without endorsing military action. See Resolution 2337, S/RES/2337 (19 January 2017).

² Act No. 1 of 1997.

³ See secs 49 & 125 of the Constitution. The Chief Justice had to recuse himself as a result of the injunction.

Although judges from Nigeria and Sierra Leone were earmarked for appointment to the Court, they never assumed office. With the case on the roll in December 2016, and again on 10 January 2017, it was further postponed to May 2017 to ensure a full bench.

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Having failed to constitute a court of his liking, the former President, with his lawyer's assistance, found a loophole which is only possible where the National Assembly is effectively under the President's control – as was the case in The Gambia. The loophole was in the following constitutional route: Section 34 provides that the President of The Gambia “may... declare that a state of public emergency exists in the whole or any part of The Gambia.” When the President has declared a state of emergency, the National Assembly *may* adopt a resolution to prolong its own term for a period up to three months.⁴ Upon the adoption of this resolution, the term of office of the President is then prolonged for the same period. In line with these provisions, the Alliance for Patriotic Reorientation and Constitution (APRC)-dominated National Assembly⁵ approved a state of emergency declared by the President on 16 January 2017 and extended its term and that of the presidency by 90 days. On 24 January 2017, after Jammeh's exit, the National Assembly ended the state of emergency in the country and rescinded the extension of executive power that had been granted to former President Jammeh. A National Assembly election has since been held in April 2017 with the United Democratic Party (the then main opposition party) having a landslide victory.

Following the end of 22 years of dictatorship and political tension after former President

Jammeh lost the elections and refused to step down, 2017 served as a transition for the new government under whom the following constitutional developments were noted.

2. Electoral reform

Section 26 of the Constitution guarantees citizens the right to make political choices, providing for free, fair, and regular elections, and permitting qualified citizens to vote and stand for public office. In line with the spirit of this provision, on 28 February 2017, the National Assembly passed the Elections (Amendment) Act 2017 “to encourage the widespread participation of the ordinary citizenry in the new democratization dispensation.” The President assented to the Act on 8 March 2017. The amendment was a response to the major shrinkage of political space during Jammeh's era. The Elections (Amendment) Act was passed on 7 July 2015 and signed by Jammeh on 20 July 2015. Candidates for President were required to pay D 500,000 (approximately USD 12,500), raised from D 10,000 (approximately USD 250); the fee for candidates for the National Assembly was increased from D 5,000 (approximately USD 125) to D 50,000 (approximately USD 1,000), and candidates for local council office were to pay D 10,000 (about USD 200). Opposition political parties not only regarded the increases as unreasonably high but also as a ploy by the government to drastically limit the participation of the opposition in elections.

The matter was further taken to the ECOWAS Community Court of Justice, in which the plaintiffs alleged that the above-mentioned amendments were a violation of article 13 (1)(2) of the African Charter on Human and Peoples' Rights (ACHPR) on the right to freely participate in one's government.⁶ The Court declared that it was not competent to deal with the electoral matter as it borders on internal affairs of The Gambia and not an issue of human rights violation as envisaged under the Charter. Despite the Court's very progressive jurisprudence, this judgment

took a very restricted view on the right to political participation. However, the exorbitant fees were reverted back to their initial amounts by the Elections (Amendment) Act of 2017.

3. *Change of retirement age and removal of upper age limit for holding office as President*
Despite the demand for a new constitution, the Barrow government has instead amended it. On 28 February 2017, the National Assembly passed the Constitution (Amendment) Bill 2017. The Bill amended section 141(2) (b) of the Constitution in extending the age at which a Supreme Court judge should vacate his or her office from 70 to 75 years. In addition, the amendment also removed the upper age limit of 65 for holding office as President provided under section 62(1)(b).

However, the initial process of amendment by government was erroneous as it didn't follow the proper procedures. In a televised statement, the Minister for Justice and Attorney General Tambadou advised President Barrow not to sign the two amended constitutional provisions because the procedures for amendment were misconceived. The proposed amendments to sections 62(1)(b) and 141(2)(b) which are not entrenched provisions, fall within the ambit of section 226(2), whose procedures were not followed. Section 226 (2) provides:

- a) before the first reading of the Bill in the National Assembly, the Bill is published in at least two issues of the Gazette, the latest publication being not less than three months after the first, and the Bill is introduced into the National Assembly not earlier than ten days after the latest publication;*
- (b) the Bill is supported on the second and third readings by the votes of not less than three quarters of all the members of the National Assembly.*

This sort of unconstitutional amendment has a history in The Gambia. In several cases,

⁴ Sec 99 (2) of the Constitution.

⁵ 43 members of the APRC were elected in the 2012 National Assembly Election and an additional five members were nominated by the President.

⁶ *Omar Jallow & Amadou Scattered v Republic of The Gambia*, ECW/CCJ/JUD/06/17.

such as *Independent Electoral Commission v Attorney General*⁷ and *Jammeh v Attorney General*,⁸ the Supreme Court per Jallow JSC (as he then was) held that:⁹

[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.

The Minister took full responsibility for the error and promised to take actions to remedy the situation as well as avoid such occurrence in the future. He further underscored the urgent need to do a comprehensive review of the Constitution. This public apology and acceptance of responsibility showed the government's responsiveness to the concerns of citizens who lamented on the non-adherence to constitutional procedures in passing the amendments.

However, the constitutional debate erupting from this was not only in the procedures but the motivation underlying the removal of the upper age limit. People saw the removal of the upper age limit as an amendment for the benefit of one person. The controversies surrounding this came about after the news of the appointment of Mrs Fatoumatta Jallow Tambajang as the Vice President as of 23 January 2017. The public discussion that ensued focused on whether Mrs. Tambajang was qualified to be appointed Vice President as it was deemed that she was above the constitutional age of 65 years at the time. Subsequently, a press statement from the spokesperson of the

President responded to the outcry stating that the attention of the President had been drawn to the constitutional provisions and that although he thought Mrs. Tambajang was well suited for the job, the provisions of the Constitution will be respected.

Interestingly, the Barrow government never appointed a vice president because it was widely believed that he still intended to appoint her, and so she was appointed overseer of the office in March 2017. With the eventual passing of the Constitutional (Amendment) Act on 25 July 2017 and assented to by the President on 27 July 2017, Mrs. Tambajang was sworn in as Vice President on 9 November 2017.

Although we acknowledge that Barrow inherited the monumental task of repairing the damage accumulated from 22 years of dictatorship, such a contrary action calls into question the commitment of the government to democratic system change. The new government needs to manifest its acceptance and commitment to democracy and constitutionalism both in theory and everyday practice, including relinquishing any attempt that gives any semblance to actions undertaken by the previous dictatorship.

4. The Constitutional Review Commission Act

On 11 December 2017, 11 months after the new government took office, Minister of Justice Tambadou finally presented the Constitutional Review Commission Bill before the National Assembly. The passing of the Constitutional Review Commission (CRC) Act, 2017¹⁰ for the establishment of a commission to draft and guide the process of promulgating a new constitution for The Gambia is a great step in addressing the deficiencies of the 1997 Constitution. The 1997

Constitution lacks legitimacy, with Gambians seeing it as an artifact of the Jammeh government. Not only was the former regime notorious for the disregard of the rule of law, but Jammeh further distinguished himself by a number of amendments to the Constitution with largely anti-human rights and undemocratic provisions, such as absence of the two-term limit, expansion of the powers and benefits of the presidency, and sweeping reforms to electoral and media provisions and subsequent laws.

In addition, some amendments did not follow the procedure laid out in the Constitution. For instance, in the case of *Hon. Kemesseng Jammeh v. the Attorney General*,¹¹ the Supreme Court invalidated a substantial part of the Constitution Amendment Act,¹² 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 in the face of the Supreme Court judgment 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." There were also amendments by implication. For example, section 24 (an entrenched clause that can only be amended through a referendum) provides that an accused can elect to be tried by jury. But this section was changed silently to the jurisdiction of the high court to state that it shall be constituted by a single judge when it presides over cases.

5. The "Freedom of Assembly" Case¹³

The case was brought by Ousainou Darboe, current Foreign Affairs Minister (and the leader of the former opposition party UDP), against the state and dealt with the right to assembly and expression. The

⁷ Gambia Law Reports [1997-2001] GR 630.

⁸ (2002) AHRLR 72 (GaSC 2001)

⁹ As above, para 32.

¹⁰ This was assented to on 11 January 2018 by President Barrow. Members of the Commission are yet to be appointed.

¹¹ Hon. Kemesseng Jammeh v. the Attorney General (2001) Supreme Court, Civil Case No 4.

¹² Act No. 6 of 2001.

¹³ *Ousainou Darboe v 19 Others IGP & Inspector General of Police, Director General of National Intelligence Agency & the Attorney General*, CML SUIT NO: SC 003/2016

plaintiffs invoked the original jurisdiction of the Supreme Court seeking declarations that section 5 of the Public Order Act¹⁴ was unconstitutional as it violated section 25 of the Constitution which guarantees freedom to assemble and demonstrate peaceably and without harm. They further claimed that the requirement levied on a person to apply for a police permit before holding any public gathering is illegal, unconstitutional, and made in excess of legislative authority.

On 23 November 2017, the Supreme Court unanimously held that the restrictions on the grounds set out in Section 25 (4) of the Constitution and section 5 of the Public Order Act were reasonably justifiable in any democratic society. The Supreme Court stated that:¹⁵

The right to assembly, as with other individual or collective rights, is usually exercised within the public space. As a result its exercise by one may conflict with the exercise of the same right by others or with the exercise or enjoyment of other rights by other persons or with the needs for the maintenance of public order and security. Hence the need for some regulation or restrictions on the exercise of the right ... The requirement of a licence from the Inspector General of police for the holding of a public procession ... to prevent a breach of the peace are reasonable limitations on the right to assembly and to free expression.

With the new democratic dispensation, this Supreme Court judgment is a major setback as it is contrary to international and regional human rights standards. For instance, Rule 71 of the recently adopted African Commission on Human and Peoples' Rights (African Commission) Guidelines on Freedom of Association and Assembly in Africa provides that:

participating in and organizing assemblies is a right and not a privilege, and thus its exercise does not require the authorization of the state. A system of prior notification may be put in place to allow states to facilitate the exercise of this right and to take the necessary measures to protect public safety and rights of other citizens.

Although, the Constitution permits the imposition of restrictions on the exercise of fundamental rights under specified circumstances, the unconstitutionality and undemocratic nature of section 5 of the Act lies in the discretionary or arbitrary nature of the decision of the IGP to grant or deny a permit. The Coalition Government's 2016 manifesto described the Public Order Act as a law that "gives too much power to the Inspector General of Police and does fetter freedom of association and assembly."¹⁶ Thus, the continuous presence of this law has led to the same repressive response by the Barrow government. Some of these incidents in 2017 included: the protest demanding the removal of a heavy security presence in Foni, which turned deadly; the arrest of sports journalist Baboucarr Sey for holding a protest and press conference over a disputed soccer field claimed by real estate company Global Properties; and the denial of a permit for an "Occupy Westfield" protest against Gambia's energy company, the National Water and Electricity Company (NAWEC), for security reasons.

The coalition government should uphold its promise of repealing any provision in the "[p]ublic Order Act that is not reasonable and justifiable in a democratic society such as those that hinder peaceful procession to highlight public grievances, which is the main tool for exercising civil society oversight over the governance process."

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. "Gambianisation" of the judiciary

Although the 1997 Constitution provides for independence of the judiciary, the Gambian judiciary under the former regime was subject to various forms of interference. Consequently, there was limited public confidence in the judiciary. Since the new government came into power, there have been considerable efforts on their part in appointing Gambians at all levels of the judiciary. Departing from the style of the former regime of foreign appointments to the position of chief justice, President Barrow appointed a Gambian, Hassan Jallow, former prosecutor of the International Criminal Tribunal for Rwanda in Arusha, Tanzania. Following this, numerous appointments took place including at the level of the Supreme Court. In 2017, 16 superior court judges were appointed, including 14 Gambians in 2017. April saw the appointment of six Gambians (two Gambians each were appointed to the Supreme Court, Court of Appeal, and High Court, respectively) and in November, eight were appointed (two to the Supreme Court, four to the Court of Appeal, and two to the High Court).

On the backdrop of allegations that during Jammeh's era foreign judges were doing the bidding of the former dictator, the Gambia Bar Association (GBA) filed a petition with the High Court against a bid to renew the contract of four Nigerian Justices in April 2017. GBA requested for leave to apply for an order of *certiorari* against the Judicial Service Commission (JSC)¹⁷ (first respondent) and the Attorney General (second respondent) to quash the appointments of four Justices who had their contracts renewed by the JSC. The GBA argued that their appointments were contrary to provisions of the Constitution such as sections 138, 145, and

¹⁴ This Act came into force on 31 October 1961. It has since been amended by the Amendment Act 2009 and 2010.

¹⁵ *Darboe case* (n 13 above) pp. 7- 8.

¹⁶ Barrow heads the coalition government.

¹⁷ *Rachel Y. Mendy, Combeh Gaye & Abdul Aziz Bensouda (as trustees of the Gambia Bar Association) v Judicial Service Commission (1st Respondent) and Attorney General (2nd respondent) in the matter of appointment by the Judicial Service Commission of Edward E. Ogar, Mathias O. Agboola, Simeon Abi and Martins O. Okoi as justices of the High Court of The Gambia and in the matter of sections 138, 145, and 229 of the 1997 Constitution of The Gambia*, Misc App. No: HC/092/17/MF/0333/A.

229. This argument was that the JSC did not follow proper procedures, as section 138(2), for instance, provides that all appointments except judges of the Special Criminal Court shall be appointed by the President on the recommendation of the first respondent. JSC did not have the power to appoint (including renewal) judges for superior courts. The presiding High Court Judge declared that the reliefs sought required an interpretation and enforcement of the Constitution and as a result, referred the matter to the Supreme Court for determination.

2. Commission of inquiry

The *Commission of Inquiry into the Financial Activities of Public Bodies, Enterprises and Offices as Regards Their Dealings with Former President Yahya A.J.J Jammeh and Connected Matters* was launched on 13 July 2017.¹⁸ The Commission was established to investigate allegations of abuse of office, mismanagement of public funds, and willful violations of the Constitution by former President Jammeh. The Commission was established to last for three months, but its mandate has been extended for an additional six months, which will continue until May 2018. The reason for the extension was the emergence of new evidence, which made it mandatory to call for more witnesses to testify before the Commission. The issue involved direct or indirect withdrawal of substantial funds – on instructions received from the Office of the President during his tenure in office – from public bodies, including the Central Bank. It has also been discovered that Jammeh accumulated at least 131 known properties and operated 89 private bank accounts, and family members hold shares in 14 companies. The Commission has also made several interim orders freezing assets of Jammeh's associates.

3. The Truth, Reconciliation and Reparations Commission (TRRC) Act

As a direct result of 22 years of authoritarian rule, human rights violations were widespread. In most cases, there was no effective investigation and perpetrators have not been brought to justice. On 13 December 2017,

the Truth, Reconciliation and Reparations Commission Act was adopted by the National Assembly and assented to by the President on 13 January 2018. The TRRC Act provides for the establishment of the historical record of the nature, causes, and extent of violations and abuses of human rights committed during the period July 1994 to January 2017 and to consider the granting of reparation to victims. The Commission's mandate includes initiating and coordinating investigations into violations and abuses of human rights; the identity of persons or institutions involved in such violations; identifying the victims; and determining what evidence might have been destroyed to conceal such violations.¹⁹ The Commission will comprise 11 members, who are yet to be appointed.

4. National Human Rights Commission (NHRC) Act

On 13 December 2017, the National Assembly passed the National Human Rights Commission Act and the President assented to it on 13 January 2018. The NHRC Act establishes a Commission for the promotion and protection of human rights in The Gambia. The NHRC is authorized to investigate and consider complaints of human rights violations in The Gambia, including violations by private persons and entities. The members of the Commission are yet to be appointed.

IV. LOOKING AHEAD TO 2018

With the enactment of the Constitution Review Commission Act, the drafting of a new Constitution will be an instrumental constitutional development feature in 2018. There is high public expectation for a new Constitution given how deeply the Gambian state was effectively personalised by the former President. As a result, the new Constitution must not only address complex issues such as term limits but also must contain a comprehensive bill of rights that complies with international and regional human rights standards. The new Constitution must also address the need of the Gambian judiciary to look at international human rights law and

foreign law in developing an indigenous jurisprudence after a dictatorship.

In the pursuit of transitional justice, the focus should not only be on the formation of a commission but on the establishment of accountable institutions and restoring confidence in them. As the country currently has a plethora of laws (including decrees) and practices from the former regime that severely limit and violate human rights and human dignity, harmonisation is very critical. The new democratic government of The Gambia must prioritise the reform of laws and institutions including the police, judiciary, military, and national intelligence.

IV. FURTHER READING

BG Galleh, *Defying Dictatorship: Essays on Gambian Politics, 2012 – 2017* (CENMEDRA 2017)

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

¹⁸ Per sec 200(1) of the Constitution and the Commission of Inquiry Act (CAP. 30:01).

¹⁹ Sec 14 of the TRRC Act, 2017.