

## Chapter 3

### LEGAL AND CONSTITUTIONAL FRAMEWORK FOR ELECTIONS

The 1997 Constitution of the Republic of The Gambia (as amended in 2001) and the Elections Act (CAP 3:01 of 2009) provide the legal framework for all elections in the country.

Further to these are Codes of Conduct for parties and independent candidates (the 'Code on Election Campaign Ethics Order') and the media ('Media Rules'). These codes were developed by the Independent Electoral Commission (IEC) and carry legal weight under Sections 92 (1) of the Elections Act, with respect to the code for parties and candidates, and Sections 93 and 134 for the media. These are addressed in Chapter 4 of this report.

Political activities in The Gambia - including during campaign periods - are also affected by other legislation, notably the Criminal Code (Amendment) Act 2004, further amended in 2005, and the Public Order Act (1990).

The Criminal Code (Amendment) Act creates the offence of "sedition" and gives a wide definition to "seditious intention". Under the law, an intention is deemed seditious where the aim is "to bring into hatred or contempt or to excite disaffection against the person of the President, or the Government of The Gambia" and/or "to raise discontent or disaffection amongst the inhabitants of The Gambia".

The Public Order Act requires that those wishing to use public address systems or hold loosely-defined rallies and processions seek permission from the police to do so.

#### **The Constitution**

Under the Constitution every citizen of The Gambia who is 18 years or older is entitled to vote (with some very few exceptions) by secret ballot. In line with The Gambia's commitments under the *International Covenant on Civil and Political Rights (ICCPR)*, the Constitution also provides for equality under the law and for freedom of expression, association and assembly, as well as other basic civil and political rights. It also has provision for the separation of powers between the Executive, Judiciary and Legislature.

A constitutional change the Team felt impacted on the 2011 presidential poll is that community leaders are no longer elected but rather appointed by the Secretary of State for Local Government and Lands. This is in consultation with the Governor when choosing a District Chief ('Seyfo'), and with the District Chief when selecting a Village Chief ('Alkalo'). The relevance of this change is discussed below.

## **The Presidency**

The Constitution stipulates that the President of The Gambia is the Head of State, Head of Government and Commander-in-Chief of the Armed Forces. In order to contest the presidency, a candidate must:

- be a citizen of The Gambia (by birth or descent);
- have attained the minimum age of thirty years and be no older than sixty-five;
- have been ordinarily resident in the country for the five years immediately preceding the election;
- have completed secondary school education; and
- be qualified to be elected as a member of the National Assembly.

Presidential elections take place every five years and within the three months preceding the expiry of the incumbent's term of office (as was the case in 2011).

The presidency falls vacant if the incumbent resigns, dies, is judged to have become mentally or physically incapacitated or if two thirds of the National Assembly support a motion of no confidence. In such instances, the Vice-President (or, if there is no Vice-President, the Speaker of the National Assembly) will complete the presidential term.

Key 2001 amendments 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% of the votes cast on a first ballot. Currently, presidential elections take place under a simple majority system ('first-past-the-post') with the whole country effectively serving as a single constituency.

## **The Elections Act**

The Elections Act covers all technical aspects of the electoral process including the registration of voters, nomination of candidates, the conduct of polls, election campaigns and registration of political parties.

Section 65 of the Act states that polls open at 7.00 am and close at 6.00 pm. However, for the 2011 presidential election, closure was changed to 4.00 pm, apparently to ensure that there would be clear daylight during the process. Polls may close earlier if all voters allotted to the polling station have voted, and may also close later if there are voters still waiting at close of polls. Voters must vote where they are registered, except police and election officers on duty on Election Day, who are allowed to vote at the polling stations where they may be serving upon presentation of the necessary documentation. Section 62 provides that to guide voters, instructions on how to vote will be placed in conspicuous places outside and inside polling stations.

A unique feature of the electoral system in The Gambia is the use of 'ballot tokens' (clear marbles) rather than ballot papers, as highlighted in Section 63 and detailed in Chapter five. This voting system was introduced in the early 1960s to address high levels of illiteracy.

The marbles are cast in separate iron-made drums (which serve as a ballot box) for each party/candidate. Each party/candidate competing in an election has a drum painted with identifying colours and party symbol/photograph. For the election in question the symbols and parties were as follows:

**Alliance for Patriotic Re-Orientation and Construction (APRC)**

Symbol: Palm Tree

Colour: Green

Candidate: President Yahya A. J. J. Jammeh

**Independent**

Symbol: Cow

Colour: Blue

Candidate: Mr Hamat N. K. Bah

**United Democratic Party (UDP)**

Symbol: Unity Handshake

Colour: Yellow

Candidate: Lawyer Ousainou A. N. M. Darboe

At the polling station on Election Day, drums are placed inside the polling booth (a screened compartment or small side room). After being issued a marble, the voter proceeds to the polling booth to vote. When a marble is dropped in the drum of the selected candidate it hits a bell whose sound clearly indicates to those in the polling station that a vote was cast. Interestingly, since they have bells, bicycles are banned from the immediate proximity of polling stations on Election Day.

After the voting process has ended, votes are counted in the counting centres by placing the marbles into specially designed trays (with either 200 or 500 holes), a system that allows counting officials to easily ascertain the number of votes cast in each drum.

**The Independent Electoral Commission**

*Establishment*

The Constitution provides for the establishment of an Independent Electoral Commission (IEC) and the procedures for appointments of members of the IEC (Sections 42 to 45). In accordance with Section 42 of the Constitution, the IEC is composed of a chair and four other members, one of whom is elected Vice-Chair.

The authority to appoint members of the IEC is vested in the Head of State and they are appointed for an initial term of seven years. The members may be re-appointed for one further term. The Constitution also provides the conditions under which the President may remove a member of the Commission from office.

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. In July 2006, the then Chairperson of the IEC and two Commissioners were dismissed by the President, and Vice-Chairman Alhaji Mustapha Carayol was appointed Chairperson - a position he retains.

### *Responsibilities*

The IEC is responsible for the registration and supervision of political parties, the registration of voters for all levels of national elections and referenda, and the conduct of such elections. The IEC is also responsible for setting the dates, times and places of public elections and referenda, and for ensuring they are publicised and held accordingly.

Section 50 of the Constitution originally gave the IEC powers to demarcate constituency boundaries on the principle of equal representation for an equal number of inhabitants. However, the 2001 amendments transferred this mandate to a Constituency Boundaries Commission, which has yet to be established.

### *Independence*

The IEC's independence is constitutionally guaranteed and in the exercise of its functions is not to be subject to the direction or control of any person or authority. That said, the manner of past dismissals of IEC members strongly suggests that Commissioners do not enjoy the security of tenure guaranteed by the Constitution.

### *Funding*

The Commission is funded principally by budgetary allocations from the government, like any other ministry or department. The allocation has in the past been supplemented by international donor support. However, according to the IEC, for the 2011 presidential elections, the only external assistance to the Commission came from the United Nations Development Programme (UNDP), which contributed USD \$100 000 for the purpose of voter education. The IEC Chairman decried this lack of support.

### *Voter registration*

Article 43 of the Constitution assigns to the IEC the responsibility for registering qualified Gambian citizens to participate in public elections. The Elections Act directs the Commission to prepare, compile and maintain a register of voters for each constituency.

The 2011 election saw the introduction of a new digital system of voter registration as a platform upon which a biometric matching was conducted. The IEC noted that the digital system "has in place adequate security features integrated in both the voter card and the data capture processes to ensure an accurate list of voters."

At the end of the voter registration exercise, the IEC announced that the number of registered voters stood at 837 039. On 4 October 2011, the Chairman of the IEC announced that this number had dropped to 796 929. The reason for this decline, he noted, was that the registration officials had initially added the spoilt and cancelled cards in the statistics returned from the field. Additionally, thumb print and facial recognition were used to detect that a total of 1 897 persons registered more than once.

As a matter of goodwill, and with the agreement of political parties, a period of amnesty was granted to the suspected cases of multiple and double registrations if the culprits voluntarily came forward. Following a discouraging response, the Commission deleted all the double and multiple cards, bar the most recent.

One of the more contentious issues amongst local stakeholders as regards the registration exercise is the Electoral Act's provision for 'letters of attestation' as suitable identification for voters to be added to the register. These documents are certifications of a given voter's claimed identity by community leaders, such as the District Seyfo or Village Alkalo. Some local stakeholders complained that because such officials were appointed, rather than elected, the system was open to abuse.

#### *Candidate Nominations*

Nomination of presidential candidates took place on 10 November 2011. Some opposition political parties complained that both the monetary deposit required and the threshold for its reimbursement were unreasonably high. The Electoral Act requires that candidates for president pay a deposit of ten thousand Gambian dalasi (approximately USD \$340) and stipulates that this is returned only if the candidate obtains "no less than forty percent of the votes cast".

#### *IEC's Preparations*

The Commission had previously noted that there were no issues with regards to the overseas and local procurement of materials. The Team encountered no complaints from polling officials as regards the availability of materials. Similarly, as regards the new digital voter registration system, the Team observed that voters' pictures and personal details were indeed clearly shown in the register and several polling officials and party agents noted that this eased the identification of voters.

The IEC had also given the assurance that the number of polling stations would be increased to give better access to all voters. In the event, the number was increased to 1,302 as compared to 989 for the previous election.

A further commitment from the Commission was that it would embark on a "massive [voter] sensitisation" programme in collaboration with the National Council for Civic

Education (NCCE) and other partners (including the entertainment industry). The NCCE was to deal with civic education and the IEC would mainly focus on voter education and voter information. This was substantiated by the NCCE who affirmed that they had received funds from the IEC and other development partners for this purpose. The National Youth Parliament, a youth civil society group, had also received funds from the IEC to carry out similar activities, which it did through musical jamborees, community drama and 'meet the candidates' events.

## **Issues**

### *Sedition laws and the Public Order Act*

The Team was informed of instances where 'sedition laws'<sup>7</sup> unfairly restricted opposition political parties' ability to meaningfully critique the performance of government and other authorities.

The Team also heard of many cases where the Public Order Act's requirement for permits from police authorities for a range of activities had been unfairly applied and overly restricted the ability of opposition political parties to play an effective part in public life.

### *2001 Constitutional Amendments*

Several stakeholders expressed the view that the absence of term limits and the requirement for a simple majority in presidential elections hindered the development of democracy in The Gambia.

Constitutional amendments in 2001 transferred the mandate to demarcate constituency boundaries from the IEC to a Boundaries Commission which is yet to be established. The IEC highlighted the need for boundary delimitation to address the current disparities in the population of constituencies.

Some opposition political parties and other stakeholders complained that the appointment - as opposed to election - of community leaders compromised the electoral process. This was because of their formal responsibility for certifying the above mentioned 'letters of attestation' and their central, albeit informal, role in the preparation and conduct of elections through, for example, providing food and lodging to polling officials and in resolving minor disputes on voting day.

### *Independence of the IEC*

The past removal of Commissioners without due process as constitutionally mandated raises concerns about the IEC's independence.

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<sup>7</sup> Criminal Code (Amendment) Act 2004, further amended in 2005, which amended section 52 of the Criminal Code Chap 10 Vol. III Laws of the Gambia 1990

## Recommendations

- The CET is mindful of the fact that The Gambia is not the only country on the continent to have abolished presidential term limits. It is, however, the Team's opinion that term limits can contribute to good governance and further deepen democracy in The Gambia. The Team would urge The Gambia to consider reinstating presidential term limits as well as the requirement for an absolute majority for the successful candidate of any presidential election.
- In the same vein, and as part of future constitutional and legal reforms, the Team would encourage consideration of the need to reinstate elections for community leaders (Seyfos and Alkalos), some of which play key roles in their localities during elections.
- The political space in The Gambia must be widened. The legal definitions of 'sedition' and 'seditious intention' as detailed above should be reviewed with this goal in mind. Furthermore, the Public Order Act should be reviewed to (i) establish to clear timeframes for the granting of permits for the use of public address systems and for rallies and processions and (ii) ensure that unless there is clear evidence that granting the permit will disrupt the peace the bias should lie in favour of granting such permits.
- The independence of the Independent Electoral Commission should be bolstered. The Team wishes to underscore the recommendation of the 2006 Commonwealth Observer Group Report which urged that the IEC should be financially autonomous and properly resourced for the smooth conduct of future elections. These measures should help to insulate the Commission from potential domestic and international pressures.
- The Team also reiterates the 2006 Report's recommendation that regulations governing the appointment, promotion and dismissal of members of the IEC should be such as to guarantee tenured appointment. "If and when it is necessary to dismiss an IEC member, due process, as provided by the Constitution, should be followed."
- There is an urgent need for demarcation of boundaries in The Gambia, ahead of future elections. The CET recommends that the mandate for demarcating constituency boundaries should be returned to the IEC until the Boundaries Commission envisaged under Article 50 of the Constitution is established.