



The National Human Rights Commission, The Gambia

Advisory Note on the Right to Freedom of Association and Assembly Vis-à-vis the Public Order Act

NHRC

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CONTACT INFORMATION

Address: National Secretariat,
Kotu, (Opp. DSTV)
The Gambia

 www.gm-nhrc.org

 Nhrc Gambia

 @NHRCGambia

FOREWORD

The National Human Rights Commission of The Gambia (NHRC) was established by the National Human Rights Commission Act 2017 with a broad mandate to protect and promote human rights. Section 12 (e) (v) of the NHRC Act 2017 empowers the NHRC to produce advisory notes, manuals, and other materials to educate, inform and explain the obligations of the State in the protection of human rights.

Section 25 (1) (d) and (e) of the 1997 Constitution, guarantees the right to freedom of assembly and freedom of association, respectively. These rights are also *sine qua non* for effective political participation and accountability.

However, the right to freedom of assembly and association was frequently interfered with by the former Alliance for Patriotic Reorientation and Construction (APRC) government under President Yahya Jammeh and those who attempted to exercise their fundamental right of assembly and association were frequently arrested, detained, tortured and even killed. With the advent of a new government led by President Adama Barrow in 2017 and the increased demand by the people of their fundamental rights and freedoms, the right to freedom of association and assembly has been severely tested in The Gambia.

In line with its mandate and considering the current position of the law regarding the right to freedom of assembly vis-à-vis the Public Order Act Cap 22.01 Laws of the Gambia, the NHRC issues this advisory note which seeks to serve as a catalyst to influence Government action to amend the Public Order Act in line with her international human rights obligations. I urge the Government to swiftly consider the recommendations issued in this Advisory Note.

Emmanuel D. Joof
Chairperson

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1.0 Background and Context

1. The right to freedom of association and assembly are fundamental human rights that underpin a democratic society in which individuals can freely express their views on issues concerning the governance of their society. The demand to exercise these rights and freedoms in The Gambia has increased in frequency largely due to the emerging conducive democratic space since 2017. However, the enjoyment of these rights is often threatened by the application of the Public Order Act.
2. In a participatory democracy like The Gambia's, the right to freedom of association and assembly remain an indispensable avenue for critical engagement between citizens and Government. These rights draw attention to issues of critical national concerns.
3. The position of the National Human Rights Commission (NHRC) is that arbitrary application of the Public Order Act does not only undermine the basic foundations of democracy but also erodes the importance of the rights as a form of political dialogue.

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4. The NHRC, acting pursuant to sections 12 (a), (e) (ii), (iii) and (j) (i) of the NHRC Act 2017, encourages the Government of The Gambia to consider the recommendations in this Advisory Note which highlights the undesirability of the current requirement for permit to hold public processions under the Public Order Act by drawing inspirations and lessons from regional and international human rights standards as well as progressive trends from certain African countries.
 5. The NHRC advances the need for an urgent review of the request for licence/permit under the Public Order Act.

2.0 Public Order Act

6. The Public Order Act was enacted in 1961, primarily to minimize public gatherings and protest against colonialism. Apart from minor amendments in 1963 and 2009¹, the Act maintains the same regulatory framework since its enactment.

¹*Public Order Act Cap: 22:01 Revised Laws of The Gambia 2009*

Section 5(2) of the Act requires any person who wants to form a public procession in the City of Banjul or the Kanifing Municipality to first apply for a license to the Inspector General of Police, or if in the regions, to the Governor of the Region, or other person authorized by the President as the case may be and if any of the aforementioned person is satisfied that the procession is not likely to cause a breach of the peace, he or she shall then issue a licence with conditions on which the procession is permitted to take place. Sections 5(4) allows a Magistrate or any police officer not below the rank of Sub-Inspector to disperse unlicensed public processions or a procession which violates any of the conditions of a licence issued under subsection (2). Similarly, individuals who participate in unlicensed processions are liable, on conviction, to imprisonment for a term of three years².

7. Over the years the application of the Public Order Act has resulted in series of human rights violations including death and injury to protesters. A case in point is the 10th and 11th April 2000 countrywide students demonstration which was sparked by the alleged rape of a 13 year old schoolgirl by a paramilitary officer at a sports event at the Independence Stadium in Bakau, and the beating to death of another secondary school student, Ebrima Barry, by fire service officers in Brikama.

²Public Order Act Revised Laws of The Gambia 2009, Section 5 (5)

As the students assembled near the gates of Gambia Technical Training Institute to present their concerns to the authorities, they were met with heavy handedness by the various security units of the country. This incident resulted to the death of about 16 people caused by the law enforcement officers and the military.

8. On the 14th April 2016, Ebrima Solo Sandeng, a youth leader of the United Democratic Party, and other activists gathered at Westfield Junction in the Kanifing Municipality to demonstrate for electoral reforms. They were arrested and manhandled, and within 24 hours it became known that Ebrima Solo Sandeng was beaten to death and buried at unknown location. Two days later, Ousainou Darboe, the leader of the United Democratic Party was arrested with his entire executive for conducting a procession demanding the release of Solo Sandeng. He was tried and convicted of various offences ranging from unlawful assembly, riot and incitement of violence on the 20th July 2016.

9. Against the backdrop of the above events, the Supreme Court of the Gambia had occasion to address the constitutionality or otherwise of Section 5 of the Public Order Act in the matter of **Ousainou Darboe and 19 Ors v Inspector General of Police and 2 Ors**³.

³SC 003/2016

In this case the Court ruled that that Section 5 of the Public Order Act, requiring police permission for peaceful assembly, did not violate the 1997 Constitution of The Gambia. This decision was widely criticized by human rights activists and organizations who argued that the requirement for a licence/permit to hold demonstration is not a law reasonably justifiable in a democratic setting.

3.0 Regional Human Rights Standards

10. The Gambia is a party to the African Charter on Human and Peoples' Rights (the Charter). Article 10 and 11 of the Charter guarantees the right to freedom of association and assembly. Article 11 of the Charter provides;
"Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others".
11. In the case of **Ousainou Darboe and 31 Ors V. The Republic of The Gambia**⁴, the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) had occasion to deal with issues relating to the provision of section 5 of the Public Order Act of the Gambia vis-à-vis Article 11 of the African Charter.

⁴Judgment No: ECW/CCJ/JUD/01/20

While the Court emphasized that permissible restrictions on the rights to assembly ensures law and order, it did not mince its stance that the requirement to obtain the approval of the IGP will certainly undermine the exercise of such right and therefore recommends its review⁵.

12. The African Commission on Human and Peoples' Rights in May 2017 adopted the Guidelines on Freedom of Association and Assembly in Africa (Guidelines). The Guidelines clarifies the precise content of the right to freedom of association and assembly in Africa taking into account the fact that these rights should underpin democratic societies. Significantly, the Guidelines posits that national constitutions shall guarantee the right to freedom of association and assembly in a broad manner consistent with regional and international human rights law. On the other hand, it recommended that national legislation on freedom of association and assembly such as the Public Order Act, should be drafted with the aim of facilitating and encouraging the enjoyment of such rights.
13. The Guidelines further provides that the right to freedom of association and assembly is a right enjoyed both by individuals and groups. However, the choice to exercise the right to freedom of association should be voluntary.

⁵*ibid at p.34*

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14. Moreover, the guidelines provide that freedom of assembly extends to peaceful assemblies, and they should be deemed peaceful if the organizers express peaceful intentions and conduct themselves accordingly. Isolated acts of violence do not render a peaceful assembly violent.
 15. Enjoyment of freedom of assembly requires the recognition that it is a right and not a privilege. Therefore, its exercise should not require the authorization of the State. A system of prior notification may be put in place to allow the State to facilitate the exercise of this right and to take the necessary measures to protect public safety and rights of other citizens.

4.0 International Human Rights Standards

16. The Gambia, as a State Party to the International Covenant on Civil and Political Rights (ICCPR), is under a duty to implement the obligations imposed by the Covenant⁶. Although the obligations under the ICCPR are very broad, in practice, the United Nations (UN) human rights treaty bodies have adopted a more specific typology of how human rights obligations should be discharged. Accordingly, States Parties are required to respect, protect and fulfil human rights.

⁶ICCPR 1966 Article 2

a. OBLIGATION TO RESPECT

17. The obligation to secure human rights entails a duty to respect human rights. By the very nature of this obligation, States Parties are under a negative obligation not to take any measures that would result in violation of a given right. Thus, the Government must take legal and other measures to achieve the purpose of Section 25 1 (d) of the Constitution, pursue accountability and provide effective remedies for violations of the right to assembly. The State must not interfere with participants in peaceful assemblies, prohibit, restrict, block or disrupt assemblies without compelling justification, and sanction participants of such assemblies without legitimate cause.

b. OBLIGATION TO PROTECT

18. Apart from the negative obligation to respect the right to assembly and peaceful demonstration, the State is also under a duty to protect individuals from human rights violations committed by third parties. This obligation also entails creating the enabling environment in which these rights are enjoyed. The State has the positive duty to facilitate peaceful assemblies, and to make it possible for participants to achieve their legitimate objectives. The Government must thus, promote an enabling environment for the exercise of this right and to put in place both legal and institutional framework within which the right can be exercised effectively.

In this regard, specific intervention such as redirect traffic, provide security and protect participants against possible abuses or interference by other members of the public may be required on the part of the Government.

c. OBLIGATION TO FULFIL

19. The obligation to fulfil human rights entails that The Gambia should take positive steps that guarantee the greater enjoyment of fundamental human rights, particularly the right to freedom of assembly and peaceful demonstration. This duty further requires the state to adopt appropriate laws that would implement her international obligations. Mere incorporation of the rights protected by the ICCPR into domestic law alone is not sufficient to discharge this duty; rather judicial, administrative as well as other appropriate measures necessary for their enjoyment must be adopted.
20. Article 21 of the ICCPR protects the right to peaceful assembly and imposes restrictions similar to those in Section 25 (4) of the 1997 Constitution of The Gambia which provides that such restrictions are;
 - a. in conformity with the law;
 - b. in the interest of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others, and

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- c. necessary in a democratic society.
21. Article 19 of the ICCPR further guarantees the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds. Restrictions on this right are also bound by a similar three-part test to the right to peaceful assembly: they must be provided by law, necessary for the respect of the rights or reputations of others or the protection of national security or of public order, or of public health or morals. Thus, for a restriction on the right to freedom of assembly to pass the aforesaid litmus test, such restriction must be in conformity with a law that is reasonably justifiable in a democratic society and be proportionate to its intended legitimate aim.

5.0 Best practices in selected African Countries

ZAMBIA

22. Just like the Gambia, Zambia had a similar law that restricted the right to freedom of association and assembly in public spaces. The police exercised wide powers to grant or refuse a permit to anyone who wanted to hold an assembly. In 1995 groups of opposition parties and activists were charged before the High Court of Zambia for taking part in an unauthorized assembly in Chongwe area.

The accused persons challenged the constitutionality of the requirement of a permit for public processions in the Supreme Court of Zambia in the case of **Mulundika and 7 Others v People** (S.C.Z. Judgment No. 25 of 1995)⁷. The Court ruled that unfettered limitation on the right to freedom of assembly by a regulatory authority is not justifiable in a democratic society, especially one that is re-establishing the essential elements of democracy based on plural politics. Thus, it struck down section 5(4) of the Public Order Act of Zambia that previously gave powers to the police to grant or refuse a permit application. This led to amendment of the Public Order Act which no longer requires a person to obtain a permit to hold an assembly, but to give at least seven days' prior notice to the police.

NIGERIA

23. In ***IGP v. All Nigerians Peoples' Party & 11 Ors***⁸, issues similar to section 5 of the Public Order Act of The Gambia were considered by the Nigerian Court of Appeal. The respondents were a registered political party and they requested from the IGP the issuance of a police permit in order to hold political rallies throughout Nigeria to protest the alleged rigging of the 2003 elections, but their request was refused. Nonetheless, they proceeded to organize the rally and there was a violent disruption of same by the police on the ground that no permit was obtained.

⁷[1996] ZMSC 26 9TH December 1996.

⁸[2007] 18 NWLR Pt. 1066

The respondent filed an action before the Federal High Court and in a celebrated judgment, the Federal High Court declared the Public Order Act which requires the issuance of a police permit before holding political rallies and other forms of assemblies in Nigeria unconstitutional.

24. Dissatisfied with the Federal High Court, the IGP appealed against the decision. In dismissing the appeal, the Court of Appeal of Nigeria ruled that freedom of speech and freedom of assembly are part of democratic rights of every citizen that the State must guard jealously as they are part of the foundation upon which the government itself rest. The appellate court went further to rule that *“police permit has outlived its usefulness certainly in a democracy; it is the right of the citizens to conduct peaceful procession, rallies, or demonstrations without seeking and obtaining permission from anybody”*.

GHANA

25. The Supreme Court of Ghana arrived at a similar conclusion in the case ***Patriotic Party v Inspector-General of Police***⁹. In this case the Court ruled that the right to freedom of speech, assembly and expression is fundamental to every citizen. The Public Order Decree that required police permits in order to hold a public assembly was declared unconstitutional.

⁹[1992-1995] GBR 585

The court observed that: *“Statutes requiring such permits for peaceful demonstrations, processions and rallies are things of the past. Police permit is the brainchild of the colonial era and ought not to remain in our statute books.”* As part of the consequential orders, the Court ordered the IGP to ensure that the decision be posted at all police stations across the country to serve as guidance.

26. In light of this unprecedented decision from the Supreme Court of Ghana, currently persons are only required to inform the police about their intention to convene a public assembly. This procedure is consistent with regional human rights standards as outlined in the Guidelines adopted by the African Commission.

6.0 Conclusion

27. While the NHRC agrees that restrictions on the right to freedom of assembly are necessary in the interest of public order, section 25 (4) of the 1997 Constitution does not envisage outright denial of the exercise of this right as contemplated in section 5 of the Public Order Act.
28. The NHRC also notes that Government has accepted the recommendation of the consultants reviewing the penal laws of The Gambia to amend section 5 of the Public Order Act to the effect that only *“notification”* instead of a *“permit”* would be required to stage a demonstration or public procession.

29. However, the NHRC is concerned that the Public Order Act Amendment Bill 2019 has still not been tabled before the National Assembly. It is the view of the NHRC that the panic and fear that grips the nation whenever citizens want to exercise their freedom to assemble is unnecessary and an affront to the democratic gains of the country.

7.0 Recommendations

30. The NHRC hereby recommend to Government to swiftly;
- A) Amend Section 5 of the Public Order Act from the requirement of permit to only notification.
 - B) Conduct a comprehensive review of the Public Order Act and bring all the provisions therein in line with The Gambia's international human rights obligations.
 - C) Put in place a comprehensive training package on crowd control and management of assemblies for the Gambia Police Force.





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