

## THE RULE OF LAW, CONSTITUTIONAL REFORM, AND THE DEATH PENALTY IN THE GAMBIA

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Late in the night on August 23, 2012, Gambian President Yahya Jammeh had nine death row inmates at the notorious Mile 2 Central Prison in The Gambia<sup>1</sup> executed to broad international condemnation.<sup>2</sup> Of the nine, three were convicted of treason, a notoriously politicized charge in a country under Jammeh's authoritarian hybrid civilian-military rule.<sup>3</sup> Prior to this, The Gambia had only carried out a single execution since its independence from Great Britain in 1965.<sup>4</sup> Specifically, Mustapha Danso was executed for the murder of an army commander during a failed coup attempt in 1981.<sup>5</sup> At the time of the August 23 executions, there were 47 inmates on death row.<sup>6</sup> Two of those executed were Senegalese nationals and at least

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<sup>1</sup> See CONSTITUTION OF THE GAMBIA, Ch. 1 (1997) (capitalizing the definite article).

<sup>2</sup> See Andrew Novak, *Nine Judicial Executions in The Gambia Undermine the Rule of Law*, AFRICLAW (Aug. 30, 2012), <http://africlaw.com/2012/08/30/nine-judicial-executions-in-the-gambia-undermine-the-rule-of-law/>; *Death Row / Gambia: "Stop Arbitrary Stream of Executions," Says UN Expert*, U.N. HUMAN RIGHTS (Aug. 28, 2012), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12461&LangID=E>. Much of the controversy centered on Foreign Minister Mamburay Njie, who was demoted to Minister for Higher Education hours before the executions took place due to his opposition. See Pa Nderry M'Bai, *Jammeh Executed First Bunch of Prisoners Friday!*, FREEDOM NEWSPAPER, Aug. 24, 2012, <http://www.freedomnewspaper.com/Homepage/tabid/36/mid/367/newsid367/7830/Gambia-Breaking-News—Jammeh-Executed-First-Batch-Of-Death-Row-Inmates-Friday-/Default.aspx>.

<sup>3</sup> See Adam Nossiter, *Gambia Leader Declares Plans for Mass Executions*, N.Y. TIMES, Aug. 24, 2012, [http://www.nytimes.com/2012/08/25/world/africa/president-yahya-jammeh-of-gambia-warns-of-mass-executions.html?\\_r=0](http://www.nytimes.com/2012/08/25/world/africa/president-yahya-jammeh-of-gambia-warns-of-mass-executions.html?_r=0); Novak, *supra* note 2 (showing that three of those executed were convicted of both murder and treason).

<sup>4</sup> See Saikou Jammeh, *Death Penalty Alive and Well*, INTER-PRESS SERV. NEWS AGENCY, Dec. 14, 2010, <http://www.ipsnews.net/2010/12/death-penalty-alive-and-well-in-the-gambia/>.

<sup>5</sup> *Id.*

<sup>6</sup> Jo Adetunji, *Gambia 'Executes Nine Prisoners'*, THE GUARDIAN, Aug. 25, 2012, <http://www.guardian.co.uk/world/2012/aug/25/gambia-executes-nine-prisoners>.

one was placed on death row prior to the enactment of The Gambia's current constitution in 1997.<sup>7</sup> The Gambia's democratic government had abolished the death penalty in 1993, but President Jammeh reinstated it in 1995 after he took power in a coup the prior year.<sup>8</sup>

The executions came as a shock to the international community, with sharp condemnation from the European Union, the African Union, and the Economic Community of West African States (ECOWAS), of which The Gambia is a member.<sup>9</sup> The Gambia is a small nation of 1.3 million and explicitly restricts the usage of the death penalty to homicide in its constitution.<sup>10</sup>

As from the coming into force of this Constitution, no court in The Gambia shall be competent to impose a sentence of death for any offence unless the sentence is prescribed by law and the offence involves violence, or the administration of any toxic substance, resulting in the death of another person.<sup>11</sup>

In January 2012, the High Court in Banjul, a trial court, sentenced Amadou Scattered Janneh, a former Minister of Information and Communication, to life imprisonment after finding that the death penalty for treason was unconstitutional.<sup>12</sup> In a separate appeal, however, the Gambian Supreme Court upheld the death penalty for treason in October 2012 in a challenge by convicted coup plotter Lt.

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<sup>7</sup> Novak, *supra* note 2. The execution of a prisoner sentenced prior to the enactment of the 1997 constitution is constitutionally problematic. *See* CONSTITUTION OF THE GAMBIA (1997), sched. 2, art. 16 (holding that all capital punishment laws that conflicted with the new Constitution were deemed to read "life imprisonment").

<sup>8</sup> *See African Union Urges Gambia to Stop Prisoner Executions*, BBC News, Aug. 24, 2012, <http://www.bbc.co.uk/news/world-africa-19366101>.

<sup>9</sup> Both Nigerian President Goodluck Jonathan and Beninois President Thomas Yayi Boni, the current chairs of ECOWAS and the African Union, respectively, have lobbied Jammeh. Jonathan intervened on behalf of the two Nigerians on death row. *See* Bubacarr Sowe, *Jammeh's Execution Threat 'Would Mean A Genocide'*, THE DISPATCH (Gambia), Aug. 24, 2012, <http://gambiadispatch.com/jammehs-execution-threat-would-mean-a-genocide/> (also noting early condemnation by French government).

<sup>10</sup> Faith Karimi, *Gambia Vows to Execute All Death Row Inmates by September, Sparking Outcry*, CNN, Aug. 23, 2012, <http://www.cnn.com/2012/08/23/world/africa/gambia-inmates-execution>.

<sup>11</sup> *See* CONSTITUTION OF THE GAMBIA (2002), art. 18(2).

<sup>12</sup> *See* Sanna Jawara & Sidiq Asemota, *Life Sentence for Scattered Janneh*, DAILY OBSERVER (Gambia) (Jan. 18, 2012), <http://observer.gm/africa/gambia/article/life-sentence-for-scattered-jannehallafrica.com/stories/201201190272.html>.

Gen. Lang Tombong Tamba and his accomplices.<sup>13</sup> The Gambian penal code still punishes treason as a capital crime and, as in other former British colonies in West Africa, the death penalty is mandatory upon conviction for homicide.<sup>14</sup> Tamba's failed constitutional challenge against the death penalty for treason was surprising in light of both the plain text of Article 18(2) and the unanimous repeal of the mandatory death penalty for drug trafficking in April 2011.<sup>15</sup> After all, the repeal was made on the legislature's assumption that the penalty was unconstitutional.<sup>16</sup> Tamba's execution in spite of Article 18(2) and

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<sup>13</sup> See *Badjie v. State*, (2012) SC Criminal Appeal 1-7/2011 (Gambia). Col. Lamin Bo Badjie and Lt. Gen. Lang Tombong Tamba were among the seven appellants in the case. For simplicity's sake in this article, however, the unwieldy case name will be referred to in short form as *Lang Tombong Tamba*. See Press Release, Amnesty Int'l, Seven Men at Imminent Execution Risk in The Gambia (Oct. 19, 2012), available at <http://www.amnesty.org/en/for-media/press-releases/seven-men-imminent-risk-execution-gambia-2012-10-19>.

<sup>14</sup> Upon a conviction for treason, the Penal Code authorizes a judge to choose between life imprisonment and the death penalty; consequently, the death sentence is not truly mandatory. 3 LAW OF THE GAMBIA Ch. 7, § 35 (2009). However, there is one instance where the death sentence for treason is mandatory: where a person "causes or attempts to cause the death of a member of the Government or other citizen of The Gambia with a view to securing the overthrow of the Government or with intent to coerce any other citizen of The Gambia into opposing the Government or otherwise into withdrawing or withholding his or her support for the Government." 3 LAW OF THE GAMBIA § 35(f). In other words, for homicide or attempted homicide carried out during a treasonous act, the death penalty is mandatory (this is the circumstance under which Mustapha Danso was executed in 1981). Attempted homicide committed during a treasonous act is the only circumstance under the current criminal law under which the death penalty may be administered for a crime not resulting in the death of another person. *Id.* See also Amnesty Int'l, *The Gambia – Statement for 52nd Ordinary Session of the African Commission on Human and People's Rights*, AFR 27/011/2012 at 4 (Oct. 24, 2012), available at <http://www.amnesty.org/fr/library/asset/AFR27/011/2012/en/d636ceb8-39fc-4942-9ba2-c215089a17ee/afr270112012en.pdf>; *Report: Gambia Executes First Inmates in About 30 Years*, CNN, Aug. 25, 2010, <http://www.cnn.com/2012/08/24/world/africa/gambia-executions>. But see CONSTITUTION OF THE GAMBIA (2002), art. 18(2). See generally Sidiq Asemota, *Another Murderer To Be Executed by Firing Squad*, DAILY OBSERVER (Gambia), Nov. 1, 2011, <http://observer.gm/africa/gambia/article/another-murderer-to-be-executed-by-firing-squad> ("Passing the sentence, Justice Emmanuel declared that the convict deserves another chance in life, but since the murder was carried out in a violent manner, the court has no discretion but to impose the full penalty of the law").

<sup>15</sup> *Gambia*, DEATH PENALTY WORLDWIDE (Sep. 10, 2012), <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=gambia>.

<sup>16</sup> See Andrew Novak, *Legislative Note: The Abolition of the Death Penalty for Drug Offenses in The Gambia*, 38 COMMONW. L. BULL. 63, 63 (2012), available at <http://dx.doi.org/10.1080/03050718.2012.646816> [hereinafter *Legislative Note*].

the repeal underscores the weakness of the rule of law in the postcolonial enclave.<sup>17</sup>

Due to these contradictions, an umbrella organization named Civil Society Associations Gambia (CSAG) brought a death penalty challenge before the ECOWAS Community Court of Justice in December of 2012.<sup>18</sup> The Nigeria-based Socio-Economic Rights and Accountability Project (SERAP) also filed suit in the ECOWAS Court in Abuja on behalf of Michael Ifunanya and Stanley Agbaeze, two Nigerian citizens on death row in The Gambia.<sup>19</sup> SERAP argued that The Gambia denied the two Nigerians due process of law because they had not been permitted to appeal their sentences.<sup>20</sup> SERAP is seeking a permanent injunction to stay the executions.<sup>21</sup> The ECOWAS Court has expanding jurisdiction to hear human rights complaints and its decisions are binding on member states, including The Gambia.<sup>22</sup> Activists are skeptical that The Gambia would comply with the ECOWAS Court's decisions. However, it is possible that the tentative death penalty moratorium installed after the international outcry over the August 2012 executions may remain indefinitely.<sup>23</sup> The prospects for total abolition, however, are dim.<sup>24</sup>

This article explores the murky constitutionality of the death penalty in The Gambia. This article will pay particular attention to the apparent contradiction between the legislature's abolition of the death penalty for drug trafficking as unconstitutional and the Supreme Court's decision in *Lang Tombong Tamba* upholding the death penalty for treason. Given the widespread trend toward abolition within Af-

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<sup>17</sup> *Id.*

<sup>18</sup> See Saikou Jammeh, *Gambia: Case to Abolish Death Penalty Falls on Toothless Court*, ALLAFRICA (Dec. 14, 2012), <http://allafrica.com/stories/201212140379.html?viewall=1>.

<sup>19</sup> *Nigerians on Death Row: SERAP Drags Gambia to ECOWAS Court*, NIGERIAN COMPASS, Sep. 13, 2012, <http://www.compassnewspaper.org/index.php/component/content/article/90-front-page-/7596-nigerians-on-death-row-serap-drags-gambia-to-ecowas-court>.

<sup>20</sup> *Id.*

<sup>21</sup> See *SERAP Takes the Fight to Stop Executions of Nigerians on Death Row in Gambia to ECOWAS Court*, SOCIAL-ECON. RTS & ACCOUNTABILITY PROJECT (Sep. 12, 2012), <http://serap-nigeria.org/serap-takes-fight-to-stop-execution-of-nigerians-on-death-row-in-gambia-to-ecowas-court>.

<sup>22</sup> See James Thuo Gathii, *The Under-Appreciated Jurisprudence of Africa's Regional Trade Judiciaries*, 12 OR. REV. INT'L L. 245, 263 (2010).

<sup>23</sup> See *Gambia: Death Penalty Impositions Temporarily Halted*, GLOBAL LEGAL MONITOR – L. LIBR. OF CONGRESS (Sept. 18, 2012), [http://www.loc.gov/lawweb/ser-vlet/lloc\\_news?disp3\\_1205403332\\_text](http://www.loc.gov/lawweb/ser-vlet/lloc_news?disp3_1205403332_text).

<sup>24</sup> *Id.*

rica, even in other Islamic-majority countries, The Gambia is one of the few steadfast supporters of capital punishment.<sup>25</sup>

#### THE CONSTITUTIONAL FRAMEWORK OF THE DEATH PENALTY: ARTICLE 18

The Republic of The Gambia grew out of the British post of Bathurst, which was built in 1816 in present-day Banjul to control trade on the Gambian River and to suppress the slave trade.<sup>26</sup> Today it is an unstable polity despite its relatively strong history of democratic rule and good governance in the early decades after independence. The country's stability was punctured in 1994 when the Armed Forces Provisional Ruling Council (AFPRC) deposed Jawara and the Council's chairman, Yayah Jammeh, became head of state.<sup>27</sup> Until a military coup d'état in 1994 ushered in a two-year interregnum of military rule, The Gambia arguably held the record as the longest surviving multiparty democracy in Africa.<sup>28</sup> By 1994, however, public support for Jawara's ruling People's Progressive Party was eroding as persistent resource constraints and poor government performance led to a low standard of living and low levels of development.<sup>29</sup> For Jammeh's part, while he initially rode a wave of public discontent to carry out populist reforms, declining human rights standards and media censorship have hampered the democratization process.<sup>30</sup>

Constitutionally, The Gambia operated under a Westminster system for the first five years following independence, with Queen Elizabeth II as head of state as represented in the colony by a governor-general.<sup>31</sup> In April 1970, a new Republican constitution installed a system of checks and balances, with a president as head of state and

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<sup>25</sup> See LILLIAN MANKA CHENWI, *TOWARD THE ABOLITION OF THE DEATH PENALTY IN AFRICA: A HUMAN RIGHTS PERSPECTIVE* 3, 53–56 (2005) (stating that two African countries performed executions in 2005, four in 2004, nine in 2003, four in 2002, six in 2001, and two in 2000).

<sup>26</sup> See Mark Davidheiser & Niklas Hultin, *Policing the Post-Colony: Legal Pluralism, Security, and Social Control in The Gambia*, in *POLICING IN AFRICA* 123, 125 (David J. Francis ed., 2012).

<sup>27</sup> See Abdoulaye S. Saine, *The Military and "Democratization" in The Gambia: 1994-2002*, in *POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES* 179, 179 (Julius Omozuanvbo Ihonvbere & John Mukum Mbaku eds., 2003).

<sup>28</sup> See OUSMAN A.S. JAMMEH, *THE CONSTITUTIONAL LAW OF THE GAMBIA 1965-2010*, at 3 (2011).

<sup>29</sup> See Saine, *supra* note 27, at 180–81.

<sup>30</sup> Abdoulaye Saine, *The Gambia's 2006 Presidential Election: Change or Continuity?*, 51 *AFR. STUD. REV.* 59, 61–71 (2008).

<sup>31</sup> JAMMEH, *supra* note 28, at 21.

a unicameral House of Representatives.<sup>32</sup> The country's early experiences had mixed success and there were significant infringements on civil liberties imposed after the 1981 coup attempt.<sup>33</sup> However, the prosecutions that followed, which included a high-profile acquittal of an opposition leader, were a testament to judicial independence in the country.<sup>34</sup> In 1982, in the wake of the coup attempt and instability in Senegal's Casamance region, Senegal and The Gambia formed the Senegambia Confederation with the intention of creating an integrated political union between the two.<sup>35</sup> Senegambia, however, failed to make significant progress toward integration and was dissolved in 1989.<sup>36</sup> A new constitution replaced the 1970 one after the AFPRC coup in 1994, which strengthened executive power, ousted the jurisdiction of the Privy Council in London as the country's highest court, created a new Supreme Court, and replaced the House with a National Assembly.<sup>37</sup> Developing constitutional jurisprudence had profound political consequences under the new constitution. In 1997, the Supreme Court found unconstitutional the provisions of an anti-corruption law that limited the rights of an accused to appeal to the highest court.<sup>38</sup> Judicial review was emerging.

Hassan B. Jallow, who later became a Gambian Supreme Court justice and the chief prosecutor at the International Criminal Tribunal for Rwanda, reflected on the abolition of the death penalty during the final year of Jawara's presidency and its reinstatement under the AFPRC military government in 1995.<sup>39</sup> According to Jallow, 87 death sentences had been handed down between independence in 1965 and abolition in 1993, of which 23 were for murder and 64 for treason related to the 1981 coup attempt.<sup>40</sup> These resulted in only a single execution. "By and large . . . the tradition had developed, and with it a public expectation, of the President commuting to life imprisonment, or to a lesser term, all sentences of death on the recommenda-

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<sup>32</sup> See *id.*, at 21-22; see also Jammeh, *supra* note 28, at 18 (describing how April 1970, how Gambia was governed by a constitution that was of statutory origin and was consequently not supreme, as it was in the form of an annexure to The Gambia Independence Order-in-Council, which is a Schedule to the Gambia Independence Act, an Act of the Parliament of Great Britain until April 1970).

<sup>33</sup> See JAMMEH, *supra* note 28, at 23.

<sup>34</sup> See *id.* at 23-24.

<sup>35</sup> See JEGGAN C. SENGHOR, *THE POLITICS OF SENEGAMBIAN INTEGRATION, 1958-1994*, at 213 (2008).

<sup>36</sup> See *id.* at 253-62.

<sup>37</sup> See JAMMEH, *supra* note 28, at 3-4.

<sup>38</sup> See *id.* at 27 (discussing the case of Alhaji Ousainou Jeng v. Gambia Commercial and Development Bank, Civil Appeal No. 4/1999 (SC)).

<sup>39</sup> See HASSAN B. JALLOW, *JOURNEY FOR JUSTICE* 344-46 (2012).

<sup>40</sup> See *id.* at 345-46.

tion of the Advisory Committee on the Prerogative of Mercy.”<sup>41</sup> Jallow believed that the death penalty was incongruous with the internationally recognized right to life, and believed that the letter of the law should reflect the country’s customary practice.<sup>42</sup> He viewed abolition as a “drive to deepen and consolidate our democratic achievements,” but he lamented that, because of the events to follow, abolition had been performed only by statute.<sup>43</sup> Almost precisely two years later, the AFPRC military regime reinstated the death penalty and all previously enacted death sentences.

The 1970 Constitution of The Gambia contemplated the continued existence of the common law mandatory death penalty through a savings clause of the right to life provision at Article 14(1), which read as follows:

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of The Gambia of which he has been convicted.

The 1970 Constitution also included a provision for the executive prerogative of mercy. This included the power of pardoning and commuting criminal sentences in Article 54.<sup>44</sup> It also included the establishment of an Advisory Committee on the Prerogative of Mercy, to be appointed by the President, in Article 55.<sup>45</sup> These articles were in *pari materia* with most of the common law constitutions in Sub-Saharan Africa and were generally based on the European Convention on Human Rights, which applied to Britain’s colonies after September 1, 1953, and lapsed at independence in 1965.<sup>46</sup> Departing colonial officials and the drafters of the 1970 Constitution looked to the ECHR and other international sources in delineating the scope of fundamental rights.<sup>47</sup>

The 1997 Constitution provided a more detailed right to life clause that altered the scope of the death penalty. The relevant portions of Article 18 of the 1997 Constitution of The Gambia read:

(1) No person shall be deprived of his or her life intentionally of right to life except in the execution of a sentence of death imposed by a court of competent

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<sup>41</sup> *See id.* at 346.

<sup>42</sup> *See id.* at 337.

<sup>43</sup> *See id.* at 346-47.

<sup>44</sup> *See* CONSTITUTION OF THE GAMBIA (1970), art. 54.

<sup>45</sup> *See* CONSTITUTION OF THE GAMBIA (1970), art. 55.

<sup>46</sup> JENNIFER WIDNER, *BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA* 161 (2001).

<sup>47</sup> *See id.*; William Dale, *The Making and Remaking of Commonwealth Constitutions*, 42 INT’L & COMP. L.Q. 67 (1993).

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.

(2) As from the coming into force of this Constitution, no court in The Gambia shall be competent to impose a sentence of death for any offence unless the sentence is prescribed by law and the offence involves violence, or the administration of any toxic substance, resulting in the death of another person.

(3) The National Assembly shall within ten years from the date of the coming into force of this Constitution review the desirability or otherwise of the total abolition of the death penalty in The Gambia.<sup>48</sup>

A simple comparison between the text of the 1970 Constitution and the 1997 Constitution indicates a desire to restrict the scope of the death penalty from that contemplated by the original common law mandatory death penalty. This intention is manifest in three ways. First, the additional provision at Article 18(2) prohibits the death penalty for any crime other than an “offence involv[ing] violence, or the administration of any toxic substance, resulting in the death of another person,”<sup>49</sup> which appears to extinguish the death penalty for rape, armed robbery, and treason, among other capital crimes. Second, the provision at 18(3) mandates a 10 year review of the death penalty, with the hope of encouraging the abolition of the death penalty.<sup>50</sup> Finally, the provision at Article 82(2) concerns the Advisory Committee for the Prerogative of Mercy.<sup>51</sup> Unlike the 1970 Constitution, the 1997 Constitution does not leave the membership of the Committee solely to the prerogative of the executive, but instead requires that the National Assembly confirm members.<sup>52</sup>

The Gambia is a party to the International Covenant on Civil and Political Rights (ICCPR), which states that the death penalty may only be reserved “for the most serious crimes.”<sup>53</sup> The Gambia has not

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<sup>48</sup> CONSTITUTION OF THE GAMBIA (1997), art. 18.

<sup>49</sup> *See id.*, art. 18(2).

<sup>50</sup> *See id.*, art. 18(3).

<sup>51</sup> *See id.*, art. 82(2).

<sup>52</sup> *Compare id.* art. 82(2) (“There shall be a Committee on the exercise of the prerogative of mercy consisting of the Attorney General and three other persons appointed by the president subject to confirmation by the National Assembly”), *with* CONSTITUTION OF THE GAMBIA (1970), art. 55(2) (“A member of the Advisory Committee shall hold office during the pleasure of the President”).

<sup>53</sup> International Covenant on Civil and Political Rights art. 3, ¶ 2, Mar. 23, 1976, 99 U.N.T.S. 85 [hereinafter ICCPR]. The Gambia ratified the ICCPR on March 22,

ratified the Second Optional Protocol to the ICCPR which commits state parties to the abolition of the death penalty. Nonetheless, the United Nations Human Rights Committee has, as early as 1982, held that the ICCPR “strongly suggest[s]. . .that abolition is desirable.”<sup>54</sup> The U.N. Committee generally holds that a limitation on rights must be established by law, must not be applied in a discriminatory manner, must not be applied in a manner that would undermine the substance of the right, and must be directly related and proportionate to the specific need on which the limitation is predicated.<sup>55</sup> The African Commission on Human and Peoples’ Rights has come to a similar conclusion and permits limitations only when “strictly proportionate with and absolutely necessary” for the advantages derived from the limitation.<sup>56</sup> As the Commission explained in a general principle applicable to all fundamental rights, “[g]overnments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or international human rights law.”<sup>57</sup> The implication of these principles is that constitutional provisions providing for the death penalty should be narrowly interpreted since the death penalty limits the fundamental right to life.

The legislative saga over imposing the death penalty for drug trafficking offenses in The Gambia accords with the plain reading of Article 18(2).<sup>58</sup> In October 2010, the National Assembly passed a mandatory death sentence for anyone possessing more than 250 grams of cocaine or heroin.<sup>59</sup> The Gambia is increasingly a transit point for drugs en route from Latin America to Europe because the country’s administrative softness and its substantial tourist trade allow couriers to easily travel on commercial flights.<sup>60</sup> Massive drug busts, including the June 2010 seizure of two metric tons of cocaine worth about \$1

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1979. See Chapter 4 *Human Rights – 4. International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Mar. 20, 2013).

<sup>54</sup> UN Hum. Rights Comm., Office of the High Comm’r for Hum. Rights, CCPR General Comment No. 6, ¶ 6 (Apr. 30, 1982).

<sup>55</sup> See *id.*, ¶¶ 6-7. See generally UN Hum. Rights Comm., CCPR General Comment No. 22, ¶ 1 (July 30, 1993) (referring to limitations on the freedom of thought, conscience, and religion, is imposing a kind of strict scrutiny on limitations of this fundamental right).

<sup>56</sup> *Media Rights Agenda v. Nigeria*, [2000] A.H.R.L.R. 200, ¶ 69 (ACHPR 1998).

<sup>57</sup> *Id.* ¶ 65.

<sup>58</sup> See CONSTITUTION OF THE GAMBIA (1997), art. 18(2).

<sup>59</sup> Karimi, *supra* note 10.

<sup>60</sup> See Stephen Ellis, *West Africa’s International Drug Trade*, 108/431 AFR. AFFAIRS 171, 171-72 (2009).

billion, lent urgency to the country's efforts to combat the drug trade.<sup>61</sup> Critics have said that the drug enforcement agency is too "cozy" with alleged drug traffickers.<sup>62</sup>

No prosecutions occurred due to the belief that prosecutions were constitutionally inoperable under Article 18(2) and due to protests from the Gambian bar.<sup>63</sup> The legislature abolished the penalty by substituting "life imprisonment" instead of "sentence to death" in April of 2011.<sup>64</sup> The legislature also increased the monetary penalties in the Drug Control Act.<sup>65</sup> It did not change the lesser penalties in the Drug Control Act of 2003, including a minimum ten years sentence for trafficking smaller amounts of drugs and a presumption of trafficking where a person is found in possession of one gram of heroin or cocaine, ten grams of cannabis resin, or two kilograms of cannabis.<sup>66</sup>

The executions in August 2012 raised some of these constitutional issues. First, the Ministry of the Interior issued a press release afterwards stating that the executions were carried out by firing squad rather than hangings.<sup>67</sup> Executions by firing squad are exceptionally rare in common law Sub-Saharan Africa. Second, two of those executed would have been entitled to certain internationally recognized diplomatic rights because they were foreign nationals of Senegal.<sup>68</sup> Because the executions were carried out secretly and suddenly, the lack of warning to diplomatic officers, families, and attorneys of the prison-

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<sup>61</sup> See *Legislative Note*, *supra* note 16, at 63.

<sup>62</sup> Peter Clotey, *Gambian Lawyer Concerned About Death Penalty for Drug Offenses*, VOICE OF AMERICA NEWS (Oct. 8, 2010), [www.voanews.com/content/Gambian-lawyer-concerned-about-death-penalty-for-drug-offenses-104537659/156005.html](http://www.voanews.com/content/Gambian-lawyer-concerned-about-death-penalty-for-drug-offenses-104537659/156005.html).

<sup>63</sup> See, e.g., *Gambian Lawyer Faults Legislation on Drug Trafficking*, JOLLOFNEWS (Nov. 21, 2010) <http://jollofnews.com/human-rights/1503-gambian-lawyer-faults-legislation-on-drug-trafficking>.

<sup>64</sup> *Gambia: Death Penalty for Drug Offenses Abolished*, L. LIBR. OF CONG. – GLOBAL L. MONITOR (Apr. 11, 2011), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205402619\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402619_text).

<sup>65</sup> *Id.*

<sup>66</sup> Drug Control Act, 3 L. of The Gambia Ch. 13 (2009), *amended by* Drug Control (Amendment) Act of 2011, art. 44, ¶ 4 (Oct. 2011).

<sup>67</sup> *9 Death Row Inmates Executed*, DAILY OBSERVER (Gambia), Aug. 28, 2012, <http://observer.gm/africa/gambia/article/9-death-row-inmates-executed>.

<sup>68</sup> See Vienna Convention on Consular Relations art. 37(a), Apr. 24, 1963, 596 U.N.T.S. 261 (protecting the consular notification rights of death row prisoners who are foreign nationals in the country in which they are to be executed). See, e.g., Howard S. Schiffman, *The LaGrand Decision: The Evolving Legal Landscape of the Vienna Convention on Consular Relations in U.S. Death Penalty Cases*, 42 SANTA CLARA L. REV. 1099 (2002).

ers is, at best, contrary to dicta of the African Commission and, at worst, a violation of international law.<sup>69</sup>

Most importantly, one of those executed had been on death row since 1988, prior to the new constitutional provisions at Article 18 and Schedule 2 of the 1997 Constitution.<sup>70</sup> Schedule 2 of the 1997 Constitution states at Article 16:

Where any law makes provision for a sentence of death in any case other than that provided for in section 18 (2), the law shall have effect as if imprisonment for life were substituted for that penalty.<sup>71</sup>

Because the prisoner in question, Lamin Darboe, had been on death row since 1988, his death sentence would have been automatically substituted for life imprisonment if his case involved a death sentence “other than that provided for in section 18 (2).” He was convicted of murder carried out in a violent fashion, so as a technical matter his sentence would survive Article 18(2) under the new constitution. However, Gambian opposition leader Halifa Sallah confirmed in a letter to President Jammeh that all prisoners then on death row had had their sentences commuted to life imprisonment when the then-House of Representatives abolished the death penalty in 1993.<sup>72</sup> Those death sentences, according to Sallah, were unconstitutionally reinstated in August 1995 when an AFPRC decree again legalized capital punish-

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<sup>69</sup> See, e.g., *Interights v. Botswana*, (2003) AHRLR (ACHPR 2003), Comm. 240/2001, reprinted in 2003 AFR. HUM. RTS. L. REPORTS 55, 60-61 (2005). One challenge in this case was that failure to give reasonable notice of the date and time of execution amounts to cruel, inhuman, and degrading punishment. The Commission did not find a violation, but stated that “a justice system must have a human face in matters of execution” by affording a prisoner an opportunity to arrange his affairs, be visited by family members, and receive spiritual advice. *Id.* at p. 61, ¶ 41. A violation of international law could occur, for instance, if the prisoner had not exhausted appeals or had not had an opportunity to seek clemency or pardon. See, e.g., *Aitken v. Jamaica*, Case No. 12.275, Report No. 58/02, Inter-Am. C.H.R., Doc. 5, rev. 1 ¶¶ 113-14 (2002) (finding violation of Inter-American Convention on Human Rights for failure to permit defendant the opportunity to seek clemency, mercy, or pardon).

<sup>70</sup> PA NDERRY M’BAI, *THE GAMBIA: THE UNTOLD DICTATOR YAHYA JAMMEH’S STORY* 54, 65-66 (2012). M’Bai is the former editor of *Freedom Newspaper* and lives in exile in the United States. *Id.*, at 180; *Gambia Leader Vows to Execute Death Row Prisoners*, NPR (Aug. 30, 2012, 12:00 PM), <http://www.npr.org/2012/08/30/160314862/gambia-leader-vows-to-execute-death-row-prisoners> (critiquing the government’s press release following the executions).

<sup>71</sup> See CONSTITUTION OF THE GAMBIA, sched. 2, art. 16 (1997).

<sup>72</sup> Halifa Sallah, *Gambian Opposition Leader Writes to President Jammeh*, JOLLOFNEWS (Aug. 27, 2012), <http://www.jollofnews.com/human-rights/3470-20120827-gambian-opposition-leader-writes-to-president-jammeh>.

ment.<sup>73</sup> Certainly, even if Darboe's death sentence could be interpreted as constitutional, his reinstatement to death row when The Gambia reinstated the death penalty in 1995 was not in accordance with ordinary rule of law principles.

Although Darboe's execution was the most constitutionally problematic of the nine, several others raised additional objections. A word must be said about the mental torture or distress that takes place in the mind of a prisoner as he or she awaits final execution.<sup>74</sup> Courts around the world have recognized that delays longer than several years or demeaning conditions on death row could turn an otherwise constitutional death sentence into a sentence that is cruel, inhumane, and degrading.<sup>75</sup> Four of those executed in August 2012 had been on death row for more than ten years, and six of them for about five years or more.<sup>76</sup> These executions were not in accordance with the emerging international consensus that undue delay on death row becomes cruel and degrading punishment.<sup>77</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> See Stuart Grassian & N. Freidman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT'L J. L. & PSYCHIATRY 49 (1986) (originally defining death row syndrome based on Grassian's research on the mental deterioration of fourteen death row inmates who were held in solitary confinement); see also Caycie D. Bradford, Note, *Waiting To Die, Dying To Live: An Account of the Death Row Phenomenon from a Legal Viewpoint*, 5 INTERDISC. J. HUM. RTS. L. 77, 82 (2010) (exploring the vast literature and case law that developed around the death row syndrome since Grassian's article). According to Bradford, the death row syndrome has both a temporal component (the length of time a prisoner spends on death row) and a physical one (the harsh conditions to which an individual is subject on death row). *Id.* at 79.

<sup>75</sup> The iconic cases arose from the European Court of Human Rights in 1989, the Supreme Court of India in 1989, the Supreme Court of Zimbabwe in 1993, the Privy Council in 1993 (appeal taken from Jamaica), the Supreme Court of Canada in 2001, and the Supreme Court of Uganda in 2009. See, e.g., *Soering v. United Kingdom*, Eur. Ct. H.R. (ser. A) No. 161 (July 7, 1989), reprinted in 28 I.L.M. 1053 (1989); *Triveniben v. State of Gujarat*, (1989) 1 S.C.J. 383 (India); *Catholic Comm'n for Justice & Peace v. Attorney-Gen.*, (1993) L.R.C. 277 (Zimb. S.C.); *Pratt v. Attorney-Gen. of Jam.*, (1993) UKPC 1, [1994] 2 A.C. 1 (P.C.); *United States v. Burns*, [2001] 1 S.C.R. 283, 353 (Can.); *Attorney Gen. v. Kigula et al.*, [2009] UGSC 6 at 63-64 (Uganda). Justice Stephen Breyer of the United States Supreme Court has recognized the death row phenomenon may be a violation of the Eighth Amendment of the United States Constitution. See *Knight v. Florida and Moore v. Nebraska*, 528 U.S. 990, 120 S.Ct. 459, 462 (1999) (Breyer, J., dissenting from a denial of certiorari).

<sup>76</sup> 9 *Death Row Inmates Executed*, supra note 67 (quoting government press release and giving the lengths of time the executed prisoners spent on death row).

<sup>77</sup> Courts have come to differing conclusions as to when unconstitutional delay on death row begins. Compare *Kigula*, [2009] UGSC, Constitutional Appeal No. 03/2006 (Uganda) (arguing that the delay begins from the time all appeals were ex-

COMPETING INTERPRETATIONS: *AHMADOU SCATTRED JANNEH AND LANG TOMBONG TAMBA*

On January 17, 2012, High Court Judge Emmanuel Nkea sentenced former Information Minister Amadou Scattred Janneh to life imprisonment for treason for distributing t-shirts reading “End Dictatorship Now.” According to one witness, these t-shirts were “capable of inciting contempt, hatred and disaffection against the democratically elected government of The Gambia and the person of the President.”<sup>78</sup> Janneh and his accomplices were duly convicted of unlawfully conspiring and endeavoring to overthrow the Government of The Gambia because they planned to protest President Jammeh’s government. In determining the judgment to be passed on Janneh, Judge Nkea noted that, “[s]ection 35 of the Criminal Code provides for both the death penalty and life imprisonment for treason. The death penalty would have been the proper sentence for this offence.”<sup>79</sup> He reasoned, however, that Article 18(2) reserved the death penalty for homicides and that the transitional provision at Schedule 16, Article 2, which substitutes the penalty of life imprisonment for any Criminal Code provision authorizing the death penalty, was outside the scope of Article 18(2).<sup>80</sup> Judge Nkea’s ultimate sentence for Janneh was life imprisonment with three years hard labor:

My understanding of the above is that for a court to be competent to impose a death sentence, it must be shown that the offence committed by the convict involved violence or the administration of toxic substance which in any case results in the death another.

These constitutional limitations warrant this Court to spare the 1st convict [Janneh] his life; I have no option than to follow the Constitution.<sup>81</sup>

Judge Nkea’s interpretation of Article 18(2) is the correct one even if imposing life imprisonment for printing one hundred t-shirts is otherwise objectionable. Amnesty International considered Janneh, a dual citizen of The Gambia and the United States, a prisoner of con-

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hausted) *with Catholic Comm’n v. Attorney-Gen. of Zim.*, (1993) L.R.C. (Zimb.) (arguing that the delay begins from the time the sentences were initially handed down). In this case, however, ten years would be too long under either standard, and five years may be as well.

<sup>78</sup> *State v. Janneh*, Crim. Case No. HC/323/11/CR/101/AO at 4 (Gambia).

<sup>79</sup> *Id.* at 37.

<sup>80</sup> *Id.* at 37-38.

<sup>81</sup> *Id.* at 38. See also Sanna Jawara & Sidiq Asemota, *Life Sentence for Scattred Janneh*, DAILY OBSERVER (Gambia), Jan. 18, 2012, <http://observer.gm/africa/gambia/article/life-sentence-for-scattred-janneh>.

science.<sup>82</sup> He was ultimately released and granted asylum in the United States after international pressure resulted in his pardon.<sup>83</sup>

The Supreme Court of The Gambia had an opportunity to interpret Article 18 in its October 2012 decision in the treason trial of Lang Tombong Tamba and six co-defendants.<sup>84</sup> The High Court imposed a death sentence for Tamba for plotting a coup attempt against Jammeh's regime and the Court of Appeal subsequently affirmed the sentence. Tamba's conviction was based on testimony that he and the other appellants sought to procure arms and train mercenaries.<sup>85</sup> However, Tamba and the others did not bring a constitutional challenge to the death penalty for treason until after their conviction at the trial court level.

After upholding the merits of the convictions, the Court addressed the constitutional challenge by first turning to the definition of "violence" in Article 18(2). According to the Court, "violence" was a constitutional element that must be proven in lieu of poisoning to trigger the death penalty.<sup>86</sup> Lawyers for the appellants argued that the crime did not involve actual violence that resulted in the death of another person. After some discussion of the definition of the word "violence," the Court found that violence "does not have to be actualized; it is sufficient if violence is intended" to satisfy the requirements of Article 18(2).<sup>87</sup> In the Court's defense, it is reasonable to question whether one could ever commit homicide without violence. However, the answer is likely yes as the provision separates out poisoning ("administration of a toxic substance") as being *non-violent*. This makes it likely that the drafters intended to separate out a type of aggravated homicide (i.e., homicide with violence) and premeditated homicide (i.e., poisoning) from other types of homicide such as mercy killing or infanticide by abandonment.

As to the appellants' objection that Article 18(2) only permits the death penalty where the "death of another person" has resulted from the poisoning or violent act, the Court's decision is critically flawed. As Justice Sock writes (paying special attention to his placement of the commas):

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<sup>82</sup> Amnesty Int'l, *Dr. Amadou Scattered Janneh – Serving Life Imprisonment for the Printing and Distribution of T-shirts in The Gambia*, AFR 27/004/2012 at 1 (July 2012), available at <http://www.amnesty.org/fr/library/asset/AFR27/004/2012/fr/d99cd4a8-b7a7-4f31-b627-87699c189c27/afr270042012en.pdf>.

<sup>83</sup> Adam Nossiter, *Jesse Jackson Helps Free 2 From Gambia Prison*, N.Y. TIMES, Sept. 22, 2012, at A7.

<sup>84</sup> See *Badjie et al. v. State*, [2012] SC Criminal Appeal 1-7/2011 (Gambia).

<sup>85</sup> *State v. Lang Tombong Tamba*, [2010] Crim. Case No. HC/153/10/CR/058/AO (Gambia).

<sup>86</sup> See *Badjie et al. v. State*, [2012] SC Criminal Appeal 1-7/2011 at 14 (Gambia).

<sup>87</sup> *Id.* at 15.

Counsel's argument that the violence must result in the death of another person is in my opinion a misinterpretation of section 18(2) arising from a misconstruction of the word "or." There are in my opinion two conditions that must be met under the section, to wit, (i) the sentence of death must be prescribed by law for the offence and (ii) the offence must involve violence "or" the administration of any toxic substance, resulting in the death of another person.<sup>88</sup>

As explained below, even if this construction is reasonable under a fair reading of Article 18(2), this holding violates ordinary principles of constitutional interpretation, international customary law on fundamental rights, and legislative intent as expressed in the repeal of the mandatory death penalty for drug offenses.

As a textual matter, this holding violates ordinary principles of constitutional interpretation because it manipulates the commas in such a way that it merges two clauses. In essence, Justice Sock removed the second comma from the clause by writing that Article 18(2) permitted the death penalty where an offense "involves violence, or the administration of any toxic substance[ ] resulting in the death of another person" (second comma removed). To restate this, according to the Court, Article 18(2) permits the death penalty where an offense (a) involves violence, *or* (b) involves poisoning that results in the death of another person. Furthermore, Justice Sock's *misquoted* the actual text by writing "the offence must involve violence 'or' the administration of any toxic substance, resulting in the death of another person."<sup>89</sup> By failing to use the first comma, and by placing the word "or" in quotes, he ignored the importance of the *second* comma that set apart the poisoning clause and clearly linked the phrase "involves violence" to the phrase "resulting in the death of another person."

Assuming that Article 18(2) is ambiguous, the position that more narrowly infringes on fundamental rights is preferred where two interpretations of a clause are possible. As the International Covenant on Civil and Political Rights restricts the penalty only to the "most serious crimes," the Court should have read Article 18(2) in a manner that would have been most consistent with international law.<sup>90</sup> The right to life in international human rights instruments is typically one

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<sup>88</sup> *Id.*

<sup>89</sup> Compare *id.*, with CONSTITUTION OF GAMBIA, art. 18, ¶ 2 (1997).

<sup>90</sup> International Covenant on Civil and Political Rights art. 6, Dec. 19, 1966, 999 U.N.T.S. 85; see also Second Optional Protocol to the International Covenant on Civil and Political Rights art. 1, ¶ 2, July 11, 1991, 1642 U.N.T.S. 414 ("Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.").

of the most fundamental human rights, which means that limitations must be read narrowly while the obligations on states must be read expansively.<sup>91</sup> Indeed, the death penalty for crimes other than homicide or serious bodily injury is heavily disfavored in international law.<sup>92</sup> The death penalty for treason warrants the strictest of limitations because such prosecutions, like Lt. Gen. Tamba's, could be politically motivated.

Finally, the Court's holding also conflicted with legislative intent. The legislature made clear in its repeal of the mandatory death penalty for drug trafficking in April 2011, only eighteen months after the provision became law, that it considered requiring the death penalty for crimes other than homicides to be constitutionally inoperable. The determination that the death penalty may be permissible for all violent crimes, not just homicide, under Article 18(2) could sweep in large numbers of people convicted of crimes, such as rape or aggravated assault, which involve "violence" (or at least the intent of violence) even though the Gambian penal code does not currently contemplate the death penalty for these crimes.

The Court next addressed a novel argument raised by appellants' counsel concerning the problem posed by Article 18(3). Article 18(3) says that, "[t]he National Assembly shall within ten years from the date of the coming into force of this Constitution review the desirability or otherwise of the total abolition of the death penalty in The Gambia."<sup>93</sup> The Court acknowledged that this constitutionally required review never took place. In 2007, a Gambian newspaper questioned whether the National Assembly had abdicated its responsibility in letting the ten year deadline pass.<sup>94</sup> Appellants' representatives argued that the death penalty was abolished in Gambian law as a consequence of this sunset provision. However, Justice Sock wrote that the failure of the legislature to comply with this provision "cannot by any stretch of the imagination equate to an abolition of [the] death penalty

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<sup>91</sup> Elizabeth Wicks, *The Meaning of "Life": Dignity and the Right to Life in International Human Rights Treaties*, 12(2) HUM. RTS. L. REV. 199, 201 (2012). Although the right to life may seem "primary" in some sense, that is not formally the case in international instruments and the right is less absolute than, for instance, prohibitions on torture and slavery in international law. See PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 130 (1983). But even though some balancing is contemplated by the right due to competing considerations such as self-defense, as with all fundamental rights, derogations and limitations must be looked at with a skeptical eye.

<sup>92</sup> ELIZABETH WICKS, *THE RIGHT TO LIFE AND CONFLICTING INTERESTS* 70 (2010).

<sup>93</sup> CONSTITUTION OF THE GAMBIA, art. 18, ¶ 3 (1997).

<sup>94</sup> Ousman Njie, Editorial, *The Death Penalty, When Will There Be A Review?*, FOROYAA, Oct. 1, 2007, <http://www.foroyaa.gm/editorial/732-gambia-news-archive>.

in The Gambia.”<sup>95</sup> He reasoned that the outcome of such a review could have been either retention or abolition, which therefore made it impossible to guess what the outcome would have been.<sup>96</sup> However, the simple existence of the constitutional clause in the first place shows that the drafters had some discomfort with the death penalty.<sup>97</sup> A decision giving due weight to the drafters’ intentions may not have dismissed the argument so easily.

Chief Justice Emmanuel Akomaye Agim came to substantially the same conclusions as Justice Sock in his concurring opinion. In his analysis of Article 18(2), Chief Justice Agim explained that the word “or” is a disjunctive that separates the preceding clause from the clause that follows. “There is nothing in that provision requiring that the offence involving violence must result in death,” he explained.<sup>98</sup> The only requirement that applies to both violent crimes and poisoning is that they be prescribed by law. He also agreed with Justice Sock that treason for coup plotting was a crime involving violence even though no actual physical violence had occurred in Tamba’s case. “The use of violence is inherent in the nature of the offences,” he wrote.<sup>99</sup> He also confirmed that the National Assembly’s failure to review the death penalty’s legality under Article 18(3) within 10 years did not make the death penalty unconstitutional, because the drafters would have included such a provision if that was their intention.<sup>100</sup> The other three justices on the five-justice panel of the Supreme Court, Ade Renner-Thomas, Henrietta Abban, and Emmanuel Abeyi, concurred in the reasoning and the judgment. Lt. Gen. Tamba and his accomplices still have the ability to seek judicial review of the decision of the five-justice panel before the full seven-member Supreme Court.<sup>101</sup> At the time of this writing, it is unclear whether they have sought this type of review.

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<sup>95</sup> *Badjie v. State*, [2012] SC Criminal Appeal 1-7/2011 at 16 (Gambia).

<sup>96</sup> *Id.* at 16-17.

<sup>97</sup> See Lamin J. Darbo, *The Constitution Vs. The Killer President*, THE GAMBIA ECHO (Sept. 17, 2012), <http://thegambiaechos.com/index.php/permalink/3380.html>. Darbo, who presumably has no relation to the executed prisoner, argues that the death penalty in The Gambia became unconstitutional on January 17, 2007, ten years after the coming into force of the 1997 Constitution, as the National Assembly never performed the ten year review.

<sup>98</sup> *Badjie v. State*, [2012] SC Criminal Appeal 1-7/2011 at 46 (Gambia).

<sup>99</sup> *Id.* at 48.

<sup>100</sup> *Id.* at 49.

<sup>101</sup> *7 Gambians Risk Execution: Amnesty International Blows Whistle*, KIBAARO NEWS (Oct. 19, 2012), <http://kibaaro.com/7-gambians-risk-execution/> (“Ordinarily, a panel of seven judges can review Supreme Court decisions”).

THE DEATH PENALTY CHALLENGE AT THE ECOWAS  
COMMUNITY COURT OF JUSTICE

The ECOWAS Community Court of Justice in Abuja, Nigeria, is a supranational tribunal with expanding jurisdiction to hear human rights complaints from its West African members. Established by treaty in 1975, the ECOWAS Community Court is relatively dynamic and has a fairly broad jurisdiction compared to other African regional tribunals.<sup>102</sup> The Gambia, however, has a record of failing to enforce judgments from the Court and has refused to honor the judgments awarded to two journalists, Musa Saidykhan and Chief Ebrima Manneh, who were illegally arrested and tortured in The Gambia.<sup>103</sup> Jammeh's regime does engage with ECOWAS in other forums, but it risks ECOWAS sanctions since a failure to enforce the judgments violates the ECOWAS Treaty.<sup>104</sup>

Following the August 2012 executions, The Gambia was the subject of two suits before the ECOWAS Court. SERAP brought the first on behalf of two Nigerian death row prisoners in September 2012.<sup>105</sup> CSAG brought the second in October 2012 on behalf of all death row prisoners and on behalf of the families of the executed, who sought monetary damages and the return of the deceased prisoners' bodies.<sup>106</sup> SERAP argued that the two Nigerian nationals did not exhaust their rights of appeal and risked secret execution. It sought an order of perpetual injunction restraining The Gambia from carrying out the executions.<sup>107</sup> Both suits claimed that The Gambia violated the right to life, the prohibition on cruel and degrading punishment, the right to a fair trial, and other provisions of the African Charter and the ICCPR.<sup>108</sup> A hearing date of May 7, 2013, was set in the SERAP challenge, after the presiding judge, Anthony Benin, rejected the de-

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<sup>102</sup> JAMES THUO GATHII, *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES* 279-282 (2011).

<sup>103</sup> Andrew W. Maki, *Gambia's Compliance with the ECOWAS Court*, HUM. RTS. BRIEF (Mar. 16, 2010), <http://hrbrief.org/2010/03/africacourts-17-3-1/>.

<sup>104</sup> *ECOWAS Sanctions Against Gambia Looms*, DAILY NEWS (Gambia) (Aug. 8, 2012), <http://dailynews.gm/africa/gambia/article/ecowas-sanctions-against-gambia-looms>.

<sup>105</sup> *Nigerians on Death Row: SERAP Drags Gambia to ECOWAS Court*, NIGERIAN COMPASS (Sept. 13, 2012), <http://www.compassnewspaper.org/index.php/component/content/article/90-front-page-/7596-nigerians-on-death-row-serap-drags-gambia-to-ecowas-court>.

<sup>106</sup> Press Release, Civil Soc'y Ass'ns Gam., CSAG Sues Gambia Government over Execution of Death Row Inmates (Oct. 12, 2012), *available at* <http://civilsociety-gambia.org/csag-sues-gambia-government-over-execution-of-death-row-inmates/>.

<sup>107</sup> SERAP v. The Gambia, ECW/CCJ/AAP/11/12 (ECOWAS Sept. 2012) (Nigeria), *available at* <http://serap-nigeria.org/the-filed-court-paper/>.

<sup>108</sup> *See id.*; Press Release, Civil Soc'y Ass'ns Gam., *supra* note 106.

defendants' initial jurisdictional challenge and found that the Court's human rights jurisdiction was proper.<sup>109</sup>

#### CONCLUDING REMARKS

Article 18(2) of the 1997 Gambian constitution has considerable promise as the only constitutional provision in Africa to explicitly restrict the death penalty to homicides involving violence or premeditated poisoning. While the lower courts have interpreted this provision as precluding the death penalty for treason, the Supreme Court of The Gambia upheld the death penalty for treason in the constitutional challenge brought by Lang Tombong Tamba and his co-defendants. The Court found that Article 18(2) contemplated the death penalty for all crimes involving "violence," including non-homicide crimes, as well as homicide by poisoning. This interpretation violated principles of statutory construction, legislative intent as expressed in the abolition of the mandatory death penalty for drug trafficking in 2011, and international human rights laws that strongly disfavor the death penalty and require the narrowest interpretation of limitations on the right to life.

While international law permits the death penalty for the "most serious crimes," the human rights instruments to which The Gambia is a party prohibit arbitrary deprivation of life and mandate that limitations to the right to life be interpreted in the narrowest possible fashion. While it may be a matter of opinion as to whether the executions of August 2012 were carried out in accordance with the 1997 Gambian constitution, the government sharply undermined its commitment to the rule of law when it failed to treat the death penalty as an exceptional punishment to be applied only in the narrowest and surest cases. The execution of Lamin Darboe, whose death sentence had been commuted to life imprisonment and then reinstated, was particularly troubling in light of international and regional human rights standards. The two challenges pending before the ECOWAS Community Court of Justice may not give closure in light of The Gambia's non-compliance with earlier judgments of the tribunal. However, they may provide the final say as to whether the death penalty, even if technically compliant with the blurry constitutional parameters of Article 18, was in conformity with international law.

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<sup>109</sup> *ECOWAS Court to Review Death Sentence on Two Nigerians by Gambian Court*, PREMIUM TIMES (Nigeria), Feb. 5, 2013, available at <http://allafrica.com/stories/201302061024.html?viewall=1>.