

The President's dilemma: To keep a promise or to keep an oath?

"The promise given was a necessity of the past: the word broken is a necessity of the present."

- Niccolo Machiavelli

Introduction

On 01 November 2016, Adama Barrow became the Flag Bearer for a coalition of opposition parties in The Gambia that shared the desire to see the incumbent President Yahya Jammeh removed from office. The parties to the coalition had agreed upon the terms of their alliance in a Memorandum of Understanding ('the Coalition Agreement'). Amongst the terms of the Coalition Agreement was a provision that if the Flag Bearer won the upcoming presidential election, they would only initially serve as the President of The Gambia "for a period of three years"¹ ('the key provision'). One month later, on 01 December 2016, the inconceivable happened. Adama Barrow became the President-elect of The Gambia after winning the general election against a dictator who had ruled with an iron fist for twenty-two years. The President-elect would go on to take the oath of presidency in which he vowed to "preserve and defend the constitution."² However, preserving and defending The Gambia's constitution would inevitably require compliance with the rules contained therein. Those rules included the mandate for the President to serve a five-year term³ rather than the shorter three-year term provided for in the Coalition Agreement. The new President was faced with an early dilemma: should he keep his promise, or should he keep his oath?

This dilemma was analogous of various decisions that the new President would have to make throughout his term of office. Such decisions could either act to preserve the status quo that had existed during the years of the Jammeh presidency, or conversely they could move the country a step closer to compliance with the rule of law. But what exactly is the rule of law? The concept does not hold a universally accepted meaning. Carothers observed that "there is uncertainty about what the essence of the rule of law actually is"⁴ and Tamanaha similarly stated that there is a "rampant divergence of understandings"⁵ about what it means. While there exist different definitions and understandings of the rule of law, this paper will focus on the one provided by Dicey which lends itself as being a system where "no man is above the law [...] whatever be his rank or condition, [he] is subject to the ordinary laws of the realm".⁶

¹ The Gambia: Opposition Coalition 2016, Memorandum of Understanding dated 01 November 2016 (Pata PJ Vault, 15 November 2016) <<http://whatpatathinks.blogspot.com/2016/11/gambia-opposition-coalition-2016-mou.html>> accessed 09 April 2021.

² The Associated Press Archive, 'Barrow sworn in as president at Gambia ceremony' (YouTube, 27 February 2017) <<https://www.youtube.com/watch?v=c9Nld0-rgNU>> accessed 09 April 2021.

³ Constitution of the second republic of The Gambia, Article 63.

⁴ Tom Bingham, *The Rule of Law* (London, Allen Lane, Penguin Press, 2010), p.5.

⁵ *Ibid*, p.5.

⁶ A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885; 9th edn., Macmillan, 1945), p.188.

During the Jammeh presidency, the desires of the President were the primary considerations which influenced the government's actions. Consequently, observance of the rule of law was reduced to being a subordinate consideration. Nevertheless, after electing President Barrow to office, the Gambian people hoped that their new President would keep his campaign promises, which included (inter alia) reconstructing a "*new Gambia [...] where democracy and the rule of law will thrive*"⁷ as well as the promise to only serve as "*Head of a transitional government for a period of three years.*"⁸ Under the existing version of the Gambian Constitution, he could not keep both promises. For the rule of law to thrive, he had to act in accordance with the Constitution, and therefore was required to serve a full five-year term. But doing so would be at direct odds with his promise to only remain at the helm for three years.

We are now in the fifth year of President Barrow's presidency, so it is clear that he will serve a full five-year term in accordance with the Constitution and thereby keep his oath of presidency. This essay will evaluate his decision to serve a full five-year term, examine the consequences of that decision and discuss the rule of law considerations that are naturally interwoven into this matter.

The promise given was a necessity of the past

The context surrounding the Coalition Agreement is fundamental to understanding why it was necessary in the first place. In the months leading up to the election, there were a series of events that highlighted the need for unity amongst the opposition parties within The Gambia. Further, these events served as a high-profile reminder that arbitrary decisions were frequently made by the Gambian government. Arbitrary decision making can often be an indicator of the absence of the rule of law within any given country. Bingham underscores this point by remarking that Dicey believed that arbitrariness was the "*antithesis of the rule of law.*"⁹

On 14 April 2016, protestors holding banners calling for electoral reform were arrested, detained and tortured in custody. Solo Sadeng was amongst them and died in custody.¹⁰ After learning about Sadeng's death on 16 April 2016, Usainou Darboe, the leader of the United Democratic Party (at the time, the largest opposition political party in The Gambia) marched with his supporters towards the building where Sadeng's body was believed to be held. Darboe and his supporters demanded that the government released Sadeng's body, but the government refused to comply.¹¹

⁷ The Gambia: Opposition Coalition 2016, Memorandum of Understanding dated 01 November 2016 (Pata PJ Vault, 15 November 2016) <<http://whatpatathinks.blogspot.com/2016/11/gambia-opposition-coalition-2016-mou.html>> accessed 09 April 2021.

⁸ Ibid.

⁹ Tom Bingham, *The Rule of Law* (London, Allen Lane, Penguin Press, 2010), p.48.

¹⁰ 'More fear than fair: Gambia's 2016 Presidential Election' *Human Rights Watch* (02 November 2016)

<<https://www.hrw.org/report/2016/11/02/more-fear-fair/gambias-2016-presidential-election>> accessed 07 April 2021.

¹¹ Ibid.

Instead, the protestors were beaten, tear-gassed, arrested and detained. In response to these arrests, another protest was held on 09 May 2016. That protest followed a similar pattern, with the government arresting a further 45 individuals while reaffirming their no-tolerance attitude to those that challenged the government.¹² The following week, on 17 May 2016, President Jammeh commented on the events by issuing a warning to opposition party members. He declared, *“let me warn those evil vermin called opposition. If you want to destabilize this country, I will bury you nine feet deep.”*¹³ President Jammeh did not stop there, and on 03 June 2016 he issued a further threat to members of the opposition:

*“I swear to Allah that you will not see elections. [The] police will not catch you, [the] army will not catch you, nobody will catch you, but you will all die one by one before elections.”*¹⁴

The media in The Gambia could not offer the opposition any protection. Human Rights Watch observed that a combination of *“self-censorship [by journalists] when reporting on politics and the near-complete domination of state media by President Jammeh”* prevented opposition parties from effectively communicating with voters.¹⁵ By now it was clear to all Gambians that President Jammeh would go to extreme lengths to ensure that he could fulfil his publicly made proclamation that he would rule for *“one billion years”*.¹⁶ Accordingly, many observers expected that one way or another, he would win the 2016 general election. Faced with the seemingly impossible task of defeating the incumbent President, seven political parties and two civil society groups joined forces to form a Coalition.¹⁷ The preamble to the Coalition Agreement recognised that restoring the rule of law was a core aim for the Coalition. This preamble stated that the signatories had a duty to create *“peaceful democratic change [...] that would give rise to [...] Respect for Human Rights and Rule of Law”*.¹⁸ There is no doubt that the Coalition’s aims were noble, but there is an existing question on whether the Coalition Agreement was fit to achieve its purpose.

The Coalition Agreement was relatively short and predominantly provided directional objectives focussed on success factors. However, it lacked the necessary detail to steer the Coalition going forwards. For example, the key provision provided for a three-year term but did not describe how a three-year term ought to be achieved in practice – would the constitution be amended, or would the Flag Bearer be expected to resign? At the time that the Coalition Agreement was signed, it is likely that even amongst the signatories themselves, not many people envisaged the possibility of

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ ‘Gambia’s Yahya Jammeh ready for “billion-year” rule’ (12 December 2011) <<https://www.bbc.co.uk/news/world-africa-16148458>> accessed 07 April 2021.

¹⁷ Kebba Jeffang and Muhammed S. Bah, ‘7 Opposition Parties, Independent Sign Coalition Agreement’ *Foroyaa* (19 October 2016) <<https://foroyaa.net/7-opposition-parties-independent-sign-coalition-agreement/>> accessed 07 April 2021.

¹⁸ The Gambia: Opposition Coalition 2016, Memorandum of Understanding dated 01 November 2016 (Pata PJ Vault, 15 November 2016) <<http://whatpatathinks.blogspot.com/2016/11/gambia-opposition-coalition-2016-mou.html>> accessed 09 April 2021.

the Coalition's Flag Bearer actually winning the election. Thus, this may explain why the Coalition Agreement did not sufficiently address the practical arrangements that would apply if the Flag Bearer won the election.

The Coalition Agreement describes itself as a Memorandum of Understanding ('MOU'). This raises immediate questions about whether or not it was intended to constitute a binding agreement. In the United Kingdom, MOU's are not generally considered to amount to an enforceable binding agreement. UK Government guidance describes an MOU as a document that has "*moral force, but does not create legal obligations.*"¹⁹ Moreover, there are existing doubts about whether the Coalition Agreement was ever signed.²⁰ The Coalition Agreement specifically states, "*This Memorandum of Understanding will come into force upon signature*" and so if it is not signed, this may provide a further indication that it is not binding. Except for what seems to be a leaked digital reproduction of the Coalition Agreement online, the original copy of the Coalition Agreement does not seem to be generally accessible online or elsewhere. Therefore, it is not possible to confirm whether or not the Coalition Agreement was executed.

Nonetheless, even if the Coalition Agreement was binding (which is not accepted), there is an argument that the key provision was *void ab initio*. Firstly, the key provision could be void on the basis of illegality given that it could require the President to act in a way that was not compliant with the Constitution. Secondly, the term could be void on the basis that the signatories to the Coalition Agreement lacked the authority to enter into an agreement that would alter the term of office for the President. The Constitution is supreme, and so the only group who had the capacity to change the term of office for the President would be a group that composed of a supermajority within the National Assembly.

Alternately, it is arguable that the key provision is not in conflict with the Constitution at all, and therefore cannot be *void ab initio*. The Constitution contains a provision enabling the President to resign before the end of their five-year term²¹ and other provisions that provide for the possibility of their term being curtailed²² or extended.²³ Accordingly, the Constitution seemingly has inbuilt flexibility that permits a longer or shorter term for the President. On this basis, it can be plausibly argued that the key provision is not *prima facie* in conflict with the Constitution.

¹⁹ 'Guide to writing a memorandum of understanding (MOU)' (GOV.UK, updated 09 October 2019) <<https://www.gov.uk/government/publications/setting-up-school-partnerships/guide-to-writing-a-memorandum-of-understanding-mou>> accessed 07 April 2021.

²⁰ Musa Bah, 'The Failure to Sign the MoU Was a Crime against Gambians' *The Chronicle* (09 May 2019) <<https://www.chronicle.gm/the-failure-to-sign-the-mou-was-a-crime-against-gambians/>> accessed 10 April 2021.

²¹ Constitution of The Second Republic of The Gambia, Art. 65(1)(a).

²² *Ibid.*, Art. 63(3).

²³ *Ibid.*, Art. 63(6).

Despite its shortcomings, the Coalition Agreement served a vital purpose. It facilitated the unification of opposition political parties within The Gambia, and in doing so, prevented the division of votes against President Jammeh, that ultimately would have worked in the incumbent's favour. The Coalition empowered ordinary citizens with the ability to assemble against a dictator without necessarily needing to establish their ultimate political allegiance. Without the Coalition Agreement, it is probable that President Jammeh might now be celebrating his twenty-seventh year in power. Consequently, it is correct to say that the promises made within the Coalition Agreement were a necessity of the past.

The word broken is a necessity of the present

Article 63 of the Gambian Constitution states that the term of office for an elected President shall be five years. Nevertheless, the question remains: if President Barrow wanted to give effect to his promise to only serve an initial term of three years, how could he have done this? The most obvious two options would have been to seek an amendment to the Constitution so that it provided for a three-year term, or to resign after three years, thereby cutting short his Presidency.

Turning to the first option, amending the Constitution for this purpose would have presented challenges. Firstly, it would have proven to be a difficult drafting exercise to find the apt language and appropriate means of amending the Constitution in a manner that it only affected the term of President Barrow, as opposed to making a permanent amendment to the term of office for all future Presidents. Secondly, the purpose of the Constitution and the objectives of the Coalition Agreement were mismatched. The Constitution is designed to provide long term rules and procedures for the nation at large. In contrast, the Coalition Agreement provided for the installation of a 'transitional' President that would only govern in the short term. In an interview with Al-Jazeera, President Barrow acknowledged that he had agreed to become a 'transitional' President who would merely set the stage for a return to normalcy:

*"There was an agreement that I will be transitional president for three years, then the parties will come back [...] [and] we will go back to the polls to get a new President."*²⁴

In the author's view, it would be problematic to amend the Constitution simply to affect the term of *one* President. Constitutions are not supposed to be easily amended, which is why a super majority is required before they can be revised. To amend the Constitution for this reason would be to treat the Constitution like any other ordinary legislative instrument.

²⁴ Abdur Rahman Alfa Shaban, 'Unpacking Gambia's three-year pact: Constitution vs. Coalition MOU' *Africa News* (28 January 2020) <<https://www.africanews.com/2020/01/28/unpacking-gambia-s-three-year-pact-constitution-vs-coalition-mou/>> accessed 07 April 2021.

The second option, namely, resigning after three years would not achieve the objectives sought by the Coalition Agreement either. Article 65 of the Constitution provides for the possibility of a resignation by the sitting President:

“65 (2) Whenever the office of the President becomes vacant in the circumstance set out in subsection (1), the Vice-President, or if there is no Vice-President in office at the time, the Speaker shall assume office of President for the residue of the term of the former President.”

The Coalition agreed that there would be new elections after three years, however, even in the event that President Barrow resigned from office, the Constitution does not provide for new elections to be held. Accordingly, this option would fail to give effect to the purpose of the Coalition Agreement.

An uncertain basis for serving a three-year term contrast with a clear constitutional mandate to serve a five-year term, meant that there was only ever one real option for President Barrow. The Constitution is the supreme law of the land and the rule of law commands that everyone is subject to it, including the President. It would be an affront to the rule of law for President Barrow to be compelled to serve a shorter three-year term, on the basis of the Coalition Agreement. In this context, it is clear that once President Barrow took office, it was a necessity for him to break his promise to only serve a three-year term. For him, breaking that promise was a necessity of the present.

The next billion years

Despite the fact that the Coalition Agreement is non-binding, the moral and political implications of breaching the agreement are not to be underestimated. Some Gambians are concerned that they have yet another leader who is determined to cling to power for as long as possible. These concerns have been heightened following the recent rejection of The 2020 Constitution Promulgation Bill (‘the Bill’). The Bill was introduced after a Constitutional Review Commission was established to draft a new constitution for The Gambia after running a series of country-wide consultations. The rejection of the Bill has been widely blamed on President Barrow’s supporters within the National Assembly who failed to vote in its favour.²⁵ Their key concern with the Bill is said to be with a transitional clause that states that the incumbent President’s current term would count towards a

²⁵ Sait Matty Jaw, ‘The Gambia: Why MPs just shot down the popular new draft constitution’ *African Arguments* (24 September 2020) <<https://africanarguments.org/2020/09/the-gambia-why-mps-just-shot-down-the-popular-new-draft-constitution/>> accessed 07 April 2021.

new two-term limit.²⁶ If this is correct, their true underlying concern seemed to be that the Bill introduced a limit on President Barrow's ability to stay in office beyond a second term.

However, Samba Jallow, a minority leader in the Gambian National Assembly, seemed to imply that his own basis for opposing the Bill was premised in the rule of law. Jallow stated, "*We don't legally have the power to pass this draft constitution with a retroactive clause*".²⁷ Bingham's definition of the rule of law draws heavily from Dicey and at first glance, it seems to offer support to Jallow's position. Bingham's definition includes the proviso that laws should take "*effect (generally) in the future*".²⁸ However, by Bingham's inclusion of the word '*generally*', he recognises that there are some instances in which a law can be applied retroactively. Furthermore, Bingham would have also been aware of multiple examples of retroactive legislation that have been passed within the UK. Stroud's Judicial Dictionary of Words and Phrases provides an indication of when retroactive laws might lawfully be made. Within the description for retrospective (or retroactive) it states that, "*unless there be clear words to the contrary statutes 'do not apply to a past, but to a future, state or circumstance'*".²⁹ Essentially, there is a presumption that a law will not apply retroactively. However, that presumption can be overridden by clear words included in any properly passed Act. The Bill provided sufficiently clear words and as a result could have been properly passed by the National Assembly. While there could be a debate about whether it was morally right to insert a retroactive clause in the Bill, it would be wrong to suggest that the National Assembly did not legally have the power to pass a Bill containing a retroactive clause.

The retroactive clause would have provided a lawful means of achieving one of the purposes of the Coalition Agreement. Fundamentally, the key provision sought to safeguard against the risk of electing a new leader who might seek to entrench themselves in power. This would prevent The Gambia transitioning from one Jammeh to another. Accordingly, by persuading his supporters in the National Assembly to support the Bill, President Barrow had an opportunity to reassure Gambians that he had no desire to cling onto power. This may have acted as a concession of sorts to those who believed he ought to have only served a three-year term. However, President Barrow did not take that opportunity and by all accounts is expected to run for a second term of office in the upcoming 2021 general election. If he is elected, the Constitution enables him to run for a third time because the same Constitution that enabled President Jammeh continues to apply. As a consequence, there remains no presidential term-limits to prevent President Barrow from succeeding where President Jammeh failed: by ruling The Gambia for the next *billion* years. This is

²⁶ Constitutional Review Commission, '2020 Draft Constitution' (Para. 5(2) of Schedule 4).

²⁷ 'Gambia opposition laments failure of bid to curb term limits' *Reuters* (23 September 2020) <<https://www.reuters.com/article/us-gambia-politics-idUSKCN26E35E>> accessed 07 April 2021.

²⁸ Tom Bingham, *The Rule of Law* (London, Allen Lane, Penguin Press, 2010, p.8.

²⁹ Daniel Greenberg and Alexandra Millbrook, *Stroud's Judicial Dictionary of Words and Phrases* (Volume 3, 6th edition, 2000,) p.2315.

an undesirable state of affairs for any country, but without constitutional change, the rule of law permits it.

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