

GLOBAL INFORMATION SOCIETY WATCH 2014

Communications surveillance in the digital age

This report was originally published as part of a larger compilation, which can be downloaded from GISWatch.org



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)
AND HUMANIST INSTITUTE FOR COOPERATION WITH DEVELOPING COUNTRIES (Hivos)

ISBN: 978-92-95102-16-3

APC-201408-CIPP-R-EN-DIGITAL-207

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Front Page International

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Introduction

Surrounded by Senegal on three sides and the Atlantic Ocean to the west, The Gambia is the tiniest country in mainland Africa.¹ It is home to 1.8 million people with a land mass of about 11,300 square kilometres. The majority of the population are farmers with a literacy rate of about 38%. Since independence from Britain in 1965, The Gambia so far has had two presidents: Dawda Kairaba Jawara, who led the country to independence and remained in power until he was overthrown in a “bloodless coup” in July 1994, followed by then-Lieutenant Yahya AJJ Jammeh.²

Jammeh’s government criticised Jawara for his slow economic progress in general, and, in a quest to avert what it called “retrogression”, investment in information and communications technologies (ICTs) was considered key.³ Given the opportunity presented by an already relatively good telecommunication network, the government and the UN Development Programme (UNDP) launched The Gambia’s Internet Initiative project in 1998.⁴ The project was aimed at opening a gateway to connect The Gambia to the internet, and to build a national backbone and points of presence (POPs) around the country to provide high-speed internet access to major centres. It also sought to encourage and nurture competition and private sector participation in internet provision. This programme was monitored by a USD 100,000 three-year support project. Project assessment reports for the period 1998-2002 showed that major developments had not just been made in internet connectivity, but that it “increased ICT investment and start-up operations, creating a context of advanced access and

technological capacity.”⁵ However, more than a decade later, all indications are that those gains were never consolidated.

Policy and political background

The internet and other public utilities are regulated under The Gambia Public Utilities Regulatory Authority Act 2001.⁶ The Act, among other things, called for the creation of a public utilities regulatory body. Consequently the Public Utilities Regulatory Authority (PURA) was established to regulate the activities of service providers of some public utilities in various sectors of the economy. The Act to establish the authority only came into force towards the end of 2003, while PURA was formally set up a year later, in 2004. The establishment of PURA was supported by a study on the appropriate regulatory framework for the sector, which included private sector participation, and was funded by the Public Private Infrastructure Advisory Facility (PPIAF) through the World Bank. Nevertheless, expert opinion on PURA in the telecoms sector seems divided, with many being pessimistic of the body’s capabilities *vis à vis* its responsibilities. “PURA is not equipped enough to live up to its challenge of ensuring the proactive and effective implementation of sound policies governing the regulated sectors, such as telecommunications, among others, in a predictable, equitable and transparent manner,” said an expert on the sector who preferred anonymity.

The government of The Gambia, through the Ministry of Communication Infrastructure and Information Technology, pays a lot of attention to ICTs and works toward growth in the sector, most notably when it comes to information technologies (IT). The government believes IT can be of great value in various economic sectors of the country if used wisely, especially for decision making. However, it is evident that the state is fearful of the consequences of the free and uninterrupted flow of information, especially through the use of new technologies – a

1 History World, History of The Gambia. www.historyworld.net/wrldhis/plaintexthistories.asp?historyid=ad47

2 BBC News, The Gambia country profile. www.bbc.com/news/world-africa-13376517

3 Status of ICT Access, Usage and Exploitation in The Gambia, Final Report, September 2007, available at the Gambia National Library.

4 NIC Gambia. www.nic.gm/htmlpages/gm-internet.htm

5 Pro-PAG/CUTS Partnership. (2008). *Strengthening Constituencies for Effective Competition Regimes in Select West African Countries: Preliminary Country Paper (PCP) – The Gambia.*

6 www.pura.gm

fundamental reason for the tight regulation of the sector.

Communication surveillance in The Gambia

During May 2006, the government obtained the names, addresses, phone numbers and email addresses of all subscribers of a very popular controversial online news site.⁷ The government described the *Freedom Newspaper* subscribers as “informers”, and went on the rampage to arrest and detain them. Several people, most of them journalists, human rights activists and politicians, were arrested and detained for weeks, but released without any court charges. Reports emerged later that the person who hacked into the *Freedom Newspaper* site was a British Telecom client using the IP address of an internet user based in the UK city of Southampton. The hacker erased all of the paper’s content and replaced the welcome page with a message purportedly signed by Pa Nderry M’bai, the publisher and editor. The message said: “I have decided to stop producing the *Freedom Newspaper* as I have pledged an allegiance with my brother Ebou Jallow to join the APRC election campaign.” A former army captain, Jallow used to be the spokesman for President Jammeh’s military junta. The APRC is the president’s party, the Alliance for Patriotic Reorientation and Construction.

M’bai is a self-exiled Gambian journalist.⁸ He launched the *Freedom Newspaper* in early 2006. It is very critical of Jammeh and his government. M’bai used to work for the then tri-weekly newspaper, *The Point* (now a daily paper), co-founded by slain Gambian journalist Deyda Hydar.

The fake message added: “This is a list of the people that were supplying me with information.” It was followed by the names and details of all those who had set up user accounts for the site. With help from the US company that hosts the site, and from Reporters Without Borders, M’bai managed to regain control of the site.

Following the hacking, on 24 May 2006, under the headline “Freedom Newspaper informers exposed”, the pro-government *Daily Observer* newspaper published M’bai’s photo on its front page, describing his paper as “subversive”.

This was met with an outcry from activists. “This case of hacking is serious and revolting,” a statement released by Reporters Without Borders said,

adding that the climate in which Gambian journalists work is totally poisonous.

“Not only was the reputation of a journalist blemished but a large number of internet users have been put in danger. And it is absolutely astounding that the *Daily Observer* became an accomplice by publishing the list of these so-called informers and describing them as ‘subversive’,” it further noted.

Since this incident in 2006, the government has worked tirelessly to help tighten its control over the telecommunications sector as it grows. The services of experts, analysts and consultants from far and wide were contracted with a view to produce a “legal and regulatory framework” that keeps a firm grip on this emerging sector. The government’s efforts have since yielded dividends, and a number of policies and programmes were introduced with a view to enhance growth in the sector. The most important in our context among the “innovations of the government” was the enactment of the Information and Communications Act 2009.⁹

The Information and Communications Act (ICA) 2009 was adopted with a view to addressing the convergence of the telecommunications, broadcasting and information technology sectors, including the internet. It is important to note key contents of the law. The ICA has 252 provisions and is divided into five chapters: preliminary matters; the regulation of information and communication systems and services; information society issues; regulatory provisions for broadcasting content; and miscellaneous matters. In addition to telecommunications and broadcasting regulation, the Act also effectively deals with cyber crime and the processing of personal data.

The ICA places the regulation of the telecommunications and broadcasting sectors under PURA.

A detailed analysis of the ICA and other media laws in The Gambia by Article 19, an independent international NGO focusing on freedom of expression and media issues, illustrates deep flaws in the legal framework. Article 19 noted at the outset that entrusting the same entity with the regulation of sectors as widely different as water and electricity services and the telecommunications sector is confusing and undesirable. It therefore recommended the creation of a separate public authority with powers to regulate the telecommunications and broadcasting sectors.

Article 19 highlighted as its main concern that the ultimate authority in respect of telecommunications and broadcasting licensing is the minister (i.e. the executive). It pointed to problematic clauses

7 The Daily Observer. (2006, May 24). Gambia: Freedom Newspaper Informers Exposed. *AllAfrica*. allafrica.com/stories/200605250666.html

8 Reporters Without Borders. (2006, May 30). Online newspaper hacked, editor smeared and subscribers threatened. *Reporters Without Borders*. archives.rsf.org/article.php3?id_article=17842

9 www.wipo.int/wipolex/en/details.jsp?id=10478

in sections 7(2), 22, 23, 27, 215, 226, 230 and 232 to 236 in this regard. Section 230(1), for example, provides that “the Minister, on the advice of the Authority, shall issue broadcasting licences in sufficient numbers to meet the public demand for broadcasting services.”

Similarly, sections 232 to 236 provide that upon recommendation by the Authority, the Minister “may” renew, revoke or suspend a broadcasting licence. PURA therefore merely has an advisory role, while the ultimate decision-making power rests with the minister. This, however, contradicts international standards on freedom of expression, which require that all public bodies exercising powers in the areas of broadcast and/or telecommunications regulation be institutionally independent so as to protect them from undue political or commercial interference.

But what is more serious in our case is Section 138 of the ICA, which gives sweeping powers to the national security agencies and investigating authorities to monitor, intercept and store communications in unspecified circumstances. The section further provides that the minister may require information and communication service providers to “implement the capability to allow authorised interception of communications.”

While Section 138 essentially raises issues of privacy of communications, and the protection of private life more generally, it has serious implications for communications. It seems to legitimise general public concerns over the privacy of their “private” communication. This raises more serious issues of surveillance in a country that is already notorious for violations of basic human rights. And indeed, even in places such as The Gambia where internet penetration is more limited than in more developed countries, particularly in the West, the ability of individuals to freely communicate on the internet, using email, social media networks or other web platforms, has become an essential aspect of our daily lives. There are four times more people on the internet¹⁰ in The Gambia today than the population of the capital city of Banjul.¹¹ In this context, unchecked internet surveillance or “monitoring” but also the monitoring of communication in general is perhaps one of the greatest dangers to privacy both online and offline.

Privacy activists and other rights defenders will therefore argue that any restriction on freedoms

must be strictly measured against the three-part test laid down under international law. Those limitations must be clearly defined by law, pursue a legitimate aim and be proportionate to the aim pursued. The interception of private communications in particular should be limited only to the investigation of serious criminal activity.

One can safely argue that despite the need to investigate serious crimes, there is an obvious danger that such unchecked and open powers given to a powerful arm of government (the executive) can be easily abused unless clearly constrained by law. We can conclude that the provisions of the ICA in general and this section in particular substantially fail to meet the requirements of international law as indicated above.

For Article 19, given the breach of the requirement of legal certainty, it is impossible to predict under Section 138 in which circumstances the authorities may intercept or monitor communications.¹² The only exception to this is perhaps Sub-section 2, which bizarrely provides that a user or subscriber fearing for his life or physical integrity may authorise such interception, rather than a judicial authority. This is also a very extreme situation, and unwarranted.

It is clear that Section 138 does not provide for monitoring or interception to be authorised *only* by a judge nor that it should at all times be in compliance with the requirements of necessity or proportionality. Against this background, the fact that information and communication service providers may be required by the minister to “implement the capability to allow authorised interception” is not just less than ideal, but detrimental to the free flow of communications and privacy.

On 3 July 2013, the National Assembly amended the ICA, stipulating a 15-year jail term or a fine of three million Gambian Dalasi (GMD) (approximately USD 75,000), or both a fine and imprisonment, for the offence of spreading “false news” against the government or its public officials on the internet.¹³

While the amendment imposes penalties for “instigating violence against the government or public officials,” it also targets individuals who “caricature or make derogatory statements against officials” or

12 Article 19. (2012). *The Gambia: Analysis of Selected Laws on Media – Overview*. www.article19.org/resources.php/resource/3043/en/the-gambia-analysis-of-selected-laws-on-media

13 Article 19. (2013, July 10). *The Gambia: New internet law furthers government crackdown on free expression. Article 19*. www.article19.org/resources.php/resource/37152/en/the-gambia-new-internet-law-furthers-government-crackdown-on-free-expression#sthash.qisIUJ.dpuf

10 Trading Economics, Internet users in Gambia (2011). www.tradingeconomics.com/gambia/internet-users-wb-data.html

11 Access Gambia, Population Figures for Gambia. www.accessgambia.com/information/population.html

“impersonate public officials.” Activists and rights groups have criticised the amendments severely.¹⁴

The National Assembly had previously come under heavy criticism from activists and rights groups for an amendment of Section 114 of the Criminal Code which raised the jail term of six months or a fine of GMD 500 (about USD 17), or both, up to five years or a fine of GMD 50,000 (about USD 1,700) for persons convicted of giving false information to a public official.¹⁵

According to Article 19, the legal framework for ICTs, including private communications, should not allow state authorities to assume sweeping powers over ICT operators and providers – in particular their equipment or content going through their networks – in undefined circumstances, including in an emergency.¹⁶

Conclusion and action steps

It is evident that the government of The Gambia fears the opportunities for transformative democracy presented by ICTs and the internet in particular. The government is therefore struggling daily to maintain a firm grip on ICTs and the internet. This is also corroborated by the fact that the government has blocked over 20 online news websites and

pages. The popular instant messaging and calling service Viber is also blocked. There are also indications that proxies such as Anonymouse.org and the Tor browser are being blocked in the country. The situation is therefore similar to what occurs in countries such as China, Ethiopia and Iran, as well as some other parts of the Arab world.

The government has denied any involvement in filtering and points to services providers who are suspected of hiding behind vague government regulations. Citizens and human rights groups generally blame the government for the status quo. It is obvious that unless there are concerted efforts, the situation is not likely to change, at least not in the near future.

Advocacy efforts should be directed toward the de-legislation of the ICA Act, as well as the 2013 amendments. This should be followed by strategic planning to create a well-regulated sector. Special efforts should be directed at reviewing and amending Section 138 to bring it more closely in line with international standards for the protection of human rights. In particular, it should be made clear that interception can only be authorised by a judge for the purposes of investigating serious crimes and subject to the requirement of proportionality.

14 Joof, M. S. (2013, July 8). The Gambia's Internet Law: RSF very disturbed, Amnesty International shocked. *Front Page International*. frontpageinternational.wordpress.com/2013/07/08/the-gambias-internet-law-rsf-very-disturbed-amnesty-international-shocked

15 JollofNews. (2013, May 8). Amnesty Int'l Denounces Gambia's Harsh Criminal Law. *JollofNews*. www.jollofnews.com/.../3827-amnesty-intl-denounces-gambias-harsh-cri

16 Ibid.