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## THE GAMBIA IN TRANSITION – TOWARDS A NEW CONSTITUTIONAL ORDER

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### 1 Introduction

The Gambia's return to democracy after 22 years of authoritarian rule under former dictator Yahya Jammeh marked a turning point. On 19 January 2017, Adama Barrow was sworn in as President of the Republic of The Gambia. This historic development presented a new blueprint for a transition from an authoritarian regime to a democratic dispensation. The moment also provides an opportune occasion to take stock of the systematic assaults on the constitutional, legal, and institutional frameworks under the former regime, and chart a new way forward.

Currently, The Gambia is undergoing national reconciliation and comprehensive constitutional reform processes to lay the foundations for a genuine and durable democracy anchored in a new constitutional framework. For this reason, discussion and debates on constitutionalism and democracy in The Gambia remain pertinent and are a precondition for capturing past failings and outlining the preconditions for the future. This book project seeks to inform the debates and fill an important gap by offering a timely assessment and analysis of the challenges and possible solutions.

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The Gambia, mainland Africa's smallest state, achieved independence after decades of colonialism on 18 February 1965 as a constitutional monarchy within the Commonwealth. On 24 April 1970, it became a republic following a referendum. Until a military coup on 22 July 1994, The Gambia was led by President Dawda Kairaba Jawara of the People's Progressive Party (PPP), which dominated post-independence political life. The first republic ended on 22 July 1994, when Jammeh, a young army lieutenant, led a *coup d'état* that overthrew the Jawara government and suspended the 1970 Constitution.<sup>1</sup>

The 1994 coup brought an end to the longest surviving multiparty democracy in Africa.<sup>2</sup> Consequently, a new constitution was drafted, and a constitutional referendum took place on 8 August 1996. This was followed by a presidential election in September 1996. The ruling junta, the Armed Forces Provisional Ruling Council (AFPRC), transformed itself into an official political party – the Alliance for Patriotic Reorientation and Construction (APRC) – to support Jammeh's campaign for the presidency. Jammeh emerged as the winner of the 1996 election, subsequently ushering in civilian rule and becoming The Gambia's second elected President in 31 years of independence. Subsequently, the Constitution entered into force on 16 January 1997.

Gambian constitutional designers did not show sufficient foresight and imagination in designing the 1965, 1970 and the current 1997 Constitution, which were unable to ensure democratic governance. The 1965 Constitution was considered a 'sophisticated version of the Westminster export models', a preservation of the status quo.<sup>3</sup> The 1970 Constitution was also a product of the times and so as a post-independence constitution, in essence, it did not adequately cater to the welfare of the people. In other cases, the context matters as well, given that the 1997 was prepared during a period of military rule. As Mark Graber notes 'most constitutions are compromises, not declarations of shared values or blueprints of the good society'.<sup>4</sup>

- 1 For a comprehensive introductory note on The Gambia, see S Nabaneh 'The Gambia: Commentary' in R Wolfrum, R Grote & C Fombad (eds) *Constitutions of the World* (2007) 1-48.
- 2 A Saine *The paradox of third-wave democratization in Africa: The Gambia under AFRPC-APRC 1994-2008* (2008) 1.
- 3 HWR Wade & H Cryer *Annual survey of Commonwealth law* (1965) 68. See also J Fletcher-Cooke 'The failure of the "Westminster Model" in Africa' (1964) 63 *African Affairs* 197.
- 4 M Graber *Dred Scott and the problem of constitutional evil* (2006) 200. See also, A Adem 'The vulnerability of constitutional pacts: Inclusive majoritarianism as protection against democratic backsliding' in A Adem et al *Annual review of constitution-building*:

The Gambia's political life, particularly since 1997, was characterised by presidential dominance with little check on their powers. Moreover, Jammeh resorted to countless constitutional amendments that undercut even the semblance of constitutional checks and balances. For 22 years, the deplorable trends in The Gambia characterised by the complete disregard for the rule of law and the personalisation of the state by former President Jammeh posed a clear and present danger to the full realisation of the Constitution. Not only was the former regime notorious for the disregard of the rule of law, but Jammeh further orchestrated a number of amendments to the supreme law with largely anti-human rights and undemocratic provisions, such as the removal of the two-term limit and sweeping reforms to the electoral law which imposes heavy financial deposits for Presidential and National Assembly candidates. In addition, under Jammeh's rule, the environment in which the media operated was a precarious one characterised by draconian laws and arbitrary arrests, detentions, and physical assaults against journalists, as well as by closure and burning down of media houses.<sup>5</sup> In the foregoing, the book appraises the state of human rights and governance in constitutional and legal frameworks. Post-Jammeh, the need for institutional and legislative reforms are imperative.

In this regard, the critical issue then is how can we design systems that ensure democracy, good governance, and the rule of law in The Gambia? In this regard, this book project, therefore, seeks to do a rigorous audit of the state of human rights standards, constitutional reform, and democratic governance in the country. Through this, the book aims to examine challenges and prospects for constitutional reform, constitutionalism, and the quest for democratic governance in The Gambia. The book also contributes to the roadmap on a new Gambian constitution, reflecting the democratic ethos that enables accountability, transparency, and participatory governance, promoting a free and fair political environment. A Gambia-specific book with diverse contributions is indeed apt. The book, therefore, provides various contributions from scholars and practitioners that provide context-specific understandings of the past, ongoing and future efforts of constitution-making, protection of human rights and enhancing good governance.

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5 S Nabaneh 'New Gambia and the Remaking of the Constitution' *ConstitutionNet* 16 March 2017 <http://constitutionnet.org/news/new-gambia-and-remaking-constitution> (accessed 20 September 2020).

## 2 Structure of the book

The book contains 12 chapters and is divided into three thematic areas. The first part examines constitution making in The Gambia and human rights protection issues. The second focuses on democratic governance and the third on perspectives that cut across transitional justice and accountability mechanisms and the institutionalisation of judicial dialogue.

### **PART I: CONSTITUTION MAKING AND HUMAN RIGHTS PROTECTION**

This part explores some themes of constitution making and human rights in The Gambia. In Chapter 2, David Perfect reviews the history of constitution-making in The Gambia. The author examines the Constitutions of 1946, 1951 and 1959. He then concentrates on the 1964 Constitution, which came into force at independence in February 1965. This is followed by an analysis of the first republican constitution of 1970, which came into force after the second republic referendum of 1970 and remained in place until the July 1994 military coup. A particular focus of this chapter is on the role played by the Constitutional Review Commission established in 1995 and the Constitutional Review Commission in 2018 respectively.

In Chapter 3, Joseph Geng Akech argues that constitutional crafting in a post-dictatorial epoch is increasingly characterised by peacebuilding, reconciliation, and national unity. He explores the challenges of building democracy through constitutional design and examines questions of inclusivity and transparency in the post dictatorial constitution-building process in The Gambia. He concludes that citizens' participation and ownership of the process of making, and the resultant constitution are the ultimate guarantees for constitutional democracy, the rule of law and good governance.

Saikou Jammeh and Satang Nabaneh, in Chapter 4, reflect on the need for a new constitutional guarantee for freedom of the media in The Gambia. They argue that while the 1997 Constitution provides for the right to freedom of speech and expression, which includes freedom of the press and other media, the environment under which the media operated under the Jammeh regime was precarious. This was characterised by draconian laws and arbitrary arrests, detentions, and physical assaults against journalists, as well as the closure and burning down of media houses. They contend that the change of government in 2017 and the ongoing democratic transition has brought about some degree of respite

on the legal and political stranglehold on civic and political rights. Journalists and citizens can now ask tough questions and publicly discuss once abominable issues. Jammeh and Nabaneh expound on the role of media freedom for the existence of an effective democratic system and make a case for broad constitutional guarantees to facilitate a press culture that holds government accountable.

Michael Gyan Nyarko and Sainey Bah argue in Chapter 5 for the inclusion of justiciable socio-economic rights in a new Constitution, given the lack of a normative constitutional basis for ensuring accountability for socio-economic deprivations. Drawing lessons from South Africa and Kenya, the chapter highlights the socio-economic rights that should be guaranteed in the constitution and the procedural and institutional framework for the enforcement or adjudication of these rights.

In Chapter 6, Satang Nabaneh presents an overview of the current state of affairs regarding women's political participation in The Gambia. She argues that women continue to face challenges despite the normative standards, constitutional provisions, legislative and policy frameworks. She concludes by proposing legal reforms such as gender quotas to pave the way for gender equality in The Gambia.

## **PART II: GOVERNANCE AND DEMOCRACY BUILDING PROCESSES**

This section has three chapters that critically interrogate governance issues, including the electoral regime, democracy-building processes, and citizen engagement.

In Chapter 7, Gaopalelwe Lesley Mathiba examines The Gambia's electoral system in the context of the 2016 presidential elections and explores how the 1997 Constitution can be improved to meet the aspirations of liberal and participatory democracy in the future electoral processes. The chapter particularly examines whether the Gambian constitutional framework on the electoral system has been inclusive towards the youth, women, and persons with disability.

Essa Njie, in Chapter 8, examines the role of Gambian civil society organisations in both the restoration and consolidation of the country's newly found democracy with a case study of the 2016 Presidential elections. He explores their role in the electoral process through voter sensitisation and civic education, advocating for peaceful elections and democratic governance, deploying election observers, and resolving the

country's political impasse that lasted for a month. He further explores the role of CSOs in the consolidation of democracy in the 'New' Gambia.

In Chapter 9, through a comparative approach, Amar Roopan Mahadew and Peter Mendy consider the issue of political representation of ethnic groups in The Gambia with lessons drawn from Mauritius. They highlight the historical context of the political systems of The Gambia and Mauritius, especially as it relates to how minorities are politically represented. Mahadew and Mendy also interrogate The Gambia's legal framework to determine what reform measures could help to ensure adequate representation of minorities in parliament.

### **PART III: CROSS CUTTING PERSPECTIVES**

The third and final section of this books embodies two chapters that focus on cross-cutting issues transitional justice and judicial dialogue.

In Chapter 10, Ismene Nicole Zarifis engages the issue of transitional justice and accountability measures in The Gambia after 22 years of authoritarian rule and widespread human rights violations that characterised the Jammeh regime. She argues that while The Gambia is eager to move forward in building a new constitutional order, it is vital to look back and address the persistent impunity of human rights violations that have taken place over the past two decades. She analyses the role and relevance of the transitional justice process to the overall goal of re-establishing a new democratic order in The Gambia that is grounded in the sound rule of law institutions and a well-established human rights culture. Drawing from other transitional processes, she proposes strategies to ensure sustainability and long-term impact beyond the life of the transition period.

Michael S Talbot, in Chapter 11, focuses on the mechanisms needed for accelerating the development of jurisprudence under The Gambia's New Constitution. He gives an overview of the meaning of judicial dialogue and maps out the mechanisms by which it could achieve the potential benefits. In making a case for judicial dialogues, Talbot illustrates the role such dialogue has played previously within The Gambian legal system. Drawing from the normative standards of the African human rights system and the South African Constitution, he concludes by emphasising the importance of judicial dialogue in furthering democratic accountability.

In Chapter 12, the editors provide a brief update of the current state of constitution-making in The Gambia and the main lessons going into the future emerging from the chapters in the book.