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A NEW CONSTITUTION IN THE GAMBIA – A PEOPLE’S APPEAL

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1 Introduction

Two decades of a brutal dictatorship has rendered the Gambian constitutional framework in shambles. The 1997 Constitution, tailored by Jammeh to entrench power, lacks legitimacy as it was subject to recurrent personalised amendments. It is also characterised by entrenched inherent institutional weaknesses – such as a powerful presidency without term limits, insufficient mechanisms to ensure political inclusion (of women in particular), and the absence of constitutionalism – failure to comply even with the weak constitutional framework established. This was further exacerbated by a personalised and pliant security sector, a rubber-stamping National Assembly, a fragmented and weak political opposition, stifled media and civil society, a captured judiciary and bureaucracy, and centralised governance. These elements contributed to the absence of constitutionalism and the rule of law.

The post-2017 period and the departure of Yahya Jammeh have seen realignments in the political class, justice sector strengthening, resurgent media and engaged civil society. The ongoing transitional justice and constitutional reform processes seek to consolidate these gains, account for past excesses, and establish the preconditions to prevent authoritarian re-emergence. It also envisions the heralding of a new and legitimate social contract through a participatory process and redefining the constitutional framework to simultaneously establish a capable and limited government.

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This book has included a number of chapters dealing with the 1997 Constitution and the process of writing the Constitution. Key substantive provisions include the electoral system, political inclusion, and socio-economic guarantees. The crucial role of civil society, the media, and the judiciary in building, sustaining, and nurturing an environment of competitive and democratic politics and a new culture of constitutionalism and the rule of law necessary to ensure stability and socio-economic progress was also examined. These emerging issues were also dealt with within the context of the 2020 Draft Constitution. From constitutionalising crucial values such as rule of law and human rights that must guide all policy decisions to enhanced qualification and integrity requirements for office holders to empowered judiciary and parliament to 'fourth branch' accountability institutions, the proposed reforms in the Draft Constitution contain the needed ingredients to restore Gambia's legacy of an African democratic emblem.

Nevertheless, the consideration of the Draft Gambian Constitution in the National Assembly was neither inevitable nor guaranteed. The passing of the Constitution requires significant political consensus (a three-fourth approval in the National Assembly) during the Second and Third Reading and popular endorsement (75 per cent approval with a 50 per cent turnout in a referendum). These are tremendous challenges, considering that there are significant political differences on critical values, such as the formulation of provisions regarding state-religion relations and institutional aspects, such as provisions on terms limits and legislative-executive relations.

Consequently, on 22 September 2020, the National Assembly rejected the proposed Constitution Promulgation Bill, 2020.¹ The Bill would have enabled the eventual promulgation of the Constitution of the Gambia, 2020 and the repeal of the 1997 Constitution of The Gambia. Twenty-three lawmakers in the National Assembly voted against the Bill, while 31 supported it. This was, however, not a big enough majority to meet the threshold requirement of three-quarters of members needed to effect constitutional change. The Draft Constitution would, therefore, not be put to a referendum.²

1 K Af Touray 'Gambia: Parliament rejects Draft Constitution Bill 2020' *Foroyaa* 22 September 2020 <https://allafrica.com/stories/202009230283.html> (accessed 10 October 2020).

2 On why the Bill failed, see S Nabaneh 'Attempts at constitutional reform in The Gambia: Whither the Draft Constitution?' *IACL-AIDC Blog* 29 September 2020 <https://blog-iacl-aidc.org/2020-posts/2020/9/29/attempts-at-constitutional-reform-in-the-gambia-whither-the-draft-constitution.html> (accessed 10 October 2020).

The rejection of the Bill also has immense implications for the delicate but ambitious transitional agenda. The new Constitution was expected to serve as a basis for a massive political, legal, social, and institutional overhaul in The Gambia. This includes the work of the Truth, Reconciliation and Reparations Commission (TRRC) to create an official record of past abuses and crimes, the National Human Rights Commission, strengthening of the judiciary to play a key role in holding the state accountable, and the security sector reform. Adopting the Draft would have also meant amending many Jammeh era laws and enacting new laws and practices to enhance good governance and prevent the recurrence of abuse of power. The consensus from the various chapters in this book point to at least one conclusion – that while the removal of Jammeh was an incredible victory, it is not enough in itself to overcome the legacies of authoritarianism.

It was hoped that the politicians would reach a consensus on the Draft, which would formally herald Gambia's Third Republic. Transitioning from an authoritarian rule to a democratic state was envisioned in the new movement for a constitution. Thus, the widespread desire for a new constitution and the resultant energy and resources that have been channelled to the constitution making exercise have generated dissatisfaction and anger. The Draft Constitution was not perfect, and no constitution ever is. Nevertheless, it represents a marked improvement to the current 1997 Constitution.

In recognition of the popular desire, political and civil society leaders were engaged in a process to narrow the differences over key reform proposals in the 2020 Draft Constitution with the aim to re-table the draft in the National Assembly, with a possible referendum in June 2021, several months ahead of planned elections in December 2021. A process of dialogue with the leadership of all political parties was initiated with a view to building consensus on all the contentious issues and re-submitting the 2020 Draft Constitution to The National Assembly. This led to efforts to revitalise the process in 2021 with the support of Nigeria's Former President Goodluck Jonathan, which failed, in large part due to issues around the presidential term limit operating retroactively and the increasing focus of political leaders on the 2021 December presidential elections.³ Thus, attempts to reboot the process in 2021 collapsed without progress.⁴

3 S Nabaneh 'In pursuit of a peaceful presidential election in The Gambia' *Democracy in Africa* 30 September 2021 <http://democracyinafrica.org/in-pursuit-of-a-peaceful-presidential-election-in-the-gambia/> /html (accessed 2 October 2021).

4 'Abuja Constitution talks collapse' *The Standard* 25 February 2021 <https://standard.>

Given this hurdle, in moving forward, The Gambia has two options: constitutional amendment or a new constitution-making exercise. On the one hand, the 1997 Constitution can be revised to change specific provisions in order to establish a society based on democratic principles. This would mean including some of the more progressive provisions in the 2020 Draft Constitution in the 1997 Constitution. For example, a key issue is the immunity clauses in the 1997 Constitution, particularly section 69, which provides immunity from civil and criminal proceedings for the President without exceptions, during and after their term. This section is considered draconian compared to section 105 of the 2020 Draft Constitution, which limited the nature and scope of presidential immunity. Given The Gambia's past history, maintaining such a provision does not solve the problem of presidential absolutism, serves as a barrier to good governance and the rule of law, and encourages immunity. The problem with an amendment is that it would have to follow the same process as the promulgation of a new constitution (section 226(2)(b) and (4) of the 1997 Constitution). In other words, it would require the approval of three-quarters of all the members of the National Assembly on the second and third readings and would also have to be passed in a national referendum (requiring 50 per cent turnout and 75 per cent approval). Amendments to the entrenched clauses would need the support of all major political actors. This means that changes to the 1997 Constitution would not be possible if The Gambia remains divided and polarised. A piecemeal reform will not address the numerous challenges and gaps in the current Constitution, and legitimacy would remain a huge factor as this will require the participation of relevant stakeholders and individuals in society.

On the other hand, a second option is to go back to the drawing board:⁵

Under this scenario, the Constitutional Review Commission Act would be amended. The commission could either restart the drafting process afresh, or amend the draft to resolve obstacles to a consensus ... Even if going back to the drawing board was feasible, success is clearly not guaranteed.

As the Constitutional Review Commission has effectively disbanded, a renewed commitment to a new constitution may require adopting a new law to outline the process to be pursued. In any of these models, the battle for a constitution that Gambian citizens and political leaders can be proud

gm/gambia-news/abuja-constitution-talks-collapse-0/(accessed 2 October 2021).

5 S Nabaneh 'Why The Gambia's quest for a new constitution came unstuck – and what next' *The Conversation* 6 October 2020 <https://theconversation.com/why-the-gambias-quest-for-a-new-constitution-came-unstuck-and-what-next-147118> (accessed 2 October 2021).

of remains. The demands of good governance, respect for human rights, enhancement of the rule of law, and the fight against corruption require that The Gambia adopts a constitution that meets these needs. Indeed, the desire to adjust constitutional frameworks is constant, one that is better suited for the current time and future of the country.

2 Future of constitution making in The Gambia

The general lack of progress on the new Constitution, one highly seen as a symbolic and foundational feature of 'New Gambia', has raised questions about the possibility of realising a vision of a future inclusive of all Gambians. However, it is important to note that not everything proposed in the various chapters and other writings would be included in a new Constitution. Accordingly, even if a new Constitution were to be adopted, it would remain an incomplete blueprint. Consequently, the various political actors must consistently push to make The Gambian state politically inclusive, participatory, and socially and economically capable of delivering the needs of the populace.

It is worth noting that the adoption of a new Constitution would have heralded the even more arduous challenge of operationalising the frameworks and guarantees.⁶ The recurrent challenge of 'constitutions without constitutionalism' simply demonstrates that good constitutions may remain insignificant in practice. Faithful implementation would not be guaranteed or be linear. Building the foundations for constitutional democracy requires a political class that sees value in genuine constitutional governance; a populace intolerant of systematic constitutional violations; a vanguard media and civil society monitoring, identifying, publicising, and challenging government excesses; an independent judiciary; and fourth-branch institutions holding the government to account.

Even if a new constitution were not to be adopted, The Gambia is unlikely to return to the old authoritarian ways. A mobilised and assertive citizenry, revitalised judiciary, civil society and media, and competitive political environment can provide the needed safeguards to stand up to government excesses. This is not a call for complacency in the process of adoption of a new constitution, but an expression of the renewed hope in the resilience of Gambians and the commitment to build on the harsh lessons of the past two decades.

6 See generally, CM Fombad 'Problematising the issue of constitutional implementation in Africa' in CM Fombad (ed) *The implementation of modern African Constitutions: Challenges and prospects* (2016) 10-24.

The battle to build Gambia's democracy did not begin with the Draft Constitution or end with its adoption or rejection. This battle is as old as human history and will continue to be so. Gambians must not relent in the pursuit of building a strong, inclusive, resilient, and adaptive constitutional democracy. No doubt, there will be setbacks, and adaptations based on experience and human learning will be necessary. Addressing past injustices and building a publicly owned and balanced constitutional framework will go a long way in setting the stage for genuine democracy. The excitement and attitude with which Gambians have engaged the constitution drafting process show that The Gambia's democratic future is in good hands.

References

Chapters in books

Fombad, CM 'Problematizing the issue of constitutional implementation in Africa' in CM Fombad (ed) *The implementation of modern African Constitutions: Challenges and prospects* (Pretoria University Law Press 2016)

Websites

Af Touray, K 'Gambia: Parliament Rejects Draft Constitution Bill 2020' *Foroyaa* 22 September 2020 <https://allafrica.com/stories/202009230283.html> (accessed 10 October 2020)

Nabaneh, S 'In pursuit of a peaceful presidential election in The Gambia' *Democracy in Africa* 30 September 2021 <http://democracyinafrica.org/in-pursuit-of-a-peaceful-presidential-election-in-the-gambia/> (accessed 10 October 2020)

Nabaneh, S 'Why The Gambia's quest for a new constitution came unstuck – and what next' *The Conversation* 6 October 2020 <https://theconversation.com/why-the-gambias-quest-for-a-new-constitution-came-unstuck-and-what-next-147118> (accessed 10 October 2020)

Nabaneh, S 'Attempts at Constitutional Reform in The Gambia: Whither the Draft Constitution?' *IACL-AIDC Blog* 29 September 2020 <https://blog-iacl-aidc.org/2020-posts/2020/9/29/attempts-at-constitutional-reform-in-the-gambia-whither-the-draft-constitution> (accessed 10 October 2020)

'Abuja Constitution Talks Collapse' *The Standard* 25 February 2021 <https://standard.gm/gambia-news/abuja-constitution-talks-collapse-0/> (accessed 10 October 2020)