



CONSTITUTIONAL LAW DEVELOPMENTS IN THE GAMBIA: 2020

Dr Satang Nabaneh
Founder & Director,
Law Hub Gambia





Constitutional Law Developments in The Gambia: 2020

Author: Dr. Satang Nabaneh
Founder & Director, Law Hub Gambia

1. Introduction

In 2020, The Gambia witnessed a series of key constitutional developments. These include the stalling of the constitution-making process, challenges to the constitutional validity of immunity from jurisdiction and recall mechanisms, and efforts geared towards better protection of fundamental rights and freedoms. Following is an overview of some of these developments.

2. Constitutional reform

In 2020, The Gambia witnessed the stalling of the constitutional replacement project. On 22 September 2020, the National Assembly [rejected](#) the proposed Constitution Promulgation Bill, 2020 which was aimed at promulgating a new constitution and repealing of the 1997 Constitution. Twenty-three lawmakers in the National Assembly voted against the Bill, while thirty-one supported it. This was, however, not a big enough majority to meet the threshold requirement of three-quarters of members needed to proceed to the Third Reading stage for effect constitutional change. The Draft Constitution could, therefore, not be put to a referendum.

[As noted elsewhere on why the Bill did not pass](#), partisanship and extreme political polarization killed the draft. There was not enough proactive engagement in consensus building by all political actors.ⁱ

In response to the growing local and international calls for a new constitution, in [October the Cabinet](#) had asked the Minister of Justice to initiate a new a new dialogue process among stakeholders to revive the constitution building process again. Since then, there have been engagements with political parties and civil society with a view of bringing about consensus on the contentious issues of the final draft.

3. Constitutional Cases

This section focuses on two main issues: recall mechanism and immunity from jurisdiction and other related issues such as *amicus curiae*.

i. Recall mechanismⁱⁱ

Generally, recall mechanisms are absent in the 1997 Constitution. The recall is a direct democracy procedure that allows the appropriate authority and/or a specified number of citizens to demand a vote for the electorate on whether an elected holder of public office should be removed from that office before the end of his or her term.ⁱⁱⁱ

Constitutional Law Developments in The Gambia: 2020

The recall law as stipulated in section 92 of the 1997 Constitution is not mandatory. It provides that the National Assembly *may* make a provision for such a law. However, such a law has never been enacted. The nominated member saga brought this into focus. The National Assembly of The Gambia is vested with legislative powers that are to be exercised through the enactment of bills.^{iv} It is to comprise not more than forty-eight elected members and five members nominated by the President.^v In 2019, President Barrow recalled Ya Kumba Jaiteh, a nominated member, from the National Assembly. It is posited that the Constitution does not provide for the recall of a nominated member despite such happening during Jammeh's regime. For example, Jammeh revoked the nomination of the Speaker in 2010. Nominated members do not represent a geographical constituency and thus have no electorate to trigger their recall from the Assembly.

Consequently, in [*Ya Kumba Jaiteh v. Clerk of the National Assembly and Others*](#),^{vi} the plaintiff challenged the revocation by the President of the Republic of her nomination to the National Assembly as invalid and sought for various restraining orders against the defendants. Initially, the Supreme Court ruled that the orders applied for by the plaintiff including restraining the Clerk and the Speaker of the National Assembly from bestowing any right, privilege or role on Foday Gassama, her replacement, as a member of the National Assembly was not granted.^{vii}

However, in the [final judgment](#) issued on 28 January 2020, the Supreme Court held and declared that the purported termination of the plaintiff's membership of the National Assembly through an Executive decision from the office of the President was unconstitutional, invalid, null and void and of no effect.^{viii} The key question the Supreme Court addressed was whether having properly exercised the constitutional discretion to nominate to the membership of the National Assembly, the President has the power to revoke such a nomination? The Court stated that:^{ix}

[P]ower, if any, granted to the President under section 231(1) to revoke any appointment cannot apply to a nominated member since this is only a general power on appointments and the Constitution has more specifically provided for the grounds on which the tenure of a nominated member in the National Assembly ceases. Those particular provisions prevail over the general provision. **In effect the President has no power to revoke a nomination under section 231(1) nor does he have such power or authority under sections 89 and 90 as revocation is not therein provided for as one of the ways in which membership of a nominated member may come to an end in the National Assembly.** *[Emphasis added]*

This progressive judgment reemphasizes the principle of separation of powers between the three organs of the state: the executive, the legislature and the judiciary. In this spirit, the Court further noted that:^x

To assert that nominated members, once appointed, hold office at the pleasure of some other person or authority would be a gross violation of both the letter and spirit of the Constitution and would undermine the independence of such members.

The parliamentarian has since then been reinstated in the National Assembly.

ii. Immunity from jurisdiction and human rights

While a State has jurisdiction over all persons within its territory and over acts that take place within, in certain situations, it would not exercise this territorial jurisdiction. The issue of immunity from jurisdiction is the key focus in a recent ongoing case. In the *State v Yankuba Touray* case,^{xi} the Supreme Court is to determine whether the accused person (Yankuba) is entitled to constitutional immunity from prosecution of the murder of Ousman Koro Ceesay pursuant to Paragraph 13 (1), (2), (3), (4) and (5) of the Second Schedule of the 1997 Constitution. Yankuba, a former member of the then Armed Forces Provisional Ruling Council (AFPRC) which overthrew the Jawara government in 1994 and suspended the 1970 Constitution, was charged by the state of murder during the transition period. The one count murder indictment is pursuant to section 187 of the Criminal Code, Cap 10, Vol 3, Laws of The Gambia. The accused pleaded not guilty to the charge.

Consequently, the accused contends that the provisions on immunity as provided in the Second Schedule in the 1997 grants him blanket immunity from prosecution. Paragraph 13 of the Second Schedule states:

(1) No member of the Armed Forces Provisional Ruling Council, any person appointed Minister by the Armed Forces Provisional Ruling Council, or other appointees of the Armed Forces Provisional Ruling Council shall be held liable **or answerable before a Court or authority or under this Constitution or any other law**, either jointly or severally for any act or omission in the performance of his or her official duties during the administration of the Armed Forces Provisional Ruling Council. [*Amended by Act No 6 of 2001, emphasis added*]

(3) For the avoidance of doubt, it is declared that no action taken purported to have been taken in the exercise of the executive, legislative or judicial power by the Armed Forces Provisional Ruling Council or a member thereof, or by any person appointed by the Armed Forces Provisional Ruling Council in the name of the Armed Forces Provisional Ruling Council except judges of the Supreme Court or the Court of Appeal, shall be questioned in any proceedings whatsoever and, accordingly, it shall not be lawful for any court or tribunal to make any order or grant any remedy or relief in respect of any such act.

(4) The provisions of the subparagraph (3) shall have effect notwithstanding that nay such action as is referred to in that subparagraph was not taken in accordance with any procedure prescribed by law.

Constitutional Law Developments in The Gambia: 2020

(5) It shall not be lawful for any court or tribunal to entertain an action instituted in respect of an act or omission against a person acting or omitting to act on the instructions or authority of the Armed Forces Provisional Ruling Council, or a member thereof, and alleged to be in contravention of any law, whether substantive or procedural, in existence before or during the administration of the Armed Forces Provisional Ruling Council.

There is currently an active exchange of opinions regarding immunity and its influence on constitutional development in The Gambia. As a result, *amicus* briefs have been submitted to the Supreme Court. For instance, in order to aid the Court, [an amicus brief was filed by a group of lawyers](#) with the goal of providing information to the Supreme Court relating to national, regional and international law on the issue of immunity from criminal jurisdiction. This was done in light of human rights standards on the right to life and the obligation of the state to exercise due diligence in investigating and prosecuting perpetrators. The right to life imposes a duty on the State to protect the lives of its citizens.

Amicus curiae procedure

Amicus curiae, a well-established concept in law, particularly in common law jurisdictions, has been defined as relating to third parties, bystanders, who make suggestions on points of law or of fact for the information of the adjudicators to a case without themselves having an interest in the cause.^{xii} *Amicus curiae* can assist adjudicators in their deliberations, as well as contribute to the litigation discourse. In the Yankuba case, the submitted *amicus* briefs are vital in helping the Court determine the potential impact of the jurisprudence that would emanate from this case, vis a vis on the rule of law bumpy road.

Currently, there are no laid down rules that stipulates that courts may allow *amicus curiae* briefs on cases. The submitted briefs were made on the basis of the Court's inherent powers as Rule 5 of the Supreme Court Act limits right of audience to the parties in the proceedings. From the recent submission of the briefs, it is posited that the courts can allow third parties to submit *amicus* briefs and to make oral presentations when it deems that necessary. While this is a welcome development, lingering questions, including the following, remain:

- What the definition of an *amicus curiae* is, which would determine *who can be one: an individual or a group and whether they are disinterested third parties or those with strategic interests?*
- Whether the courts will have the discretion to either admit or reject such briefs?
- Whether interested parties will submit briefs of their own accord or at the invitation of the courts?
- When the brief should be submitted?
- What type or form of information can be submitted?

- How much attention the courts should pay to the arguments contained in such briefs?

Thus, there is need for clear laid down rules on the *amicus* procedure.

Conflict between human rights and immunity

In terms of the ongoing immunity case and its implications for human rights, it is yet to be seen what the decision of the Supreme Court will be. Whatever the decision is, the determination would have a great impact not only on the transitional justice process, but also on whether it would be in line with the position that recognizes that certain human rights norms or norms of *jus cogens*, when they are violated, would constitute a grave crime, thereby prevailing over immunity.

4. Legislative efforts

i. Access to information

Section 25 of the 1997 Constitution on freedom of speech does not address the issue of access to information. The [Access to Information Bill, 2019](#) was first presented to the National Assembly in December 2019. This was followed by a review done by the National Assembly Select Committee on Education, Training and Information Communication and Technology (ICT) and was [adopted](#) by the National Assembly on 25 June 2020 with amendments. The draft bill, which was subsequently tabled for a final consideration by the National Assembly members, is yet to be passed.

The Bill aims to promote transparency, accountability, good governance and development by educating people about their rights. The Bill, when enacted, will provide for the right to access public records and information and provide for the procedure of obtaining access to that information. This ensures that citizens can hold government accountable when their right to request information is guaranteed. By empowering citizens to demand public information, the law is therefore a hugely instrumental in the fight against corruption and ensuring that public institutions deliver public services in an efficient, effective and responsive manner.

Given the current political climate in the Gambia, coming from 22 years of dictatorship, such a law is vital in enhancing democratic governance and promotion of transparency and accountability. There is indeed great need to build citizens' capacities to demand the upholding of human rights. Information empowers people to demand their right to participate and improve the realization of economic, social and cultural rights, and by extension, promote transparency and accountability.

ii. Enhanced protection for marginalized groups

The [Persons with Disabilities Bill, 2020](#) was, on 8 June 2020, tabled for the first time since its drafting more than 10 years ago, at the second ordinary session of the National Assembly in the 2020 Legislative Year. The Bill is intended to make provisions for the health care, social support, accessibility, rehabilitation, education and vocational training, communication, employment and work, protection and promotion of basic rights for persons with disabilities and for connected matters. The Bill, if passed, will be in accordance with the 1997 Constitution of The Gambia, and the [Convention on the Rights of Persons with Disabilities \(CRPD\)](#) and its Optional Protocol acceded to by The Gambia on 7 July 2015.

iii. Protection of women's rights

On 22 June 2020, [several bills](#) were tabled before the National Assembly geared towards the protection of women's rights in The Gambia. These included the following:

Domestic Violence Amendment Bill: The Bill seeks to amend in Subsection (2) of section 36 of the Principal Act by inserting a new paragraph which will ensure that the rights of complainants are not prejudiced by an out of court settlement

Skin Bleaching Prohibition Repeal Bill: The Bill seeks to repeal the Skin Bleaching Prohibition Act, as it is deemed to be discriminatory against women and Girls in the Gambia in furtherance of the Gambia's International Obligations and in line with the Constitution

Married Women's Property Amendment Bills: The Bill seeks to review and amend the provisions of the married Women's Property Act found to be discriminatory against women and girls in the Gambia

Matrimonial Causes Amendment Bill: The Bill seeks to review and amend the Provisions of the Matrimonial Causes Act found to be discriminatory against Women and Girls

Labour Amendment Bill: The Bill seeks to add a clause to Section 71 which states that "every woman is entitled to a period of six months maternity leave with pay or with comparable benefits without loss of employment, seniority or similar benefits". The sub-section provides that "every father is entitled to a reasonable period of time not exceeding 10 working days as paternity leave with pay"

Forced Labour Amendment Bill: The Bill seeks to amend the Principal Act by inserting a new section 7A which states that "a woman shall not be subjected to any labour during pregnancy, that is hazardous to her health or likely to affect her

Constitutional Law Developments in The Gambia: 2020

reproductive health and that a child should not be exposed to any labour that is hazardous to her health and safety”;

Basic and Secondary Education Amendment Bill: The Bill seeks to review and repeal the provisions of the Basic and Secondary Education Act found to be discriminatory against women and girls in The Gambia; and

Women’s Amendment Bill: The Bill seeks to amend Section 15 with the addition of a new subsection (2), which provides that it shall be mandatory for every Public Institution, authority or state-owned enterprise to ensure that, for political and public offices, a minimum of 30% of all offices, positions and appointments are reserved for women. For Educational placement and school enrolment award of scholarships, bursaries and such other allocations, a minimum of 50% is reserved for women among eligible candidates. In all other case, a minimum of 30% is reserved for women.

Further consideration of these bills is foreseen in 2021.

iv. Review of Criminal Code & Criminal Procedure

A comprehensive review of the Criminal Code and Criminal Procedure was done in late 2019 as part of efforts to reform the criminal justice system post Jammeh. The review and redrafting of the codes took into account other laws whose application are impacted by, or related to, the codes. Further revisions were proposed for a more robust administration of criminal justice in the country. Subsequently, a Criminal Offences Bill, 2020 was drafted. Some key changes include the repeal of provisions on sedition, criminal defamation for enhancing freedom of expression; removal of death penalty for capital or any other offences; greater flexibility for bail; introduction of a system of parole; plea bargaining and other non-custodial sentences such as community service.

However, there have been concerns that the draft bill contains provisions that limit citizens’ political rights and shields the executive from public scrutiny. The bill was withdrawn from the National Assembly and yet to be re-tabled. A separate stand-alone legislation on the domestic criminalization of torture is also expected to be introduced.

v. Anti-Corruption Bill, 2019

The Anti-Corruption Bill, 2019 was also laid before the National Assembly and is currently before the Finance and Public Accounts Committee (FPAC). The Committee is expected to engage more stakeholders as well as finalize the report. The deliberation on the Bill is [deferred](#) to next parliamentary session.

5. 2021 Prospects

The future of the Gambian constitution building project

In 2021, it is likely that we would see a revitalization of the constitution making project in some form given that the “rejection of the bill on its merits means that Gambians will not get to see this version of the 2020 draft constitution in a future referendum.’ Given the highly politicized nature of the contentious issues, there is need for proactive engagement in consensus building by all political actors. A new constitution is very much dependent on this. Institutionalized platforms of inter-party dialogue such as the Inter-Party Committee (IPC) is vital and could be better utilized for trust building and consensus building on contentious constitutional questions and issues.

As posited elsewhere, amending the 1997 Constitution or going back to the drawing board by having the Constitutional Review Commission (CRC) restart the drafting process afresh would be challenging as buy-in and political legitimacy would be difficult to attain. An alternative option, drawing from the Kenyan case study, would be to enact a new law that focuses mainly on providing a mechanism for consensus-building on the contentious issues that arose in the review process of the 2020 Draft Constitution. Section 5 of the [Constitution of Kenya Review Act, 2008 \[Revised 2009\]](#) established the following mechanisms that would be involved in the reform process: Committee of Experts (CoE), the relevant Parliamentary Select Committee, the National Assembly, and a national referendum. These were the following steps:

First, section 23(b) of the Kenya Review Act provided that the CoE would identify the issues already agreed upon in the existing draft constitutions and the issues which are contentious or not agreed upon in the existing draft constitution. Then upon identifying issues which were contentious, section 30 (2) of the Review Act required the CoE to invite representations from the public, interest groups and experts on contentious issues so as to resolve them and prepare a harmonized draft constitution. Such a report and draft would be published so as to incorporate the views of the public.

Thereafter, the draft constitution goes to the Parliamentary Select Committee (PSC) for consensus building on the contentious issues as determined by the CoE. The PSC, upon deliberation, resubmits the draft Constitution and the report presented to the CoE, together with the recommendations agreed upon. The CoE then revises the draft constitution taking into account the achieved consensus. The CoE then submits the revised draft Constitution and its final report to the PSC. The PSC tables the report and draft constitution before the National Assembly. If the National Assembly approves the draft constitution without amendment, it is submitted to the Attorney-General for publication and then followed by a referendum.

Whatever path is eventually taken, based on key lessons learnt in the rejection of the 2020 Draft Constitution, there is need for coherent and rigorous safeguards against partisan manipulation and limiting the impact of partisan interests over national interest. Ultimately, the constitution-making process should be an inclusive one that ‘strengthens national unity and a sense of common, national identity.’^{xiii}

Political participation and electoral process

More legislation, as noted above, is also expected to be tabled in 2021 including an Elections Bill, which, if enacted, will repeal the existing [Elections Act](#). Current review of the Elections Act has already kickstarted in 2020. The Gambia’s Inter-Party Committee (IPC) has recently concluded a two-day workshop in November 2020 focused on the draft bill. This Bill is envisaged to expand political pluralism and enhance electoral processes in The Gambia. While the role of political actors is critical in this process, there needs to be opportunities created for citizenship participation and awareness about the electoral reform process.

Other legal reforms

There are much more laws that are yet to be addressed, although, ‘the [Barrow] government has promised and has actually started the process of sweeping legal and institutional reforms, including repeals or amendments of several laws from the Jammeh era that eroded human rights.’^{xiv} Among these include:

- i. Public Order Act – this bill has not yet been reviewed much less placed before the National Assembly.
- ii. Media- related laws including the Newspaper Act, the Telegram Act and the [Official Secrets Act](#).

An attempt was made to place the Media Services Bill earlier this year, but which was dropped after a public outcry that it was antithetical to free press.

6. Conclusion

Going forward in 2021, the State needs to take a leading role in re-establishing respect for human life and dignity. In terms of constitutional development, there is need for transparent and participatory lawmaking process. While the future of the constitution making process is currently unclear, transparency and accountability remain critical as well as civil society inclusion throughout. Civil society including the media can and should contribute to building, sustaining and nurturing an environment of competitive and democratic politics; a new culture of constitutionalism; and rule of law.

Constitutional Law Developments in The Gambia: 2020

A major challenge in lawmaking is its lack of inclusion of relevant stakeholders and the general public in the process. In most instances, bills are drafted at the Ministry of Justice and then taken to the National Assembly without any active involvement of the stakeholders. For example, the review of the Criminal Code was confined to lawyers, the National Human Rights Commission (NHRC) and the Gambia Bar Association (GBA). In the review of media laws, the Gambia Press Union (GPU) has been sidelined in several situations despite being a key stakeholder. For instance, they were not involved in the drafting of the Media Services Bill nor the Information and Communication Bill that was tabled recently before the National Assembly. It was also a closed-door process for the Anti-Corruption Bill as civil society groups working on corruption were not involved. On the websites of the both the Ministry of Justice and the National Assembly, bills are not placed there for public scrutiny. Moreover, National Assembly Members do not hold any public hearings where they present bills to their constituent to draw their inputs.

It is therefore critical that relevant stakeholders and the general public have the opportunity to share their inputs in current legal reform processes. The Gambia, as a transitional democracy, needs civil society to play a greater role in efforts to consolidate democracy.

Additional Resources

S Nabaneh, G Sowe & M Saine, 'Gambia' in R Albert et al (eds). *The I-CONnect-Clough Center 2019 Global Review of Constitutional Law* (November 26, 2020), pp. 129-133. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736382.

S Nabaneh '[Country report: The Gambia](#)' (2018) 6 *African Disability Rights Yearbook*, pp. 232- 248.

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

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

S Nabaneh 'The Gambia: Commentary' in R Wolfrum, R Grote & C Fombad (eds.) *Constitutions of the World* (Oxford University Press, 2017)

Gambian Constitutional law database: www.lawhubgambia.com

ⁱ S Nabaneh 'Attempts at Constitutional Reform in The Gambia: Whither the Draft Constitution?' *IACL-AIDC Blog* (September 29, 2020).

ⁱⁱ This is based on a presentation I did on '*Recall Mechanism in The Gambia*' during a virtual dialogue on Recall Mechanisms and the Impact on Representation in African Legislatures on 21 October 2020 organized by International IDEA in partnership with Electoral Resource Centre Africa and Centre for Democracy and Development (CDD) West Africa.

ⁱⁱⁱ International IDEA 'Direct Democracy: The International IDEA Handbook' (2008), available here: <https://www.idea.int/sites/default/files/publications/direct-democracy-the-international-idea-handbook.pdf>.

^{iv} Section 100 of the Constitution.

^v Section 88 of the Constitution.

^{vi} *Ya Kumba Jaiteh, the Clerk of the National Assembly, the Speaker of the National Assembly, Foday Gassama and the Attorney General*, S.C. No 001/2019 (15 March 2019).

^{vii} See S Nabaneh, G Sowe & M Saine, 'Gambia' in R Albert et al (eds). *The I-CONnect-Clough Center 2019 Global Review of Constitutional Law* (26 November 2020), p. 132.

^{viii} *Ya Kumba Jaiteh, the Clerk of the National Assembly, the Speaker of the National Assembly, Foday Gassama and the Attorney General*, S.C. 001/2019 (28 January 2020).

^{ix} *Ibid*, pp 31-32.

^x *Ibid*, p.35

^{xi} *State v Yankuba Touray*, S.C: CR 001/2020.

^{xii} S Krislov 'The Amicus Curiae Brief: From Friendship to Advocacy' (1963) 72 *Yale Law Journal*, p. 694.

^{xiii} Y Ghai 'The Role of Constituent Assemblies in Constitution Making,' (2012) International Institute for Democracy and Assistance (IDEA) p. 3.

^{xiv} S Nabaneh 'New Gambia and the Remaking of the Constitution' (16 March 2017) *ConstitutionNet*. Available at <https://constitutionnet.org/news/new-gambia-and-remaking-constitution>.

About the Author

Dr Satang Nabaneh is a socio-legal scholar with expertise on human rights, comparative constitutional law and democratization. Her teaching and research focus on international human rights law and monitoring mechanisms; human rights in Africa, with particular focus on sexual and reproductive rights and women's rights; democratization in Africa and Gambian constitutional law.

She is also the founder and director of Law Hub Gambia, a legal resources and knowledge institute providing open-access source of legal information from The Gambia. Dr Nabaneh is a Post-doctoral Fellow at the Centre for Human Rights, Faculty of Law, University of Pretoria.