

Constitutional Reform and the Rule of Law: A Workshop for Civil Society and the Legal Profession in The Gambia



Constitutional Review Commission

Alex Goodman

Barrister

Landmark Chambers

Fundamental Rights and Freedoms in the Draft Constitution

Alex Goodman

- Chapter VI of the Draft Constitution (sections 30-71)
- Overall a modern and admirable foundation for a new democracy over and above e.g. ECHR.
- Why do fundamental rights matter or make a difference?
- How does the draft constitution ensure people can actually use these rights?

Abuses which the Draft Constitution seeks to redress

How does the Constitution help if:

- - Paramilitary groups detain people in illegal detention centres.
- - Police carry out brutal practices towards political dissidents; racial minorities or peaceful demonstrators
- - A disabled person is unfairly debarred from a job
- - The state shuts down independent media
- - Soldiers demand protection money
- - The state takes people's land to build a pipeline without proper compensation?

The Existing Constitution- Summary of Rights

Fundamental right in the existing constitution:

- Section 18- Right to Life
- Section 19- Right to Liberty
- Section 20- Protection from Slavery
- Section 21- Prohibition on torture, inhuman treatment etc
- Section 22- Protection from deprivation of property without compensation
- Section 23- Right to Privacy
- Section 24- Right to Fair Trial
- Section 25- Freedom of Speech; Assembly; freedom of religion
- Section 33- Non-discrimination
- Sections 35-6 – Emergency Powers provisions
- Section 37: Basic right to seek redress in the High Court.

The Draft Constitution: Main Changes

All of those existing rights are still within the new draft constitution. The main changes/additions are:

- 1. The existing rights are in many cases modernised and made more specific.
- 2. New rights are introduced.
- 3. The draft constitution seeks to ensure that anyone in the Gambia can go to court to get a remedy for breaches of their rights. Brings in new mechanisms; strengthens procedures for redress.

Draft Constitution: Specific New Rights

Section 60- Economic and Social Rights

60. (1) Every person has the right-

- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
- (b) to accessible and adequate housing, and to reasonable standards of sanitation;
- (c) to be free from hunger, and to have adequate food of acceptable quality;
- (d) to clean and safe water in adequate quantities; and
- (e) to social security.

(2) A person shall not be denied emergency medical treatment.

Draft Constitution: Specific New Rights (2)

Section 64: Right to Development

64. *(1) All peoples have, and every person has, a right to development, and to the enjoyment of economic, social, cultural and political development.*

- Section 32(2) requires the state to take measures to achieve the progressive realisation of this right as well as the social and economic rights under section 60
- Note combination with non-discrimination

Draft Constitution-S.31(5) State to justify allocation of resources

(5) In applying any rights under sections 55 (2) (b), (c) [rights to education] and (d), 60 and 64, if the State claims that it does not have the resources to implement the rights, a court, tribunal or other authority shall be guided by the following principles-

(a) it is the responsibility of the State to show that the resources are not available and when they shall be available;

(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the fundamental right or freedom having regard to prevailing circumstances, including the vulnerability of particular groups, individuals, or communities; and

Specific New Rights (3): Environment

Right to clean environment

59. Every person has the right to a clean and healthy environment, which includes the right-

- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Chapter XIV, and
- (b) to have obligations relating to the environment fulfilled under Chapter XIV.

Specific Rights in the Draft Constitution continued Chapter XIV, section 252 - Environment

- s. 252.** (1) Land, environment and natural resources in The Gambia shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles-
- (a) equitable access and security of land rights...
 - (c) sustainable exploitation, utilisation, productive management and conservation of the environment, land and natural resources, and the equitable sharing of the accruing benefits;
 - (d) protection, conservation, preservation and sustainable use of land, environment and natural resources for the benefit of present and future generations...
 - (f) establishment of systems of environmental impact assessment...

Section 252 (Environmental principles)

Continued...

- (g) recognition of the adverse effects of climate change on the sustainable use of land...
- (i) sound conservation and protection of ecologically sensitive areas;
- (j) public participation in the management, protection and conservation of land, environment, and natural resources;
- (k) elimination of discrimination in law, customs and practices related to land and property in land based on gender;

Augmentation of Existing Rights in the Draft Constitution

Also worth noting these improvements on the existing:

- More specific protection of a **free and independent media** (section 45)
- Freedoms of **conscience and religious belief**; assembly and association (sections 47-9) more specific and extensive than existing section 25, e.g.47 (3)- no person may be denied access to any institution, employment or facility or enjoyment of any right because of their religion.
- **Rights of Children** (section 54) and the **youth** (section 62) far more up to date and extensive than existing section 29
- Rights of the **disabled**(section 56) and the **sick** (section 65) again more up to date and extensive than existing section 31

Draft Constitution: The Mechanics for Upholding People's Rights

- Section 46: Right of **Access to Information** (v. important)
- **Access to Courts** to challenge any infringement of fundamental rights: no fees – section 33(3)(b)
- **Wide standing provisions**: Section 33(2) facilitating public minded individuals or bodies to bring proceedings in High Court.
- Organisations may appear as **friends of the court** (s. 22(3)(e))
- **Formalities** to be kept to a minimum (section 35(3)(b))
- Claims about fundamental rights may be brought in the High Court (not just Supreme Court) for **declaration; injunction; conservatory order; compensation** and “an order for **judicial review**” (probably includes a quashing order, a mandatory order and prohibition)

Discussion Topics (1) Secularity

Would the Constitution Protect Against Religious Discrimination?

Secularity

- Suppose the constitution is adopted, everyone is given a copy and the institutions start to take shape.
- However, in 2030 a new President seeks to redefine the Gambia as an Islamic state and to ban the ringing of church bells on Sundays:
- What could be done by a small Christian NGO?

Discussion Topics (2)

Secularity Example

Note the Following Provisions of the Constitution:

- the declaration of a multi-party democratic state and sovereignty of the people (sections 1- 2);
- prohibition on any form of government otherwise than in accordance with the constitution section 7(2);
- prohibition on religious political parties (section 82(3));
- the prohibition on passing Bills to establish any religion as a state religion (section 151).
- Obligation on the state in section 11 to promote all forms of national and cultural expression; universal enjoyment of fundamental rights and freedoms (section 31(2));
- Right to freedom of conscience (section 47(1));
- Cultural rights (section 57);
- Right to non-discrimination on grounds of religion (section 67);

Discussion Topics 3

Return to the abuses identified at the outset...

- - Paramilitary groups detain people in illegal detention centres.
- - Police carry out brutal practices towards political dissidents; racial minorities or peaceful demonstrators
- - A disabled person is unfairly debarred from a job
- - The state shuts down media
- - Soldiers demand protection money
- - The state takes people's land to build a pipeline without proper compensation.

Possible Tweaks?

Section 9: international Law

Section 9(3) provides:

(3) The courts may have due regard to international treaties on human rights to which The Gambia is a party where it considers it necessary to aid its interpretation or application of a provision of this Constitution with respect to any right or freedom.

- Strengthen Section 9(3) so as to require consideration of international law when interpreting the Bill of Rights, as for example Section 39 of the South Africa constitution?
- Require due regard to all international treaties on human rights- whether or not Gambia is a party?
- Require regard to be had to all international treaties to which Gambia is a party when interpreting the constitution?
- Another option would be to incorporate something like section 3(1) of the UK's Human Rights Act 1998 which provides that "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.". This provision has proved highly effective in securing the embedding of rights into all of UK public law.

Possible Tweaks:
International Law In South Africa

Section 39 of the South Africa constitution provides:

39. (1) *When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; **(b) must consider international law;** and (c) may consider foreign law.*

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Further Tweaks? Protections for NGOs

Protections for non-governmental organisations/ civil-society organisations

- Protection of the work of non-governmental organisations and civil society organisations is an important component of establishing a culture of respect for the rule of law around the world.
- Suggest that section 45 (freedom of the media) could be extended to protect the freedom of non-governmental organisations.
- section 33 of the draft constitution provide specifically that NGOs be entitled to bring claims before the courts?

Further Tweaks? Clarification of section 44

Clarification of the wording of section 44 on freedom of expression

Section 44(2)(c) exempts from the right to freedom of expression “the uttering of abusive or threatening speech or writing that causes feelings of ill-will, disaffection or hostility”.

This wording is potentially too broad and could conceivably be open to abuse or place an excessive restriction on freedom of expression.

See also provisions for disqualification from presidency

Suggest the simple phrase “hate speech” has an international pedigree (see, for example, article 33(2)(c) of the Kenya Constitution).

Further Tweaks- Discrimination

Non-Discrimination Rights

Clause 67 Equality: More progressive than ECHR 14

Fairly comprehensive and generous in many areas, e.g. free-standing equality right (cl 67). Refers to “all persons”.

BUT

The protection against discrimination is subject to a significant carve-outs

- Section 31 (2) provides that fundamental rights and freedoms are granted only to “every person in the Gambia” – raising the different questions e.g. about Gambians abroad)
- for personal law (e.g. Islamic law) of marriage, adoption, inheritance etc (s.67(3)(c))
- for persons who customary law claims as its subjects (s.67(3)(d))
- Could clarify whether hotels and taxis can discriminate for example- seemingly only to laws (s.67(2)(a)) and to public officials (s.67(2)(b)).
- Overbroad carve out with respect to non-citizens (s.67(3)(a))? E.g. false imprisonment?