



**ADVISORY NOTE ON THE ELECTIONS ACT
VIS-À-VIS THE 1997 CONSTITUTION
AND 2020 DRAFT CONSTITUTION**



*The National Human Rights Commission,
The Gambia*



FOREWORD

The National Human Rights Commission of The Gambia (NHRC) was established by the National Human Rights Commission Act 2017 with a broad mandate to protect and promote human rights. Section 12 (e) (v) of the NHRC Act 2017 empowers the NHRC to produce advisory notes, manuals, and other materials to educate, inform and explain the obligations of the State in the protection of human rights.

Section 26 of the 1997 Constitution, guarantees every citizen of The Gambia of full age and capacity the right, without unreasonable restrictions, to take part in the conduct of public affairs either directly or through freely chosen representatives, to vote and be voted for during genuine periodic elections and access, on general terms of quality, to public service in The Gambia.

Article 21 of the Universal Declaration of Human Rights highlights the role of periodic and genuine elections in ensuring that everyone is able to participate in the public affairs of his or her country. However, political rights cannot be fully enjoyed if the political landscape is not a level playing field for the conduct of free and fair elections. The absence of fair rules undermines the integrity of any election and the Independent Electoral Commission plays a pivotal role in delivering, a free, fair, and credible election.



Over the years, there have been demands for electoral reform to update the current voting system, address non-involvement of civil servants, including members of the various security units, in the electoral process, introduce a presidential term limit, reinstate second-round voting, and enfranchise Gambian citizens abroad.

The demand for electoral reform has continued, and is at the centre stage of every political discourse in the country. The Government must therefore take all necessary measures to complete consultations and table the Election Bill 2020 before the National Assembly for enactment.

In line with its mandate and considering the need to reform The Gambia's electoral laws, the NHRC issues this advisory note which seeks to serve as a catalyst to influence Governments action to swiftly consider prioritising the electoral reform process by considering the views and recommendations of all the stakeholders.

Mrs. Jainaba Johm
Vice Chairperson

1.0 Background and Context

1. The role of the National Human Rights Commission (NHRC) is stipulated in the NHRC Act 2017, which grants the Commission, inter alia, authority to ‘promote awareness of and respect for human rights by undertaking studies on all matters concerning human rights and assisting the Government in formulating appropriate policies to guarantee these rights’¹. The Commission fulfills this advisory role in part, by conducting review of existing and draft legislation, to determine the extent to which it complies with international standards and treaty obligations. Where a relevant law is inconsistent with the Gambia’s human rights obligation, the Commission may bring this to the attention of the Government and issue appropriate recommendations². As such, the overall objective of this Advisory Note is to explore the rationale for electoral reform in The Gambia; examine the suitability of current electoral laws in a democratic society in light of human rights standards; and propose recommendations to address and resolve any challenges.

¹Section 12 (a), (ii) and (iii) NHRC Act 2017

²ibid at Section (j), (i), (ii)

2. Although the definition of what constitutes an ideal democracy differs across countries and governments, there is a global consensus that the election process is a yardstick by which the legitimacy of a country's democratic culture is judged. Generally, the existence of an electoral framework which enables free and fair elections and effective participation of the people, while respecting and enforcing the rule of law and human rights, is indicative of a country's commitment to democracy and good governance. These notions are particularly important in the case of The Gambia, which is allegedly plagued by a history of unfair and alleged fraudulent electoral practices, and government failure to uphold democratic principles especially between 1994 and 2016. As 2021 looms, marking the year of the first Presidential elections since the end of a 22-year dictatorial rule, it is an opportune time to reinforce the country's democratic legitimacy. A thorough re-evaluation of electoral laws is necessary to amend any gaps in the existing legal framework which may hinder the exercise of electoral rights or prevent free and fair elections, thereby rendering them inadequate in a functioning democracy.

3. An integral aspect of democratic development involves undertaking electoral reform. In recent years, political leaders and activists, law advocates, human rights defenders, and members of the public have called for

electoral reform and submitted proposals advocating for various legal, administrative, and procedural changes including, but not limited to, inclusion of a presidential term limit and revision of the redemarcation of electoral constituencies, and adoption of a paper ballot voting system³.

2.0 Limitation of Presidential Terms

4. Under the 1997 Constitution of The Gambia an elected President and members of the National Assembly may serve a five-year term⁴. As the Constitution makes no express mention of term limits, an elected presidential official could rely on this provision to serve an unlimited number of terms, and in fact the country has had only three Presidents in roughly fifty-five years. Proposals to introduce term limits are based on concerns that the lack of such a feature seriously undermines the entire election process and stunts the country's democratic progress. In the absence of a proper mechanism for replacing the executive head and other legislators, accountability is minimal at best and non-existent at worst.

³Anadolu Agency, 'Gambian Opposition Demand Electoral Reform' AA, February 11, 2016 <https://www.aa.com.tr/en/africa/gambian-opposition-demand-electoral-reforms/519741> (accessed 15 June 2020)

⁴The Constitution of The Gambia 1997, Section 63 (1)

This may not only destabilize the political situation, but also paves the way for corruption and reduces the people's confidence and participation in electoral processes. Indeed, available election statistics suggest a correlation exists between the political and democratic environment of the country and voter turnout⁵.

5. This issue is addressed in the 2020 Draft Constitution which prohibits any President holding office for more than two terms, regardless of whether the terms are consecutive or not⁶.

3.0 Redemarcation of Electoral Constituency Boundaries

6. Demands for redemarcation of constituency boundaries are based mainly on the need for proportional representation and to a lesser extent on preventing gerrymandering. Nonetheless, the disparity in size between constituencies in the existing boundary delimitation unfairly benefits some communities while disadvantaging others.

⁵International Institute for Democracy and Electoral Assistance, 'Gambia, Voter Turnout by Election Type' IDEA, <https://www.idea.int/data-tools/country-view/114/40> (accessed 15 June 2020)

⁶The 2020 Draft Constitution, Section 102 (2)

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According to the EU Election Observation Mission Report voting equality is virtually unattainable where larger constituencies may have up to 23 times more voters than their smaller counterparts and some regions like Banjul are grossly overrepresented, while others such as Kanifing and Brikama remain underrepresented⁷.

7. While Sections 81(1) and 82(1)(d) of the 2020 Draft Constitution establishes the Independent Boundaries and Electoral Commission and lists ‘delimitation of constituencies and wards’ as a function of the Commission, it remains to be seen what impact these provisions will have on the ground, as section 50 of the 1997 Constitution and The Election Act contain similar provisions which have not been implemented or given full legal effect to date. To place the entire population on an equal footing in terms of representation, boundary redemarcation must be placed at the forefront of any electoral reforms. There is a need for specific guidelines for drawing up constituent boundaries which accurately depict the variables of area size, population, residency and geographical features.

⁷International Institute for Democracy and Electoral Assistance, ‘European Union Election Observation Mission: Final Report The Gambia’ Europa, 6 April 2017
http://www.epgencms.europarl.europa.eu/cmsdata/upload/065b878b-5049-419b-a9b4-fb0588b26d86/Gambia-parliamentary-elections_6-April-2017-EU-EOM-report_.pdf
(accessed 17 June 2020)

4.0 Adoption of the Paper Ballot

8. The use of ‘ballot tokens’ or ‘ballot marbles’ pursuant to The Elections Act 2001 is unique to The Gambia’s electoral system⁸. Since the 1960s this has been the preferred voting method both due to its seemingly ‘rig-proof’ features and to accommodate a relatively low literacy rate. On the other hand, critics argue that token voting is severely outdated and suggest reform to adopt a ‘paper ballot’ system to cut down on equipment expenses⁹.
9. Aside from the financial implications, using tokens poses logistical challenges during the voting and counting process. As political parties and candidates increase in number, and as voting is expected to be extended to Gambians who live abroad, this method is both infeasible and unsustainable.

⁸The Elections Act, CAP 3:01 formerly Decree No. 78 Sections 62-64

⁹Euronews, ‘Gambia to switch from glass marble voting to use of ballot papers’ Abdur Rahman Alfa Shaban, 20 March 2018 <https://www.euronews.com/2018/03/20/gambia-to-switch-from-glass-marble-voting-to-use-of-ballot-papers> (accessed 17 June 2020)

10. The paper ballot is used successfully in other developing nations such as Ivory Coast, South Sudan and Liberia, despite the significantly lower literacy rates in these countries than in The Gambia, which has seen an increase in its literacy rates in recent years¹⁰. Adopting the paper ballot voting system will also reiterate the country's commitment to improving voting technology, and set the tone for greater technological advancement, including, online voter registration and electronic ballot counting.
11. In anticipation of the paper ballot, voter education must be conducted more frequently. Policies to further this aim and to regulate any financial investment are necessary.

5.0 Decree No: 78 of 1996

12. As well as the aforementioned concerns, a closer reading of electoral laws as enshrined in the Constitution, Election Act and secondary legislation, reveal a series of gaps in the law which either expressly or by way of omission, undermine the democracy of electoral laws, and compromise the fairness and freeness of the system.

¹⁰Countryeconomy, 'The Gambia: Literacy rate', <https://countryeconomy.com/demography/literacy-rate/gambia#:~:text=The%20Gambia%20it%20has%2C%20according,has%20increased%20in%20recent%20years> (accessed 17 June 2020)

13. The Elections Act 2001 formerly known as Decree No. 78 of 1996, the Elections (Amendment) Act, 2015 and Elections (Amendment) Act, 2017 regulate all voter eligibility, political party registration, candidate nomination, conduction of polls, campaigning, and other electoral processes. Electoral laws are also contained in the 1997 Constitution and 2020 Draft Constitution, and supplemented by the African Charter on Human and People’s Rights, International Covenant on Civil and Political Rights, ECOWAS Protocol on Democracy and Good Governance, and other international legal instruments related to the conduct of elections. While efforts have been made to domesticate these among other treaties, electoral reform would enable greater compliance with existing treaty obligations. The country would also do well to ratify the African Charter on Democracy, Elections and Governance.

14. The qualifying criteria for voting are listed under Section 12 and Section 75 of the Election Act and 2020 Draft Constitution respectively. Gambian citizens who have attained 18 years of age may vote in public elections. The 2020 Draft Constitution goes further to place a positive obligation on citizens to register as voters¹¹.

¹¹The 2020 Draft Constitution, Section 75 (2)

Precluded from exercising the right to vote, are those who are found to be of ‘unsound mind’, citizens of foreign states or those on foreign voting registers, convicts of election offences, and those in detention or imprisonment¹². These exclusions, albeit justifiable on grounds of national security, may disenfranchise otherwise eligible voters, and as such are indirectly discriminatory.

6.0 Exclusion of Disabled Persons

15. The Convention on the Rights of Persons with Disabilities, to which Gambia is a party, guarantees the political rights of persons with disabilities, including disabilities related to mental illness or soundness of the mind. Article 29 of the Convention urges member states to respect the rights of physically vulnerable persons on par with the rights of others, and to take necessary steps to remove any obstacles to the exercise of these rights. Voting eligibility requirements which exclude citizens with mental disabilities propagate stigma and are based on the presumption that these vulnerable groups lack basic rationalization and comprehension skills.

¹²The Elections Act, CAP 3:01 Section 13

16. Similarly, those with visual impairments encounter difficulty in accessing voting equipment and exercising voting rights. Although, section 66(10) of the Election Act states that voters incapacitated by blindness may receive assistance from election officers, this may compromise secrecy of the ballot and deter or intimidate certain voters.
17. Section 58 of the 2020 Draft Constitution aims to correct this shortfall by requiring the State to take measures to assist persons with disabilities to realize their political participation rights but falls short of making specific mention of the action required for realization of these rights. Electoral laws should reflect the need for braille on ballot drums and voter education materials, ramps for ease of access, and other improvements which would make voting facilities and polling stations more accessible to persons with ‘
18. disabilities.

7.0 Exclusion of Detainees

19. In spite of universal suffrage principles, those previously convicted of certain offences, or serving prison sentences are also deprived of the right to participate in elections pursuant to section 13 (b) of the Election Act. In these cases, the Governments’ right to punish breakers of the law supersedes the

right of the citizen, regardless of the fact that prisoners and detainees are equally impacted by the policies and laws in the country. Arguably, this principle goes against the underlying rationale of the Constitution and the very essence of participatory democracy.

20. As other democratic nations including Canada, South Africa, and certain parts of the US, transition to enable prisoners to vote¹³, it would be prudent to revise the electoral laws to promote voter education and the exercise of voting rights in detention facilities, or restoration of these rights upon release.

8.0 Exclusion of Citizens Abroad

21. Proponents of electoral reforms in The Gambia also base its necessity on the need to enable enfranchisement of Gambians abroad. As at now, Gambians abroad may only vote if within The Gambia, and registered with the IEC at least 6 months prior to the election. This system undoubtedly discourages rather than promotes enfranchisement.
22. Section 11 of the Election Act requires a register to be kept of Gambian citizens abroad, and Section 141 obliges

¹³Business Insider, 'Bernie Sanders' divisive proposal to give all prisoners voting rights is already a reality in countries like Canada and Israel' John Haltiwanger, 25 April 2019<https://www.businessinsider.com/bernie-sanders-prisoner-felon-voting-plan-similar-to-canada-israel-2019-4> (accessed 17 June 2020)

the Independent Electoral Commission (IEC) to create rules to enable Gambians residing in a foreign country to vote in Presidential elections. The 2020 Draft Constitution also reiterates this sentiment in Section 79, which places a positive obligation on The National Assembly to ‘provide for progressive registration of citizens abroad and the progressive realization of their right to vote’¹⁴.

23. Notwithstanding, a lackadaisical approach has been adopted in regards to giving effect to these provisions, and little progress has been made in recognizing the electoral rights of Gambians who live abroad. It is also pertinent to note that the operative word used in Section 79 of the 2020 Draft Constitution, namely ‘progressive’ suggests that these obligations are subject to resource availability and may be reasonably restricted. As such, it remains to be seen what initiatives will be taken by the National Assembly to bring the relevant provisions into force.
24. Proper mechanisms must be put in place to facilitate registration of Gambians who live abroad, and more effective electoral provisions created to allow them to exercise their democratic rights at par with citizens living in the country.

¹⁴The 2020 Draft Constitution, Section 79 (2)(f)

In South Africa citizens who have registered in advance may vote on condition that the electoral commission has been given prior notice¹⁵. Similarly, citizens from Cameroon may submit out of country votes provided they reside in countries where Cameroon has a diplomatic mission¹⁶.

9.0 Political Participation of Women

25. In the interest of a democratic society, electoral laws should promote the rights of women and other marginalised groups. As per The EU Election Observation Mission Report, participation of women in public elections is generally low. The report indicates that in 2017, women accounted for a mere 8.4 % of the candidates nominated for election into the National Assembly¹⁷. As The Gambia is a party to the Convention on the Elimination of All Forms of Discrimination Against Women, special measures must be taken to promote and enhance female representation

¹⁵Iams Wellman Elizabeth, “Diaspora Voting in South Africa. Perceptions, Partisanship and Policy Reversal”, *Afrique contemporaine*, 2015/4 (No 256), <https://www.cairn.info/journal-afrique-contemporaine-2015-4-page-35.htm> (accessed 19 June)

¹⁶Business Insider, ‘Bernie Sanders’ divisive proposal to give all prisoners voting rights is already a reality in countries like Canada and Israel’ John Haltiwanger, 25 April 2019 <https://www.businessinsider.com/bernie-sanders-prisoner-felon-voting-plan-similar-to-canada-israel-2019-4> (accessed 17 June 2020)

¹⁷International Institute for Democracy and Electoral Assistance, ‘European Union Election Observation Mission: Final Report The Gambia’ Europa, 6 April 2017 http://www.epgencms.europarl.europa.eu/cmsdata/upload/065b878b-5049-419b-a9b4-fb0588b26d86/Gambia-parliamentary-elections_6-April-2017-EU-EOM-report_.pdf (accessed 19 June 2020)

in electoral processes.

26. This includes, inter alia, use of gender quotas, as well as the application of laws which demand affirmative action, similar to Section 84(2)(g) of the 2020 Draft Constitution which promotes youth representation by stipulating that political parties seeking registration must 'ensure that at least ten percent of candidates for election to the National Assembly are youths'.

10.0 Political parties

27. Prior to January 2017, a hostile political landscape and substantial increases in election fees led to a decrease in the participation of political parties¹⁸. While the Election Act has since been amended to remove certain obstacles, proposals for reform maintain that political party and candidacy eligibility requirements remain too stringent, to the detriment of the rights of average citizens.
28. Pursuant to Section 105 of the Act, party registration applications must include a declaration signed by at least 10,000 registered voters and members¹⁹.

¹⁸Human Rights Watch, 'More Fear Than Fair
Gambia's 2016 Presidential Election' Jim Wormington, 02 November 2016 <https://www.hrw.org/report/2016/11/02/more-fear-fair/gambias-2016-presidential-election> (accessed 17 June 2020)

¹⁹Election Act AP 3:01 Amendment 2015 Section 105

Applicants must pay a GMD 1,000,000 registration fee, undertake to submit yearly audited accounts, and have party executives who are resident in The Gambia and able to ensure that the party has a secretariat in each administrative region²⁰.

29. The consensus is that such onerous requirements will deter party formation in violation of Constitutional rights and treaty obligations. In accordance with both Article 22(1) of the International Covenant on Civil and Political Rights and Article 10 (1) of The African Charter on Human and Peoples' Rights, the right to freedom of association, is a fundamental feature of a democratic society. Revising Section 105 to reduce fees and remove constraints imposed by the previous government, and adopting a more lax approach in governing political parties, would not only demonstrate a willingness to adhere to international standards, but also ease access and bolster the people's confidence in the electoral system by emphasizing the need for and promoting political participation.

30. Furthermore, in line with the Universal Declaration of Human Rights (UDHR) and Article 1(i) of the Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance

²⁰Ibid.

(2001) ‘political parties have the right to carry out their activities freely and without hindrance in any electoral process’.

31. This right is threatened by Section 87 of the Election Act and Section 2(3)(2)(m) of The Code on Election Campaign Ethics Order, which demand that prior to holding any demonstration, political parties must submit a written request to the IEC which is subject to approval or denial, failing which would result in cancellation of the party’s registration.
32. Absent any legal guidelines to assure impartial consideration of such requests, this requirement may be construed as a violation of the right to freedom of assembly. Modifying the law to permit demonstrations upon provision of sufficient notice, in lieu of prior authorization, would suffice to balance liberty and order.

11.0 The Independent Electoral Commission

33. Credibility of the electoral system relies heavily on the existence of an independent and impartial election management body, hence, the establishment of the Independent Electoral Commission (IEC), a constitutional body comprised of a chairperson and

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four other members appointed by the president²¹. The IEC's responsibilities include overseeing and governing all aspects of elections from voter registration, and voter education to campaign and media management²².

34. Concerns regarding the lack of structural and operational independence of the IEC, and security of tenure of its members, following the unconstitutional dismissals of IEC Commission members Archbishop Solomon Tilewa Johnson and Imam Saja Fatty by the former government, have also spurred demands for electoral reform in this area²³. As the law stands, and as stipulated in Section 218 of the 2020 Draft Constitution, the President may remove a member of an independent institution, such as the IEC, for gross misconduct or misbehavior and/or failure to satisfactorily perform his/her functions.
35. Introduction of legal safeguards to the statutory seven-year appointment terms of commission members, as indicated in Section 81(4) of the 2020 Draft Constitution, and adoption of a comprehensive mechanism for the

²¹The Constitution of The Gambia 1997 Section 42

²²Election Act AP 3:01 Amendment 2015 Section 8

²³Rowman and Littlefield, 'Historical Dictionary of The Gambia' David Perfect, 27May 2016https://books.google.com/books?id=9MknDAAAQBAJ&dq=gambia+independent+electoral+commission+fired&source=gbs_navlinks_s(accessed 19 June 2020)

vetting, selection, and dismissal of members, would go a long way towards ensuring the independence of the IEC.

12.0 Modernization of the Voter Register

36. Enhancement of various aspects of the electoral system is required for the full realization of electoral rights by Gambian citizens. To this end, voter register must be modernized and updated to depict an accurate representation of the population. According to the EU Observation Report, many eligible voters were left disenfranchised due to errors in the voters' roll, which is inundated with the names of persons who have moved since registering, deceased persons, and other ineligible voters²⁴.

37. Preempting such issues, Section 19 of the Election Act obliges the IEC to maintain alongside the electoral roll, a separate list of voters and deletions for each constituency, to be published for public scrutiny. Nonetheless, per Section 11(5) of the Act, which enables the Commission to improve upon the format and content of the voter register, it may be suitable to revise the law to enable regular

²⁴International Institute for Democracy and Electoral Assistance, 'European Union Election Observation Mission: Final Report The Gambia' EUROPA, 6 April 2017 http://www.epgencms.europarl.europa.eu/cmsdata/upload/065b878b-5049-419b-a9b4-fb0588b26d86/Gambia-parliamentary-elections_6-April-2017-EU-EOM-report_.pdf (accessed 17 June 2020)

updates, corrections, and deletions to be made directly onto the voter register, following checks and verification with the civil registry and other authorities. To enhance transparency and accuracy, the Act should also include provisions to facilitate proper record keeping, filing and storing.

38. In addition, it may be necessary to introduce laws aimed at increasing voter turnout, which is relatively low, at 59%²⁵. These may include provisions to remove registration deadlines and other obstacles to voter eligibility, or provisions for mandatory voter registration in public schools and workplaces.

13.0 Summary of Recommendations

39. In view of the above, and pursuant to Sections 12 (a), (e), (i) and (j) of the NHRC Act 2017, the Commission makes the following recommendations for reform of the electoral system;
- I. Amendment of the existing laws to ensure adherence to principles of universal suffrage and legal and political equality, and to advance

²⁵International Institute for Democracy and Electoral Assistance, 'Gambia, Voter Turnout by Election Type' IDEA, <https://www.idea.int/data-tools/country-view/114/40> (accessed 15 June 2020)

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compliance with international treaty obligations. Transparency and credibility of electoral processes, laws, and governing bodies are mandatory not only to ensure the integrity and fairness of elections, but for better governance, political stability, national security, and human rights law compliance.

- II. Revision of the electoral legal framework in The Gambia and assessment of its compliance with international best practices and election governing legislation.
- III. Update of voting systems to ensure technical accuracy and credibility.
- IV. Empowerment of the electorate to exercise their right to vote and participate in electoral processes on an equal playing field, without fear of discrimination-direct or indirect. Electoral justice must be guaranteed by amending laws which disadvantage certain classes of citizens and prevent equal representation. The criteria for registration must be reevaluated with the overarching principle of inclusivity in mind, and disenfranchisement of certain groups should be rectified. Rights to freedom of association

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and assembly should be monitored.

- V. Implementation of laws to facilitate voting of Gambians living abroad, who meet the qualifying voting criteria. Universal franchise of citizens is an inalienable right rather than a privilege.
- VI. Drafting of legislation which eases political party registration and bolsters competition among political contenders. Freedom of association and freedom of assembly of political parties must not be unduly restricted or deterred
- VII. Regulating by law the appointment and dismissal of Commission officials and safeguarding of security of tenure. The IEC and any other electoral governing body must be able to function with full independence and without fear of retribution.



***P.O. Box 2858, Kotu (opp. DSTV), The Gambia
Tel: (220) 446 1713 / 446 1717
Email: contact@gm-nhrc.org; Website: www.gm-nhrc.org***