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THE GAMBIA
**A new constitution - revised
draft still threatens human
rights**



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INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 8DJ, UNITED KINGDOM

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INTRODUCTION

On 8 August 1996, the Gambian people will vote in a referendum to decide on their future constitution. The previous constitution was almost entirely suspended on 29 July 1994, one week after Lieutenant (now Captain) Yahya Jammeh seized power on behalf of the Armed Forces Provisional Ruling Council (AFPRC). Since then, the rule of law has been steadily eroded: human rights have been increasingly violated with victims having no recourse to the law.

The initial draft constitution was prepared in 1995 by a Constitutional Review Commission and then presented to the AFPRC which issued a version for public consultation in April 1996. Less than a week before the referendum, a revised draft was made public which incorporated some of the comments made during a period of public consultation. However, Amnesty International remains concerned about important weaknesses in the human rights components of the draft constitution, which are not addressed in the revised text. Some of these concerns are set out below.

A. ACCOUNTABILITY FOR PAST HUMAN RIGHTS VIOLATIONS AND THE NEED FOR JUDICIAL REMEDIES

The principle of accountability is vital in human rights protection. Amnesty laws which have the effect of preventing the emergence of the truth about human rights violations and the bringing to justice of the perpetrators have a highly detrimental effect on future respect for human rights. Accordingly, Amnesty International is concerned about Article 69¹ of the draft constitution which provides impunity for the President against any criminal or civil action even in his private capacity. This impunity continues for any act done in an official capacity during the period in office, even after that period has finished. Criminal proceedings against a former President for acts committed during his term of office may only be brought after the National Assembly has lifted the immunity from prosecution by a two-thirds majority.

Article 13 of Schedule 2 of the draft constitution further provides members of the AFPRC with total impunity from criminal prosecution and civil action. This section emphasizes that the courts have no jurisdiction to entertain any criminal or civil action against

¹Numbers given in the text refer to those appearing in the original draft constitution issued for public consultation - some of these have since changed in the revised draft.

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members of the AFPRC or its appointees, even though there may be allegations that the action of such persons may have been unlawful. Article 14 of Schedule 2 also prevents the courts from receiving any complaints regarding the confiscation of property or any other penalties imposed by the AFPRC or the Chairman. Further, Article 17 prohibits the National Assembly from amending any of the provisions of the Schedule which provides impunity to the AFPRC, its members and appointees.

These provisions contravene the Gambia's international treaty obligation under the **International Covenant on Civil and Political Rights (ICCPR)** which stipulates "... any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;". More specifically, for the truth to be known, independent investigations must be organized in all cases of human rights violations, including possible extrajudicial executions, carried out during the AFPRC's period in office. The deaths of at least 13 military personnel in unclear circumstances at the time of the November 1994 coup attempt, the death in custody of former AFPRC Interior Minister Captain Haidara in June 1995 and the discovery of Finance Minister Ousman Koro Ceesay's dead body in a burnt-out car in June 1995 have still not been explained. The "effective remedy" specified under the ICCPR must include the possibility of judicial remedy.

In addition, Chapter XXI which incorporates a code of conduct for public officials including members of the security forces, does not oblige the public officials to uphold and protect the fundamental rights and freedoms enshrined in Chapter IV.

B. THE RIGHT TO LIFE

The AFPRC reintroduced the death penalty in August 1995, just over two years after it had been abolished by the Gambia's House of Representatives. Article 18 of the draft constitution retains the death penalty. Amnesty International is totally and unconditionally opposed to the death penalty and would urge that the abolition of this ultimate cruel and degrading punishment is urgently considered. In the draft constitution the National Assembly has the responsibility to review the desirability or otherwise of the total abolition of the death penalty in the Gambia within 10 years. Now is the time for the Gambia to rejoin the worldwide trend towards abolition of the death penalty.

Additionally, Article 18, sub-section 4, seriously limits the right to life by permitting the use of lethal force in defence of a person or property, to effect arrest and prevent escape, to suppress riot, insurrection or mutiny and to prevent commission of a criminal offence. These limitations erode the right to life and are contrary to the Gambia's obligations under **the African Charter on Human and Peoples' Rights**, (African Charter), which it ratified in June 1983. Article 4 of the African Charter states: "... No one may be arbitrarily deprived of this right [to life]." Article 18, sub-section 4 of the draft constitution also contravenes the **UN's Basic Principles on the Use of Force and Firearms by Law Enforcement Officials** which recommend that the use of firearms should be limited only to circumstances of imminent threat of death or serious injury.

Another article which could be interpreted to allow for excessive use of force is Article 6, sub-section 3, which provides for the defence of the constitution. This sub-section which states that “[a] person who resists the suspension, overthrow or abrogation of this Constitution... commits no offence”, could create a situation where unlawful acts could be committed with impunity, if they are deemed to be committed on the pretext of defending the constitution. It could prevent the abusive use of force from being punished as a criminal offence.

C. DEROGATIONS OF HUMAN RIGHTS

The human rights provisions of the previous constitution - which were completely removed from the country’s laws by the AFPRC in April 1995 - are restored in the draft constitution’s Chapter IV, entitled “Protection of Fundamental Rights and Freedoms”. However, these could be seriously curtailed as the constitution makes them subject to respect “for the public interest” without defining what this might mean. This could enable a government to use any pretext to limit the rights and freedoms apparently enshrined in the constitution.

In addition, Article 34 allows for many of these fundamental rights and freedoms to be set aside if the President declares that a state of public emergency exists or “if a situation exists which, if it is allowed to continue, may lead to a state of public emergency”. As the criteria for determining a “state of public emergency” are not specified, it leaves fundamental human rights of Gambians potentially as vulnerable to the discretion of future governments as they have been under the AFPRC. The Gambia is a party to the African Charter, which does not permit derogation of any of the rights specified in that treaty. Although some derogation from certain provisions guaranteeing civil and political rights is not absolutely prohibited by other international standards in times of public emergency (defined in the ICCPR as a period “which threatens the life of the nation”), these standards recognise that there are some rights which are so fundamental that they should **never** be derogated from in any circumstances. These non-derogable rights, enumerated in Article 4(2) of the ICCPR, include: the right to life; the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; the right to freedom of thought, conscience and religion - it is also stipulated that any such measures must be of an exceptional and temporary nature. It is essential that the nature of the state of emergency is clearly defined, and possible derogations specified in line with the Gambia’s obligations under the ICCPR.

The draft constitution’s rules regulating the detention of persons during a period of “public emergency” allow detainees access to their families and stipulate that detainees should be informed of the reasons for their arrest. Such rules have not been respected by the AFPRC, which has held people in incommunicado detention for long periods.

Under the draft constitution, during a “public emergency” detentions must be reviewed by a tribunal, of three people with qualifications to be High Court judges, after 30 days and thereafter every 90 days, up to a maximum of 180 days. These provisions are similar to those established by existing AFPRC Decrees. However, obligations to review detentions under AFPRC decrees have been regularly ignored - for example, AFPRC

Decree 3 allows for the detention of members of the security forces for up to six months - in fact, more than seven have been held for over two years.

The importance of stringent human rights safeguards is illustrated by the following current cases in the Gambia. More than 35 alleged supporters of the former ruling party, the People's Progressive Party (PPP), have been held since October 1995. The only reasons for their continued detention seems to be their non-violent political activities and the influence they may have as members of the former ruling party. Their case highlights the arbitrary nature of arrest in the Gambia. Their arrest around 12 October 1995 had no legal basis until 25 October 1995, when the AFPRC issued a decree which was "deemed to have come into force on the 22nd day of July, 1995" which made provision for 90 days of detention without charge or trial and without any right to challenge the legal basis for the detention. When the 90 days had expired in January 1996, defence lawyers successfully argued that bail should be granted and 25 were released on bail. However, they were rearrested later that same day, 12 January 1996. The legal basis for this act became clear in Decree 66 dated 15 January 1996 and "deemed to have come into force on the 10th day of January, 1996" which permits the Minister of the Interior to prolong the period of detention for a further period of 90 days. They remain detained. Some have been charged with sedition and have appeared in court to answer these charges; others are reported to have been charged with treason, but no trial proceedings have begun.

Others remain held without formal reference to any decree and seem to have "disappeared" in custody. For example, Lamin Waa Juwara, a former opposition member of parliament, was arrested in February 1996 and has "disappeared" in custody. The authorities have given no reason for his arrest and his family have been told he is held at Jangjangbureh prison, but the Commissioner in charge has reportedly denied this. He seems to have been arrested purely on account of his previous political activities. Numerous appeals for information about his whereabouts have remained unanswered. Similarly, Ousman Sillah, a youth leader, was arrested in late 1995 and remains held, apparently at Jangjangbureh, although his family have not been informed of his arrest or been allowed to visit him. He was arrested after attending a workshop organized by the US National Democratic Institute in the Gambian capital, Banjul.

D. FREEDOM OF EXPRESSION

Press freedom has been frequently attacked by the AFPRC. Foreign journalists have been arrested and deported; others have been questioned, detained and some tried, on account of their articles. Decrees 70 and 71, issued by the AFPRC in February 1996, modified the Newspaper Act to massively increase the fine for any contravention of the Act. It also increased the sum required as a bond for the registration of all existing newspapers. Irregularities with the bond formalities brought proprietors and editors of four newspapers into court over several weeks and caused the suspension of their newspapers for one week.

These freedoms are guaranteed in the draft constitution under Article 25 (freedom of speech, conscience, assembly, association and movement) and Articles 210 to 213 (media), but can be removed in states of “public emergency”, as mentioned above. Furthermore, Article 212 allows for restrictions on the media for reasons of national security, public order, public morality and for the purpose of protecting the reputation, rights and freedoms of others. Again, a tight definition of what would constitute a state of public emergency would help to safeguard press freedom.

E. THE IMPORTANCE OF THE RULE OF LAW

If the rule of law is to be fully reinstated in the Gambia, it is important that those in authority show a willingness to correct past excesses and a determination to ensure improved human rights safeguards in the future, both in law and in practice. The Gambia has to ensure that it respects all its international treaty obligations, particularly under the International Covenant on Civil and Political Rights and the African Charter. Both these treaties require the Gambia to take measures to give effect to the rights enshrined in them.

Since seizing power the AFPRC has eroded human rights safeguards by its own decrees. However, it instructed the Constitutional Review Commission which prepared the first draft of the new constitution to ensure that the draft provided guarantees for fundamental rights and freedoms. In the light of this instruction, it would seem appropriate for the AFPRC to immediately revoke decrees which violate those same human rights and which remove the right of the courts to oversee detentions, so that all Gambians are free from arbitrary arrest and have the freedom to express themselves and engage in peaceful political activities during this period of political transition.

<p>KEYWORDS: CONSTITUTIONAL CHANGE / IMPUNITY / DEATH PENALTY / EMERGENCY LEGISLATION / INCOMMUNICADO DETENTION / ARBITRARY ARREST / REARREST / UNACKNOWLEDGED DETENTION / CENSORSHIP / EXTRAJUDICIAL EXECUTION / DEATH IN CUSTODY / MILITARY AS VICTIMS / ICCPR / GOVERNMENT CHANGE / REFERENDA /</p>
