



Position Paper on the deleted Clause 14 of Election Bill 2021 and its impact on Diaspora Voting

Introduction

The right to vote and be voted for in public elections is a constitutional right.

The 1997 Constitution stipulates in Section 26 the political rights of Gambians which includes to vote or to be voted for in elections. In Section 39, the 1997 Constitution states further that every citizen who is 18 years and of sound mind has a right to register as a voter to vote in public elections.

The Elections Act, 1996, aligns with these constitutional provisions. Section 11 of the Elections Act states that the IEC will register all Gambians including maintaining and compiling a register of Gambian voters in foreign countries. Section 12 of the Elections Act provides the requirements for qualification for registration, among which is one has to be registered in the constituency in which one resides or was born. Further, Section 141 of the Elections Act gives the IEC the power to make rules for Gambians in the diaspora to vote in presidential elections.

The Supreme Court, in its 2021 ruling, confirmed that all Gambians, including those in the diaspora, have the right to be registered and to vote, as provided for in the Constitution and the Elections Act.

These provisions of the Constitution and the Elections Act as well as the Supreme Court ruling clearly do not only guarantee the right to vote of all Gambians including those in the diaspora but also places a clear legal and political obligation on the Executive, legislature and the IEC to give effect to these provisions.

Background of Diaspora Voting Efforts

The fight for diaspora voting rights has spanned over 25 years. Key milestones include:

- 2012: The main opposition parties (UDP, NRP, GMC, GPDP, NCP, PDOIS) formed an alliance advocating electoral reforms, including diaspora voting.

- 2015: A twelve-point proposal was submitted to former President Jammeh, Jesse Jackson, and the UN, demanding diaspora voting rights.

- 2016: The Coalition 2016, led by Adama Barrow, explicitly included diaspora voting in its manifesto. Gambians abroad played a crucial role in securing victory for this coalition.

- 2019-Present: The IEC, National Assembly, Ministry of Justice, political parties, civil society, and diaspora representatives engaged in multiple consultations on the Elections Bill, agreeing that diaspora voting is a constitutional right that must be actualized.

Purpose of this Position Paper

The purpose of this position paper on the deleted Clause 14 of the Elections Bill is to provide clarity and guidance to members of the National Assembly to re-introduce and restore Clause 14 into the Elections Bill under consideration. It seeks to provide answers to the divergent and conflicting perceptions that led to the deletion of the Clause and thereby generate enough clarity to encourage Members to re-introduce the Clause using the procedure provided in the Standing Orders of the National Assembly.

Justification by Parliamentarians Who Voted No

Many Parliamentarians who voted for the deletion of clause 14 cited its incompatibility with section 39(1) of the 1997 constitution which states that:

“Every citizen of The Gambia being eighteen years or older and of sound mind shall have the right to vote for the purpose of elections of a President and members of the National Assembly and shall be entitled to be registered as a voter in a National Assembly constituency for that purpose.”

Their interpretation of this section, especially the language “...*shall be entitled to be registered as a voter in a **National Assembly constituency***” means that a new constituency for the diaspora must be created, which will require amendment of section 88 of the 1997 Constitution to increase the number of National Assembly constituencies, justifying their action.

Our Position on Section 39

Our position is, section 39(1) of the 1997 Constitution confers the right to vote to all citizens of age and sound mind and the registration of eligible Gambians under a national assembly constituency to be able exercise their suffrage, regardless of their residency.

The Supreme Court of The Gambia, in the case of *Bakary Bunja Darbo & Others vs. Attorney General & Independent Electoral Commission in 2021* interpreted section 39 as follows:

“Pursuant to Section 39 of the Constitution, every Gambian, **including those residing outside the jurisdiction**, is entitled to be registered and to vote in the election to the offices of President, members of the National Assembly, for local government offices and traditional rulers, as well as referenda.”

This interpretation by the Supreme Court leaves no ambiguity for the registration and voting rights of Gambians residing outside The Gambia in public elections.

To be registered “...in a **national assembly constituency**” means the established constituencies created by the IEC which according to the 2015 constitutional amendment are 53. IEC, while conducting its voter registration exercise, should register eligible voters wherever they may be residing, under the existing National Assembly constituency.

Section 11 of the Elections Act of 1996 further provides for the IEC to prepare and maintain a register of voters for each constituency “*and a register of Gambian registered voters in foreign countries*”. *The qualification to be registered as a voter is set out in Section 12 of the Elections Act. Specifically, section 12(c) provides that a person should be registered in the constituency one resides or was born.*

In addition, section 141 of the Elections Act states that:

“The Commission may make rules for Gambians in any foreign country to vote in a Presidential Election”

It is worth noting that this section 141 in the Elections Act is what has been transformed into Clause 14 in the Elections Bill, 2021. Both provide for the IEC to register and make rules for Gambians in the diaspora to vote in public elections in the Gambia.

In light of the foregoing, it is our humble view that the current legal framework provides for the registration and voting of Gambians residing abroad to vote in public elections.

Clause 14 of the Bill is not incompatible with Section 39 of the 1997 Constitution

Clause 14(1) of the Elections Bill is consistent with section 26 and 39 of the 1997 Constitution and the Supreme Court 2021 ruling on *Bakary Bunja Darbo & Others vs. Attorney General & Independent Electoral Commission*, all of which extend voting rights to every citizen of The Gambia at home and abroad.

In addition, clause 14 provides for further legal guidelines for the IEC to formulate rules in facilitating the registration and voting of Gambians living outside The Gambia.

Why Clause 14 Should Be Reinstated

1. Clause 14 aligns with the 1997 Constitution and the 2021 Supreme Court Ruling

Clause 14 does not contradict Section 39. Rather, it provides legal guidelines for the IEC to register diaspora voters under existing constituencies, ensuring their participation without requiring new ones.

2. Deleting Clause 14 Violates Constitutional Rights

By removing this clause:

- The National Assembly directly violates Section 39 of the Constitution, which guarantees voting rights to all citizens.
- The IEC is prevented from fulfilling its constitutional and legal obligations.
- Gambians abroad, who contribute significantly to national development, are unjustly disenfranchised.
- This creates a dangerous precedent, where any Gambian who moves abroad automatically loses their voting rights.

3. Diaspora Voting is Logistically and Legally Feasible

Best practices globally and regionally demonstrate that diaspora voting is possible without requiring separate constituencies. Gambians abroad can be registered under their birth constituencies or former places of residence, as permitted by Section 12 of the Elections Act.

4. Deletion of Clause 14 contradicts the Principles of Democracy and Good Governance

Excluding diaspora voters undermines democratic participation, human rights principles, and the rule of law, as affirmed by the Supreme Court.

Our Call to Action

Reintroduce Clause 14 with Minor Adjustments

1. Substitute the word “shall” with “may” in clause 14(2)

To ensure IEC discretion in consulting with cabinet and the Inter-party Committee, which must not be a legal obligation upon the election management body.

2. Maintain Presidential Election and Referenda

Keep within bounds diaspora voting to presidential elections and referenda for now, removing ambiguous wording such as "or any other elections as determined by the Constitution or any other law" from Clause 14(2). This will at least remove any ambiguity and accommodate the diaspora to vote in subsequent presidential elections and referendums until such time when the necessary legal frameworks to facilitate the diaspora to vote in local and constituency elections are established

3. Uphold Constitutional and Democratic Obligations

We remind National Assembly Members of their duty under Section 17(1) of the Constitution, which mandates respect for fundamental human rights by all branches of government, including the Legislature.

4. Act Before the 2026 Presidential Election

Failure to reinstate Clause 14 would:

- Perpetuate an unconstitutional system that denies Gambians abroad their rights.
- Set a regressive precedent for future electoral laws.

Conclusion

The removal of Clause 14 from the Elections Bill 2021 is a direct infringement on the constitutional rights of Gambians living abroad and total disregard to the verdict of the Supreme Court of The Gambia. It effectively disenfranchises almost quarter a million of Gambians abroad who have long fought for the right to participate in national elections and continue to contribute immensely on the country's economy.

We urge the immediate reintroduction of Clause 14 with minor amendments to ensure Gambians abroad can vote in the 2026 presidential election and future referenda.

The time to act is now—to safeguard democracy, uphold constitutional rights, and respect the sacrifices of Gambians worldwide.

Reference

1. Migration and Sustainable Development in The Gambia (MSDG). (2021). Gambian Diaspora Constituencies and Estimates of Diaspora Populations. GK Partners. Retrieved from [MSDG-BP-10-Gambian-Diaspora-Constituencies-May-2021.pdf]
2. Constitution of The Gambia, 1997 - Section 39(1), Section 26(a)(b); Section 33(2)
3. Elections Act, 1996 – Section 11, Section 12(c), Section 141
4. Bahoum, J. (2021). Statement to the National Assembly: Lands and IEC, and Human Rights & Constitutional Matters in Relation to Diaspora Voting and Representation and the Elections Bill, 2020. Migration and Sustainable Development in The Gambia (MSDG)
5. Bakary Bunja Dabo & Ors v. Attorney General & Independent Electoral Commission (SC 001/2020) [2021] GMSC (17 March 2021).