CONSTITUTION PLAGIARISM: THE GAMBIAN REALITY

Akpojevbe OMASANJUWA*

Abstract: The Note addresses the assignment mandated The Gambia Constitution Drafting Committee to prepare a Constitution to replace that of 1997 in response to popular demand. The team of experts assembled by government accomplished the task though with a serious flaw: plagiarism. The legislature however, for other reasons, vetoed the document. With diverse viewpoints on plagiarism and legal maxims, through qualitative analysis, this Note examines where the fault lay by probing what the assignment entails. The action of the drafting Committee left the society confused and without recourse after spending a whooping sum of money on what turned out to be a white elephant project that preserved rather than eliminate well preserved colonial constitutional anachronisms. As no legal remedy exist for both plagiarism and breach of trust, the Note concluded that the fault is not in their stars but in the society that needs to accelerate the pace of educational development to avert a repeat of the incidence.

Key Words: constitution drafting, plagiarism, The Gambia, fiduciary duty, good faith.

ANAYASA İNTİHAL: GAMBİYA GERÇEĞİ

Öz: Not, 2017 yılında Gambiya Anayasası Hazırlama Komitesi'nin, yoğun talebe yanıt olarak 1997 Gambiya Anayasası'nın yerini alacak bir Anayasa oluşturmasını zorunlu kılan atamayı ele alıyor. Hükümet tarafından toplanan uzmanlardan oluşan ekip, görevi ciddi bir kusurla yerine getirdi: intihal. Ancak yasama organı başka gerekçelerle belgeyi veto etti. İntihal ve yasal özdeyişler üzerine çeşitli bakış açılarıyla, nitel analiz yoluyla bu Not, ödevin neyi gerektirdiğini ve özünü inceleyerek hatanın nerede yattığını inceler. Taslak Komitenin eylemi, yerleşik sömürge anayasal anakronizmalarını ortadan kaldırmak yerine korunan beyaz bir fil projesine boğmaca bir miktarpara harcadıktan sonra toplumu uyuşuk ve kafası karışmış hâlde bıraktı. Hem intihal hem degüven ihlali için yasal bir çözüm bulunmadığından, Not, hatanın yıldızlarında değil, insidansın tekrarlanmasını önlemek için eğitim gelişiminin hızını hızlandırması gereken toplumda olduğusonucuna varıyor.

Anahtar Kelimeler: anayasa taslağı hazırlama, intihal, Gambiya, güven görevi, iyi niyet.

1. Introduction

The Gambia became a British colony in 1843 before gaining independence in 1965 while from 1880 until 1960, educated Africans had limited franchise in a legislative council (Hughes and Perfect 2008: XXIII, XXXV and XXII) before the emergence of political parties. The Rev. J. C. Faye launched the Democratic party in June 1951 followed by Garba M. I. Jahumpa who estab lished the Muslim Congress also in 1951 before P.S. Njie founded theUnited

ORCID ID : 0000-0002-8005-3924
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*Okutman.

Party (Hughes and Perfect, 2008: XLVII). In February 1959, the Peoples' Protectorate Party (PPP) came into existence. Gambia Congress Party (GCP.) was formed in October 1962 but later and merged with PPP in, 1968 (Hughes and Perfect, 2008: XLIX and 48). Initially political parties were permitted by the colonial administration to exist only in the colony, while the protectorate had none. After independence, in 1968 The People's Progressive Alliance (PPA) joined the fold (Hughes and Perfect, 2008, p. 114 and XXVII). The Vice President Sheriff M. Dibba, resigned from government to form the National Convention Party in 1975 (Hughes and Perfect 2008 :153). Later, the Gambia People's Party, People's Democratic Party and The People's Organization for Independence and Socialism PDOIS were born in 1986, 1991 and 1986 respectively. (Hughes and Perfect 2008: 206; 112 XXVIII; See Omasanjuwa and Tarro 2021)

The 1960 pre-independence Constitution extended voting privilege to the protectorate dwellers hence the Protectorate Peoples Party was alluring to the rural population that has all along been marginalized by the urban-based parties. However, for it to favourably compete with other urban based parties, in December 1959, the party had a change of name to Peoples Progressive Party (Hughes and Perfect 2008: XXV). That was the situation until 1994 when the military toppled the democratically elected government, thereby ushering in the first military administration.

Madi Jobarteh's (2020) account of constitutional development shows that it progressed concurrently with the establishment of political parties while the country, then a British colony, was granted Colony status in 1894. As part of the administrative structures in place, a novel legislative council conveyed for the first time in 1843. At the outset, the Council was composed of Europeans only until J. D. Richards was appointed as an African member in 1883. In 1947, a Constitution was crafted making allowance for an African representative for colony dwellers, this led to Edward Francis Small becoming an elected Council member. The Council was abolished in 1959 and replaced by the House of Representatives following a constitutional conference which gave birth to a new Constitution under the administration of colonial Governor Edward Windely. The House consisted of 34 members 19 of which were elected. Under the new arrangement, protectorate dwellers were given the vote to elect their representatives. Constitutional conferences continued in 1961 in Banjul, followed by another in London in July of the same year. Consequently, a new Constitution was in place in 1962. The new Constitution formed the basis of an election which resulted in the PPP forming a government in 1963 which transformed the country into a full internal self-rule status within the British Commonwealth. The Independence Act of 1964 was enacted making provision for the

attainment of independence within the Commonwealth in 1965 while in 1970, republican status was attained after an earlier unsuccessful attempt in November 1965. The development led to the emergence of the 1970 Republican Constitution. In 1994, parts of the Republican Constitution were suspended by the military dispensation that ousted the democratically elected government before a transitional process, from the military to democratic order, ushered in a constitutional arrangement leading to the emergence of the 1997 Constitution.

Falling back on 73 years of experience on constitutionalism acquired from 1843 until 2016, as part of preparation to usher in a third republic, the President of The Gambia in collaboration with the National House of Assembly enacted the Constitutional Review Commission Act, (2017) "to provide for the establishment of a Constitution Review Commission to draft and guide the process of promulgating a new Constitution [to substitute that of 1997] and connected matters" (Constitutional Review Commission 2020). This was after what appeared to be a state of siege trailed the controversial release of a fiercely contested general election result in 2016. Primarily, the electoral contest was between a coalition of opposition political parties and the ruling party which led to the defeat of the now former president Yayah A. J. J. Jammeh who retained power for twenty-two consecutive years. The acrimony which marred the ousting of the regime and subsequently trailed its exit made the replacement of the 1997 Constitution imperative to address and amend what some observers perceived as, inter alia, the excesses and highhandedness of the ousted administration as well as colonial constitutional anachronisms.

Part II § 4 (1) §§ (a) (b) (c) of the Act stipulated that "the Commission shall be composed of a Chief Judge as Chairperson, or a Judge of a superior court designated in writing by the Chief Justice. Also on the Commission were a Vice-chairman who shall be a legal practitioner of not less than ten years standing nominated by the Minister of Justice, and nine other members of high moral standing and integrity with appropriate academic qualification and experience in a relevant field of expertise.) § 4 §§ 2 further states that "the President shall ensure that the members he or she nominates pursuant to sub-section (1) (c) are individuals of high moral character and integrity who have appropriate academic qualifications and experience in a relevant field of expertise.) Eventually, the Commission was inaugurated and tasked to prepare a report in relation to a draft Constitution. In exercising its functions, the aforementioned Act empowered the newly constituted body to seek public opinion and take cognizance proposals it deemed appropriate. Additionally, it directed that "the secular status [of the state] in which all faiths are treated equally and encouraged to foster national cohesion and unity should be considered" (Halifa, 2020). "The [exercise] was the first of its kind assigned to and prepared by an all-

Gambian team of experts; it was the first of its kind that employed full and open participatory democracy to involve citizens at home and abroad to express their wishes and aspirations" (Gambian Talents Promotion, 2020).

The team of eleven wise men and women and their support staff embarked on extensive nationwide and overseas tours seeking diverse opinions of citizens on the content of the proposed document intended to refine the country's governance system. At the end of an arduous two and a half years' task, a draft Constitution was composed and presented to the National House of Assembly for ratification. In the history of the country, "it was the first to be ever presented to the legislature for endorsement to be advanced to a national referendum [for adoption]. But history will also record that it was the first to be [derailed] before it could be advanced to a referendum." (Gambian Talents Promotion 2020. Paragraph 3)

Astonishingly, the National Assembly Speaker announced, following two days of critical deliberation, the rejection of the document after 23 (40 percent) of the 56 House members voted against while 31 (55 percent) voted in favour of the bill which needed 75% endorsement of the legislators.[1] Contrary to popular expectation, a government sponsored bill was voted against by government supporters in the House, while the opposition candidates voted in favour. Reasons enunciated below, with incised colonial constitutional anachronisms, which could incapacitate the sitting president's political ambition motivated the opposition to vote in favour while those on the other side of the political divide voted against. The United States Embassy, United Kingdom High Commission and The German Embassy earlier on "urged the law makers to vote the bill to finalise the final stages of parliamentary scrutiny" (The Chronicle, 2020). The European Union representative in the country expressed concerns over the setback caused by the rejection (European Union Website)

Several reasons entrenched in the political, social, ethnic, and religious divide pervading the country were advanced for the rejection. Some supporters of the sitting President felt the draft was discriminatory for retroactively applying a two-term presidential limit to disadvantage the siting President (Deutsche Welle News) and indeed violated §, 100 (c) of the 1997 Constitution

1. §226 2(b) and 4(b) of The Gambian 1997 Constitution, §§2, states: "a bill for an act of the National Assembly under this § shall not be passed by the Assembly or presented to the president for assent unless 2(b) the bill is supported on the second and third readings by votes of not less than three quarters of all the members of the National Assembly. The "226(b) a bill for an Act of the National Assembly altering any of the provisions referred to in §§, 7 shall not be passed by the National Assembly or presented to the president for assent unless 4(b) the bill is supported on the second and third reading by the votes of not less than three quarters of all the National Assembly Members."

that was still in force.[2] Also, The Gambia Christian Council unequivocally censured the draft for gravely compromising its interests by what it perceived to be the elevation and tacit imposition of *Sharia* jurisdiction in the proposed dispensation where "all faiths are [supposed to be] treated equally and encouraged to foster national cohesion and unity" (Halifa, 2020). The eventual fragmentation of the coalition of political parties which brought the president to power, after ousting the long serving administration, was another cause advanced in some quarters (Marième, 2020). Others are of the opinion that the confederates of the ousted dispensation had infiltrated the new administration hence the rejection was a long-predetermined conclusion; the list of reasons for the rejection is virtually infinite. As the situation was downright deplorable, a member of the House of Assembly called for the institution of a Commission of Inquiry to investigate the disbursement of the fund allocated for the project (*Adama, 2020).*

However, aggravating the multiple shortcomings of the draft, the vetoed document harboured a major flaw which received scanty attention during the two-day House deliberations, a deficiency that pricked the minds of the academically inclined members of the society. Long before the *Constitution Promulgation (2020) bill* was tabled for discussion, newspaper columnists levelled acrid accusations against the team of experts who prepared the document, allegations least expected to be directed at revered members of the society. For instance, *The Standard Newspaper* of April 20, 2020 under the caption "*Gambia's D116 million CRC cost looks terribly fraudulent*,"[3] (Samsudeen, 2020) a columnist chastised the Chairman of the drafting Commission for "asking his critics what they had offered after being accused of plagiarizing and delivering the Kenyan Constitution to The Gambia government, calling it their own final draft." (Samsudeen, 2020). In response, the Commission Chairman took observers aback by claiming that they merely adapted some aspects of the Kenyan Constitution. Hence Samsudeen (2020) retorted that "trying to deny what they did-plagiarism-by calling it an adaptation exercise is exactly what plagiarism means especially if the owner of the intellectual property was not formally consulted for permission." As the exercise cost the taxpayers a

2. "The National Assembly shall not pass a Bill- Where a Bill passed by the National Assembly is presented to the President for his or her assent, the President shall, within thirty days, assent to the Bill or return it to the National Assembly with the request that the National assembly reconsiders the Bill; and if he or she requests the National Assembly to reconsider the Bill, the President shall state the reasons for the request and any recommendations for amendment of the Bill." § 100 (2) (c) 1997 Constitution.

3. At The Exchange Rate Of 55 Dalasis To The US Dollar, It Is Approximately 2.109 Million U.S. Dollars.

fortune, readers found it incomprehensible why a country living on a shoestring budget should expend such colossal sum of money on Constitution drafting, under the cloak of rectifying the excesses of an already defunct administration.

2. Objective

"…There is a deep-seated tendency dating from early Christian sources that lying is a defective function of language and that its structure deforms communication to the harm of society generally, even although this normative view is not accompanied by a formal or logical analysis" (Peters, 2015:54). The fundamental issue under investigation in this paper is the expectation criteria of the Constitution Drafting Commission in exercising its task with utmost good faith while drafting the rejected Constitution. The objective is to examine the authenticity of the allegation of plagiarism levelled against the body to ascertain if the Commission exercised sufficient fiduciary discretion. The purpose of the Note is to add credence to the assertion that truth and lying has become contentious to the extent that there are now talks of the dawn of a post truth era (Shelly , 2018)

A question that comes to mind is: to what standard should the Commission be held while discharging its duty? A fiduciary is defined as 'one who has a duty to act primarily for another person's benefit' State of Indiana Legislators, 1935: 392). (Susan et. al, 2011:2) expressed that "agency relationship is founded on trust, confidence, and good faith by one person in the integrity and fidelity of another, creating certain duties owed by each party established in the agency agreement and implied by law. Within the relationship, fiduciaries have a duty of loyalty – the duty to act primarily for another in matters related to the activity and not for the fiduciary's own personal interest." Therefore, this paper views the Constitution Drafting Commission as being charged with a fiduciary mandate by the government (entrustor) to act on its behalf in drafting the document. This approach is adopted as fiduciaries in general are obliged to be loyal to their entrustor as that is what makes their responsibility to be enormously challenging. The confidence the government reposed on the Commission can be equated to that between a medical officer and his patient, an instructor and a learner, or a legal practitioner and his client. A breach of trust in such relationships could led to complications. Government and the public at large placed so much trust in the fiduciary of the Commission by expecting it to exercise its duty with utmost care. Similarly, the trust can be likened to a unidirectional traffic from the fiduciary to the entrustor, a feature which placed the entrustor (government) at the mercy of the Commission (fiduciary). (Caroline and Sortun: 2009) asserts that "trust could be betrayed through self-

dealing, dishonesty, abuse of power, and conflict of interest hence fiduciary duty is often described as involving both care and individual loyalty."

Numerous cases fortifies the legal axiom *ex dolo malo non oritur action*[4] which means '*no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal ac*t.'[5] Within the context of the maxim, this Note assesses the allegation of plagiarism levied against the experts and the rejection of the draft Constitution taking into cognisance the defects of the document submitted. The evaluation is in sections which begins with an introduction to the political and constitutional development of the country before examining the composition of the Draft Commission and the legislature that turned it down. Next, viewpoints on plagiarism describes what transpires could be equated with immorality and how plagiarism is viewed differently. The part on Gambian situation explains the seriousness of the flawed outcome of the Draft Constitution and highlights reasons why the House members in support of government rejected the Constitution Promulgation (2020) Bill. Comments on why most members of the public are not reacting to the development posed by the manner the Commission members carried out their assignment received attention. Afterward, the constitutional dilemma the country has to contend with preceded the conclusion, which narrated antecedents buttressing why the Commission members did not live up to expectation.

3. Viewpoints on Plagiarism

A broad ramification of plagiarism has been addressed in literature as the different degrees of societal sophistication has enabled writers over time to examine the infraction from different perspectives. The word was coined from the Latin word *Plagiarus* meaning a kidnapper (Bills 1990: 106). Bast (2008) explains that it dates to the first century A.D when the poet Martial used it to chastise his fellow poet who used his Martial's poetry as his own. Bushway and Nash as cited in (Brian and Fairs, 2010:3) explained that academic dishonesty could be traced back to documented instances of cheating on Chinese Civil Service examinations thousands of years ago. However, the practice started much earlier, at least as old as the Bible as contained in the accounts of Isaiah chapter 37 and II King chapter 19 which are stunningly identical; hence Jerimiah 23:30 states that "therefore, behold, I am against the prophets, de clares the LORD, who steal my words from one another."[6] Lambert and Hogan

4. In The Supreme Court Of India Civil Appellate Jurisdiction Civil Appeal Nos. 7630-7631 Of 2019 (Arising Out Of S.L.P.(C) Nos. 2920529206 of 2015) Https:// Main. Sci. Gov. In/Supreme court/ 2015/ 33360/ 33360_2015_12_1501_17031_Judgement_26-Sep-2019.Pdf

5. Holmann V. Johnson [1775], 98 Engl. Rep. 1120 (1. Cowp. 341).

6. In the Holy Bible, Isaiah 37 and II Kings 19 are strikingly identical.

(2003) illustrates the documentation of dishonesty in schools and society in 1982 and also mentioned an incident where two third of the students were engaged in dishonesty while Le Clercq (1999: 236) discovered that law schools, in most instances, do not explicitly teach their students what plagiarism is and how to avoid it rather, students are simply handed a code of honour (236). Vine (1966), Zastrow (1970), Harding et al. (2001), Bailey (2001) shows clearly that the practice cut across diverse disciplines.

However, modern understanding of the word varies among societies (Thomas, 2004). The common denominator among the wide-ranging meanings is that "the plagiarists misappropriate another's words as their own without acknowledging the contribution or source" Bast, and Samuels (2008). The Legal Writing Institute (2003) defined plagiarism as taking the literary property of another, passing it off as one's own without appropriate attribution, and reaping from its use any benefit from an academic institution. The definition, according to Bast and Samuels (2008), encompasses both unintentional and intentional plagiarism; however, because it is restricted to "literary property," it does not encompass the use of another's spoken words or ideas (Legal Writing Institute, 2003).

A United States Judge, Posner A. Richard, sees plagiarism as "non-consensual fraudulent copying" (Bast and Samuels, 2008:781). This implies that if a university lecturer copies from a student whose thesis he is supervising, with the permission of the latter, the lecturer, though dishonest but cannot be said to have plagiarized judging from Posner's perspective. Also, a student who procures the writing of another person for a fee has not plagiarised provided the party with the right to the paper agrees. These instances show that Posner's perception is at variance with how an academic setting perceives the practice. Thus, Judge Posner's viewpoint is decidedly narrower than what is usually thought of as plagiarism in academe as his "definition is much more restrictive because "fraudulent" conduct requires intent to deceive or at least recklessness by the plagiarist and would not include inadvertent or innocent instances of copying" (Bast and Samuels, 2008).

Harvard University's definition as "passing off a source's information, ideas, or words as your own by omitting to acknowledge that source-an act of lying, cheating or stealing" is more encompassing. (Gordon, 1995) However, it does not cater for co-authors where one of which plagiarises thereby tainting the reputation of his colleague. Some believe that the unintentional partner does not deserve sanction, while others argue that the onus is on the writer to be more careful. (Bast and Samuels, 2008:784). From the viewpoint of both the person whose work has been plagiarized and the reader of the plagiarised text, the effect is the same, whether the plagiarism is intentional or unint-

entional (Bast and Samuels, 2008). By borrowing another's words or ideas, the plagiarist is deceiving the reader into believing that those words or ideas are original" (Bast and Samuels, 2008:392).

Self-Plagiarism is another aspect of the infraction. An author could distinguish between borrowing passages from his own previously authored pieces and borrowing passages from another author's writing because there is no problem with consent. There could be a conflict of self-interest when a writer reuses a previous work to compose another as in academe, each piece is believed to be unique, at least in principle. A worse scenario is when an article is submitted more than once for publication with different titles, without reference to the previous publication. These are fraudulent cases that does not require permission (Miguel 2006).

There is a distinction between plagiarism and copyright infringement. Plagiarism extends to the use of another's words without attribution, and can extend to the use of another's information and ideas. Copyright infringement is a legal wrong based on the theory that an author has a property interest in the authored text. The copyright law in most jurisdictions provides the author a legal remedy against one who has infringed his Rights.[7] In jurisdictions such as the United States, 'a document in the public domain lacks copyright protection; thus, anyone can copy and use portions of such documents.'[8] As a result of this prohibition, using passages of a federal statute or legal decision without acknowledging the source does not violate copyright law, but their use without attribution does constitute plagiarism (Bast and Samuels, 2008). "Thus, the frequent use of "plagiarism" as a synonym for "copyright infringement" is technically incorrect." "Although the words are related, they are of different species: one legal, one ethical" (Bills 1990: 109). Consequently, plagiarized work may, or may not, violate copyright laws. Plagiary that cannot be shown to damage an economic interest by exceeding fair use will not constitute copyright infringement" (Bills, 1990: 108).

"The field of law is heavily grounded in the writing of documents. Most law professors, judges, and practicing lawyers devote considerable effort to researching the law and composing a variety of legal writings, including law journal articles, client memoranda, appellate briefs, and legal opinions" (Bast and Samuels, 2008:793). Common law judicial system is anchored in the doc trine of *stare decisis*, which obligates courts to consider and usually to follow precedent hence, [ironically] there is no need, [in most instances] for judicial writing to be original" (Baast and Samuels, 2008: 800). Although practicing

7. 17 U.S.C. § 504 (2000 & Supp. V 2005).

8. See Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33 (2003).

attorneys are aware that it is a common practice for judges to borrow from the writing of attorneys and law clerks, the public is mostly unaware of the practice (Bast and Samuels, 2008:801). While it can be argued that judges are involved in plagiarism, such accusations are rare, or even non-existent, because, going by the doctrine of *stare decisis*, a judge's writing is not expected to be original (Bast and Samuels, 2008:800). This explains why judges are rarely accused of plagiarism despite that their writings are rarely unique. A prevailing attorney whose words are borrowed is not likely to complain if the practice serves his client. The opposing attorney typically refrains from complaining for fear of raising the judge's ire, knowing he or she is likely to appear before the judge in a future case (Bast and Samuels, 2008: 804). As for practicing lawyers, they customarily borrow from the writing of others, especially for transactional documents; in fact, it is rare for an attorney to produce wholly original writing (Bast and Samuels, 2008: 804).

Notwithstanding the doctrine of *stare decisis*, there are instances in which the judiciary frown at plagiarism hence "a persistent body of case law exist in which courts publicly rebuke attorneys for plagiarism in submitted briefs." Courts, writes (Carter, 2019: 533) variously label the practice as "unprofessional,"[9] "obnoxious,"[10] "dishonest,"[11] "reprehensible,"[12] "wholly intolerable,"[13] and "completely unacceptable."[14] Plagiarism has a moral aspect hence in most academic institutions, there are instances of expulsion of culprits.[15] "The norm prevails because originality has a unique value in academia, and these values are well served by a professional rule against plagiarism" (Carter, 2019: 534). Though academic institutions seriously frowned at the practice, it could however be a mark of brilliance in some other settings. Carter (2019:539) is of the view that in transactional law practice, lawyers habitually plagiarize other lawyers works without being chastised for not giving the original author attribution, a practice in vogue to ensure uniformity in contract lan guage beside creating interpretive efficiencies and saves time and money (Carter, 2019: 535). The Supreme Court of Canada is of the opinion that a Judge need not attribute his sources of information:

9. Vasquez, 2006 WL 1098171, at *8 n.4.
10. Pick, 298 F.R.D. at 412 n.1.
11. Rossello, 2015 WL 5693018, at *2 n.4.
12. Pagan Velez v. Laboy Alvarado, 145 F. Supp. 2d 146, 160–61 (D.P.R. 2001).
13. Dewilde v. Guy Gannett Publ'g Co., 797 F. Supp. 55, 56 n.1 (D. Me. 1992).
14. United States v. Bowen, 194 F. App'x 393, 402 n.3 (6th Cir. 2006).
15. United States Bar applicants denied admission on the ground of plagiarism. White, 656 S.E.2d 527,528 (Ga. 2008). K.S.L., 495 S.E.2d 276, 277-78 (Ga. 1998). Zbiegen, 433 N.W.2d 871 (Minn. 1988). Widdison, 539 N.W.2d 671 (S.D. 1995).

... [J]udicial writing is highly derivative and copying a party's submissions without attribution is a widely accepted practice. The considerations that require attribution in academic, artistic, and scientific spheres do not apply to reasons for judgment. The judge is not expected to be original.[16]

"This case concerned an appeal of a trial judgment in which 321 of the total 368 paragraphs were copied, unattributed, from the plaintiffs' submissions.[17] "Standard forms are an intrinsic part of legal practice in many areas. Commercial providers are the source for many legal templates, and are also in the business of selling legal analysis in the form of ready-made documents on a wealth of topics" (Hanson and Anderson, 2015: 421), hence for expediency reasons, transactional practitioners and judges ignore giving credit to their sources, a practice that has led to the sharing of documents among law firms (Hanson and Anderson, 2015: 421). "In law practice, legal service outcomes are the commodities of value, whereas in academia original documents are valued in themselves" (Hanson and Anderson, 2015:421). This explains why there have been many instances of plagiarism allegations in academic circles, including at law schools, while complaints against practitioners and judges are rare (Bast and Samuels, 2008: 807).

Through the customary use of forms and reuse of client materials, practicing attorneys are rarely accused of plagiarism, even though much of their writing are not original. However, such do sparingly occur. A practicing attorney may be susceptible to plagiarism and copyright claims if the attorney borrows from copyrighted works or misrepresents the work product as being original (Bast and Samuels, 2008: 804). Borrowing from another's transactional and litigation documents without identifying the source of the writing, a customary practice for practicing attorneys, is currently a grey area in legal scholarship, though it potentially raises important legal and ethical issues (Bast and Samuels, 2008: 806).

Consistent with the legal maxim that *ex dolo malo non oritur action*[18] (No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act), academically inclined members of The Gambian society found it nauseating that the draft Constitution was accepted by government without query after news divulging its content had already deluded the public domain. However, there is a legal maxim that '*a legal contract is not "rendered unenforceable*" by illegal performance (Shields 1957: 43 footnote). While the agreement was being sealed, government probably had no inkling

16. Cojocau v. B.C. Women's Hospital & Health Centre, 2013 SCC 30 at para. 65 (Can.).

17. Cojocau v. B.C. Women's Hospital & Health Centre, 2013 SCC 30 at para. 65 (Can.). Par 53.

18. See Holman V. Johnson ([1775] 1 coup. 341].

nor ground to suspect probable breach of fiduciary responsibility. Viewed from that perspective, government could accept the document, though with reservations, because the agreement reached in inaugurating the Commission cannot be nullified by the fashion the Commission went about discharging its function save that government was privy to the ulterior motives of the members, which seem not to be the case. However, government accepted the draft despite the general aphorism that "the law will not enforce a contract founded on a violation of law" as "…a plaintiff cannot walk into court and say, "I have done an evil thing for you, pay me for it" (Shields 1957:34). Government reserve the right to decline acceptance as accepting an agreement grounded on the relegation of fiduciary duty could have implications. Besides, "most judicially recognised breach of fiduciary duty claims has involved conflicts of interest resulting in actual or potential financial loss to the entrustor" (Caroline, 2009: 566). Had government overruled the draft, going by the reasoning of Shields (1957), it would have served as a form of punishment upon the perpetrators of the alleged immoral transaction. Those contemplating mischief would have been aware that they will bear the full consequences of their action. These would have saved the judicial system from the trouble of grappling with cases laden with immorality and concentrate on the suits of honest litigants.

4. The Gambian Situation

Diwate (2014: 18) debunked the claim of innocence, or just a coincidence, sometimes advanced by some plagiarists. "Physicists and mathematicians calculated the odds that a 67-word page would show up in two writings as a happenstance. The result published in a book, "Living Ethics," shows that the odds were a lot worse than winning a seven-number lottery. It is phenomenal. They are called statistical odds of impossibility, not possibility, but impossibility" (P.18) The ease with which printed matter can be reproduced with modern technology is no excuse for tolerating the immorality associated with plagiarism. Students may not realize it is wrong but it is pretty intentional to cut and paste something from a webpage or a document and represent it as their own. It's hard to do that by accident (p. 19) (Diwate, 2014: 19). Diwate further stated that from a legal perspective, if you commit a crime, it doesn't matter whether or not you knew what you were doing or not-ignorance of the law is not an excuse" (Diwate, 2014:19).

The extent and fashion the eleven wise men and women went about what appears to be a cut and paste exercise labelled as draft Constitution elicited some reservations of the academically inclined members of the public. The viewpoints on plagiarism enunciated above shows that although plagiarism is not a crime both in civil and criminal law, it does not however mollify the

immorality of claiming credit for what belongs to another person. Diwate (2014) is of the opinion that "using a large amount of text quoted verbatim with proper attribution in a research paper is probably not plagiarism. However, it can be classified as a copy right violation." However, as stated above, the Commission members belatedly admitted adopting some aspects of the Kenyan Constitution but that was after being accosted besides, no attribution let alone an appropriate one was paid.

The Commission members reached an agreement with government to draft a Constitution, an effort fully funded by the latter with utmost good faith on either side. However, the former settled for a plagiarised document as attested to by Appendix 1 of this write up.[19] The issue under review is within the ambit of immoral agreements. "The immorality of [agreements] constitutes a vast, confusing, and rather mysterious area of the law," asserted (Strong, 1961). As plagiarism is not defined in most statute books, and the issue under review is not strictly within the purview of copyright related matters, some observers might perceive it as a case of immorality/unethical practices. Strong (1961), categorised [immorality] in contract as (1) one caused by the object or purpose of the contract if it is immoral. (2) It could result from an immoral promise rooted in the contract, and (3) a moral promise being performed immorally. The case in question falls within the ambit of the third category, which is to draft a Constitution, a moral promise the eleven wise men and women executed in their own fashion. The law denies the recovery of a contract seemingly valid but connotes that the plaintiff has resorted to gravely [undesirable] conduct in executing his side of the contract (Buffalo Law Review, 1960). Therefore, the position of government in the matter requires scrutiny.

During the House debates, opinions were characteristically polarised along political divide which the voting pattern reflected after the second reading of the bill. Save two members, the House Minority Leader, and an independent candidate, who voted against the motion, the twenty-one other members who opposed the draft Constitution are known supporters of the sitting president. They seem to believe the draft, if passed into law, would curtail the powers of the President and his subsequent successors. In a newspaper publication, a legal practitioner, Dr Henry Carrol highlighted reasons why the Constitution would have relegated the President and his successors to a ceremonial Head of government.[20]

§ 86 (1) (b) of the draft Constitution, according to Carrol, concerns Accent to Acts enacted by the National Assembly. It states that: The President shall

19. The Appendix displays clauses from the 2020 Draft Constitution and the derived Sources.

20. The Gambia Standard Newspaper of Tuesday October 13, 2020.

"assent to Acts enacted by the National Assembly and, where required, to bring the Acts into force." Carrol is of the opinion that *"The president does not ascent to Acts and the national Assembly does not enact Acts. The House merely passes bills after which the President gives his accent to those bills and then those bills will be enacted and becomes Acts or Statutes of the National Assembly.*"

That has been the practice under the previous Constitutions. Carrol further enunciates that under § 71 (3) of the 1997 constitution, *"the President has powers to appoint Ministers without vetting by the National Assembly."* However, the draft Constitution from Carrol's point of view, took the powers from the President. § 113 (2) of the Draft states that *"The President shall, within sixty days of assuming office, nominate and appoint the Ministers, subject to confirmation by the National Assembly."*

Furthermore, Carrol faulted § 86 (1) (c) which states that *"The President shall exercise or perform the following powers and duties…subject to this Constitution, to appoint, accredit, receive or recognize ambassadors, high commissioners, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers."* According to him, it should read "The President may…" rather than "The President shall…" This would enable the President to delegate powers to perform such function if for whatever reason he is unable to do so. Another contention Carrol addressed relates to the power to declare war and make peace vested on the President. § 86 (1) (m) of the draft states: *The President shall exercise or perform the following powers and duties – "... subject to the prior approval of the National Assembly, to declare war and make peace."* Carrol felt that the powers of the President to make peace outside the country was unnecessarily curtailed by the draft Constitution. Another contention was the issue of declaration of the state of emergency. The 1997 Constitution states that *"The President may, at any time, by proclamation published in the Gazette, declare that- (a) a state of public emergency exists in the whole or any part of The Gambia; (b) a situation exists which, if it is allowed to continue, may lead to a state of public emergency."* Whereas § 69 (1) of the draft Constitution states that *"An Act of the National Assembly may authorise the taking, during any period of public emergency, of measures that are reasonably justifiable for dealing with the situation that exists in The Gambia*." Carrol believes that the power to officially declare a state of emergency should belong to the President, but it will require an Act for it to be declared under the draft Constitution. § 100 (1 and 2) of the draft states that Subject to §§ (3), the President shall hold office for a term of five years. (2) No person shall hold office as President for more than two terms of five years each, whether or not the terms are consecutive. Carrol believes that

it is a violation of the Presidents political rights. Dr Carrol's explanations clarified why the voting pattern took unexpected dimension.

Concerning the opposition members who voted for the bill, their action, from the look of things, was also politically motivated. The sitting president defeated his predecessor in a bitterly contested election in 2016 on a coalition ticket with the understanding that the new administration will be transitional for three years after which another election will be organised (Marième, 2020). This was while the main opposition leader was in prison, after conviction, for staging an unauthorised public demonstration (Mustapha, 2016). However, the victorious presidential candidate exercised his prerogative of mercy to pardon the jailed opposition leader after which he assigned him a ministerial position in the new dispensation. Ultimately, he ascended the Vice-presidency. With time, the President and his Vice became administratively incompatible especially when the former renegaded on his earlier promise to vacate office after three years to pave way for another election Marième (2020). In time, the President relieved the Vice of his position, as some believe he had an eye on the presidential seat, an action which made the former political bedfellows antagonistic. The political divide separating the former allies affected their followers in the House, some of whom tilted towards the President while others maintained their loyalty to the erstwhile Vice. The animosity was the undercurrent which rocked the voting pattern during the House debate. The issues addressed by Dr Carrol were seen from diametrically different perspectives by the House members.

5. Comment

The accusation of plagiarism levelled against the Constitution Drafting Committee members is baffling judging by the compilation of blatant instances of copy and paste from other Constitutions, as shown in Appendix 1 of this article. It is evident that verbatim clauses of at least five different Constitutions are integral parts of the compilation. These are the 2010 Kenya Constitution, the 1994 Constitution of the Republic of Malawi, the Constitution of the Republic of Malta, and that of Turks and Caicos, in addition to the several clauses of the 1994 Gambian Constitution reproduced word for word. The rejected Final Draft 2020 Constitution drips plagiarism as it is evident that the drafters did not exercise enough care, notwithstanding the stringent professional qualifications required of them by the Act for the appointment.

The fact that the 1997 Gambian Constitution belongs to The Gambia does not exonerate the drafters from the blame of verbatim copying its sections and phrases without attribution. "The role of "intent" [is] the central issue to a student charged with plagiarism, asserted (Lindsay, 2011). Aside from being a

case of lack of ingenuity to at least paraphrase the reproductions, plagiarising the 1997 Constitution of The Gambia falls within the domain of self-plagiarism, an aspect of infractions mentioned earlier. Besides plagiarism, the wordy nature of the entire draft document makes it incredibly a similitude of a Constitution.

Despite the copious nature of plagiarism in the final draft, the reaction of the public, save a few newspaper columnists, was characteristically nonchalant. Reasons are not farfetched. The CIA Fact Book of 2020 states that the overall literacy rate in The Gambia is around 55 percent.[21] A number of the educated did not proceed beyond high school level hence the populace could not comprehend the enormity of the allegation. Most of those who received advanced education show minimal or no interest in politics as they increasingly become indifferent to idealism. As it requires a high level of literacy to comprehend the gravity of plagiarism, one will be expecting too much of the populace to censure the action *in-toto.* The same applies to most members of the House and their support staff whose levels of education hinders them from treating the matter with the seriousness it deserves.

The low standard of education and high, but dwindling, illiteracy rate that has pervaded the country is another factor. At the end of the first three decades of independence in 1965, the country could boast of eight public secondary schools with no university serving a population of about one million people; a crucial factor which retarded educational development. (Omasanjuwa, 2021: 18). Besides, the level of awareness was also low taking cognisance of the absence of a television station, and only the numerically insignificant educated few could read newspapers. Past political administrations bamboozled the public with bogus promises by pulling the wool over its eyes for so long, so it seems. However, with the late opening of a national university, there has been incremental progress in public awareness and the populace is increasingly developing the habit of demanding answers to what the yet few reasonably educated members of the public perceives as incongruities in society. The Commission members, virtually all of whom belong to the old dispensation, likely thought it was business as usual believing that the public, as before, will remain nonchalant.

The government probably did not chastise the Commission on purpose. It seems to have relied on its House majority strength to scuttle the recommendations of the Commission to avert public row should it attempt to temper with the document before submitting it to the House for deliberation.

While executing the task, the Commission members claimed to embark on

21. https://theodora.com/wfbcurrent/gambia_the/gambia_the_people.html

extensive tours in search of opinions, even to the overseas (Mariama, 2020). Most of the travels are akin to a jamboree as the use of online facilities would have suffice, as a more efficient means, in achieving the anticipated ends. The question that readily come to mine is: why embarking on extensive overseas tours when the end product drips copy and paste sections of other Constitutions? The enormous wealth of experience of political and constitutional development the country has accumulated since the colonial era rendered the overseas trips exercises in futility in search of opinions of those in the diaspora on how to copy and paste. It is absolute improbability for the populace, most of who are unlettered, to mandate the Commission members to copy foreign Constitutions copiously, if the final draft is truly based on the opinions and wishes of the populace. Also it is impractical for Gambians and Kenyans to reason alike in so diverse issues highlighted in Appendix 1. Regardless of being African societies, the probability of the populace to express their opinions in words that perfectly match those of peoples of other lands and cultures in diverse parts of the world is zero. It shows that the action of the Commission seems to be on purpose. The points discussed in this Note shows that there seem to be more to the issue of drafting a Constitution than meets the eye taking cognisance of the colossal sum of money expended on the white elephant project, yet there is deafening silence on the side of the government that facilitated the project. It would have cost the nation much less had the services of an experienced law professor was engaged, from any part of the world, to draft the Constitution; this most likely motivated the *Standard Newspaper* writer to cry foul.

6. Concluding Remarks

Caroline and Sortun (2009) are of the opinion that "Law and Medicine are professions designed to assist people when in need, and are in most cases in vulnerable situations." In like manner, the Commission was mandated to assist a society in need of a Constitution after getting over a state of siege perceived to be rooted in the defects of their 1997 Constitution which required a replacement. On this account, there is need for the conclusion of this Note to be somewhat unconventional as foreign legal theories, axioms, and practices, from the look of things, are not the panacea to the problem under review whose cause is firmly rooted in the society. Besides, going by the findings tabled in Appendix 1, it is incontrovertible that the Commission could not exercise sufficient discretion in discharging its mandate.

To what standard should the Commission be held while discharging its duty? Its relationship with the entrustor should be entrenched in trust, utmost good faith, and unalloyed confidence reposed in its members in matters related

to the issue at stake, not in the interest of its members on a globetrotting jamboree at public expense. Caroline and Sortun (2009: 565) succinctly put it as "Trust and loyalty are what distinguish fiduciary from non-fiduciary relationships." Nevertheless, the cord linking the government with the Commission can be likened to that between a principal and his agent. A principal is vicariously liable for the actions of his agent hence he cannot exonerate himself from such actions while the later acts within the bounds of the agreement which compels him to owe his principal a fiduciary duty of utmost good faith (Law Teacher, 2020). In William Shakespeare's *Julius Caesar*, Cassius remarked:

"…men at some time are masters of their fates.
The fault, dear Brutus, is not in our stars,
But in ourselves, that we are underlings." (*Julius Caesar, Act I, Scene III)*

Two antecedents in the history of education in the country are worth narrating. On or around 2012, during a university convocation ceremony attended by the President of the republic as Chief Guest of Honour, deserving students and lecturers received prizes from the President in his capacity as Chancellor of the institution. However, a Dean of one of the Schools had none to present to qualify him for an award. Nevertheless, he had his name written on an article authored by another faculty member of foreign extraction, with neither attribution nor consent, unknown to members of the public in attendance. Based on the plagiarised claim, he received a prize with standing ovation from the attendees. An online newspaper brought the depravity to public attention in a publication which caused mild ripples within academic circles. No authority reprimanded the impostor. Subsequently, he gained promotion to the rank of Professor and Acting Vice-chancellor of the same institution.

The other antecedent is a legal tussle involving the Director of International Affairs of a university and his boss, the Vice-Chancellor. The former accused the latter of unprintable infractions. While defending his claims before a magistrate, the latter was cross-examined by the defence counsel, during which he claimed, *inter alia*, that due to his sterling academic performance in his university days, he was awarded both his Bachelor's and Master's degrees in the same year by the same university. The presiding magistrate had cause to doubt the integrity of the Vice-chancellor as the possession of a bachelor's degree is a *sine qua non* for admission to pursue a master's degree programme. Hence, in addition, the court recommended an investigation of the Vice Chancellor for what the Principal Magistrate tagged certificate racketeering as his claim was untenable, coupled with judging by his performance during his court appearances. The investigation was never effected rather, after leaving office, in a subsequent convocation ceremony attended by the Vice-president of the republic, the same Vice-chancellor received an honorary doctorate degree,

amidst standing ovation, for what was referred to as his invaluable contribution to the development of education in the country (Bakary, 2012; *Inspector General of police Vs Gumbo A. Touray* 2012, Bakary, S., 2012).

In view of other comparable prevalence in society of the above-mentioned antecedents, some members of the public could fathom why a Constitution Drafting Commission allegedly copiously did the unexpected to foreign Constitutions to bamboozle laypeople into believing that it is an original product of a painstaking jamboree around the globe, at a cut-throat price. Nevertheless, going by the revealing and pungent criticisms from some well-read members of the society, such as Samsudeen, (2020) and Halifa, (2020), members of the Commission must have realised that "copying does not demonstrate the skill or level of understanding that an educated person is reasonably expected to have" (Tami, 2006:15). However, their action has left society confused, without recourse, after spending 116 Million Dalasis on a white elephant project. Consequently, the sitting President has no option but to stick to the discredited 1997 Constitution with all its defects in governing the country.

However, a number of clauses in the 1997 Constitution undermine the principle of separation of power. One of which is the selection of the Speaker and Deputy Speaker of the House of Assembly from among its members. § 88 (1) of the 1997 Constitution states that the National Assembly shall comprise [of] forty-eight members elected from the constituencies demarcated by the Boundaries Commission; and (b) five members nominated by the President, a colonial hangover since 1959 when the House of Assembly consisted of 34 members 19 of which were elected. However, § 93 (1) stipulates that "The Speaker of the National Assembly and the Deputy Speaker shall be elected by the members of the Assembly from among the nominated members." This arrangement fused the executive and legislative arms of government as it is the President that will determine the Speaker and the Deputy who are his nominees, not elected members of the unicameral House.

Furthermore, § 138 of the Constitution states that "The Chief Justice shall be appointed by the President after consultation with the Judicial Service Commission." Experiences have shown under previous political dispensations that the opinions of the Judicial Service Commission, in the appointment of judges, are non-binding opinions and recommendations which the President may choose to cast overboard. More so, §, 141 (c) states that a Judge "may have his or her appointment terminated by the President in consultation with the Judicial Service Commission." These indicate that under the 1997 Constitution, separation of powers which is an integral pillar of democracy and representative government is a mere formality necessitating the need for a new constitutional arrangement (See Constitution of The Republic of The Gambia 1997).

Furthermore, § 145 (2) states that "the members of the Judicial Service Commission shall be appointed by the President in consultation with the Chief Justice [who is a presidential appointee] and subject to confirmation by the National Assembly. As it is the President who appoints the judges and members of the Judicial Service Commission, the three arms of government (executive, legislature and, judiciary) are under his direct manipulations, an extension of the colonial dispensation. The constitutional arrangement has led to a situation since independence whereby the interests of the ruling party supersede that of the country as his wishes are supreme, in practice. It is therefore a paradox for the provisions of a constitution to be unconstitutional because the underlining reasoning propping Western democracy is the separation of powers. Technically, the three arms of government are separate only in theory. That explains the bane of the siege that rocked the country during the 2016 general elections which culminated in a deceleration of a state of emergency. The ousted president was able to perpetuate his grip on power for 22 years as he highhandedly controlled the three arms of government.

The resultant failure of the Constitution Review Commission to present an acceptable draft Constitution has resulted in both dignitary and pecuniary losses to society as it occasioned emotional pain in the public mind. The bungled exercise would have abolished the constitutional anachronisms that have plagued the country since the advent of colonial rule.[22] This include the simple majority system in presidential election results [euphemistically referred to as first past the post] where a winner is the candidate with the plurality of votes, without minimum threshold. Another colonial legacy is the absence of presidential term limit in the 1997 Constitution, a snag that opportune previous two presidents to cling onto power through becoming perennial presidential candidates. On winning re-election, the sitting President promised a new Constitution that will introduce presidential term limit and ensure that a presidential candidate wins an absolute, rather than simple, majority to be declared winner (Mommodu, 2021). With a backlog of 51 years of acquaintance with constitutionalism, there is more than meets the eye as these are immutable colonial antics.

Lastly, with regard to the draft document, it is paradoxically understandable that the House members could not reason through why they ought to reject the

22. An instance was a contained in part III of the 1970 Constitution. Under Summation, Prorogation and Dissolution, section 85 (1) of the Constitution tartly stated that "The President may at any time prorogue Parliament." The section did not only make the impeachment of the President impossible, it actually conditions the House to dance to the whims and caprices of the President.

draft document on principle, a justifiable alternative. This would have appeared more plausible to the European development partners than the partisan voting pattern the House exhibited. With the exception of few well-read House members like Halifa (2020), who saw through the issue at stake, some of them lack the requisite educational background to comprehend the complexity of House debates, besides seriously lacking adequate supporting staff who would have put them through in performing their duties (Omasanjuwa, 2020: 182). Unquestionably, Caroline and Sortun (2009) opined that "most, if not all, betrayal of trust call for an apology but patient entrustors needs more than an apology to be made whole." Apparently, to be made whole, as no legal remedy exist for breach of trust and plagiarism, only time coupled with sustained concerted effort in making education available to all and sundry will make the society whole by accelerating the educational upliftment of the country as Cassius rightly pointed out, the fault is truly not in its stars but in the society.

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Appendix 1.

Clauses from the 2020 Draft Constitution.	**Derived Sources**
Supremacy of the Constitution. § 6, §§ 1 to 4	Kenyan Constitution (2010), § 2, §§ 1 **to 4.**
Defence of Constitution § 7, §§ 1 to 6.	Kenyan Constitution (2010), § 3, §§ 1and 2.
Enforcement of Constitution § 8, §§1(a and b), 2, 3, 4(a and b).	Kenyan Constitution (2010), §22, §§ 1, 2 (a to d). and (1997) Gambian constitution §5, §§ 2, 3 (a and b).
National Values and Governance. § 10, §§ 1 (a to c) 2, (a to d).	Kenyan Constitution (2010), §10, §§ 1(a to d).
Culture § 11, §§ 1 and 2 (a to c), 3 (a and b).	Kenyan Constitution (2010), § 11, §§ 1, 2 (a to c), 3 (a to b).
§ 13 (a and b).	(1997) Gambian Constitution § 8 [Rephrased].
Citizen by Birth § 14, §§ 1 and 2.	(1997) Gambian Constitution § 9, §§ 1 [Rephrased].
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Protection from slavery and forced labour. § 39, §§ 1 to 3(a to d)	Part 1, § 4, §§ 1 to 3 [The Constitution of Turks nd Caicos Island] (Rephrased).
Protection from cruel and inhuman treatment. § 40, §§ 1, 2(a to d).	Kenyan Constitution (2010), § 28, 29 (a to f).
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