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SUPPLEMENT



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A REVIEW OF THE DRAFT CONSTITUTION OF THE SECOND REPUBLIC



Book Two



On The Executive Branch Of
Government (The Presidency)

INTRODUCTION

Book One of FOROYAA's publication on the draft Constitution dealt with its Preamble, the establishment of the Republic, the representative institutions and elections.

The Preamble is the declaration of intention of the draft Constitution. It gives the reader a summary of what is to be expected in the Constitution.

The reader would recall that a foundation is established in the Preamble and Chapter 1 concerning the Republic. The Preamble states categorically that "All power emanates from the sovereign will of the people." It indicates that "The Constitution guarantees participatory democracy."

Chapter 1, section 2 of the draft Constitution gives flesh to the spirit expressed in the Preamble of the Constitution concerning power emanating from the collective will of the people by asserting that:

"The sovereignty of the Gambia resides in the people of The Gambia from whom all organs of government derive their authority and in whose name and for whose welfare and prosperity the powers of government are to be exercised."

This means that as a sovereign Republic, the sovereign people of The Gambia have the responsibility or duty to determine the economic, social, political and cultural life of the country.

Now, one may ask: How are taxes to be collected? Who are to raise them? How are banks to operate? How is trade to be conducted? How are we to relate to each other? How do we solve our differences if you borrow money and refuse to pay? We can go on and on. What is clear is that there must be laws to guide our economic, social, political and cultural life.

Furthermore, we must be able to collect money from all in order to provide the public services required by all.

One may now ask: Can all the people in The Gambia meet everyday to determine what public services to establish and how much to contribute per head to establish them?

The answer is in the negative. This is why it is necessary to select people from among our ranks who shall be our representatives and who shall be charged with the responsibility of making the laws which will govern our economic, political, social and cultural life as well as to provide the public services we need such as hospitals, schools, roads and other amenities.

The representatives responsible for making laws constitute the legislative branch of the State. In the draft Constitution, it is to be called the Na-

tional Assembly. Those responsible for the day to day management of services on the basis of rules or laws enacted by the legislative branch constitute the executive branch of the State which is headed by a President. The representatives responsible for the provision of services in cities and districts become part of the local government structure.

In The Gambia, there has also been the institution of chieftaincy and alkalship since the colonial days. We shall see whether the draft Constitution has anything to say about these institutions.

Let us now proceed to examine the executive, legislative and other branches of representation from the national to the local levels.

THE EXECUTIVE BRANCH OF THE STATE

Chapter six of the draft Constitution establishes the executive branch of the State. The executive branch is responsible for the administration of the State. It provides for the office of President; defines who is or is not qualified for election as President, fixes the term of office of the President; indicates what should happen when the President is unable to exercise executive function; explains how the President's salary, pension and other allowances are to be fixed; shows how the President can be removed from office for infirmity of mind or body and for violation of the Constitution or other corrupt practices; indicates the mode of appointment and removal of the Vice President and secretaries of State; defines the role of the cabinet; shows how national security is to be safeguarded and foreign affairs conducted; explains how public offices are to be created; prerogatives of mercy exercised to pardon offenders; honours awarded and offenders prosecuted.

We shall now proceed to examine what the draft Constitution has to say about the executive branch of the State. A summary of the essential points to remember shall be given at the end.

PART 1 - THE PRESIDENT

Establishment Of The Office Of President

Section 61, subsection 1 states:

"There shall be a President of The Gambia who shall be the Head of State and of Government and Commander-in-Chief of the Armed Forces."

Section 61, subsection 2 states

"The President shall uphold and defend this Constitution as the supreme law of The Gambia."

This means that the President is not to have absolute power, but must abide by the Constitution if the draft Constitution is approved.

WHO IS QUALIFIED FOR ELECTION AS PRESIDENT?

Section 62, subsection (1) of the draft Constitution states categorically that:

"A person shall be qualified for election as President if -

"(a) he or she is a citizen of The Gambia by birth or descent;

"(b) he or she has attained the age of thirty years;

"(c) he or she has been ordinarily resident in The Gambia for at least five years immediately preceding the election;

"(d) he or she has completed senior secondary school education; and

"(e) he or she is qualified to be elected as a member of the National Assembly."

WHO IS NOT QUALIFIED FOR ELECTION AS PRESIDENT?

Section 62, subsection (2) states:

"A person who holds the citizenship or nationality of a country other than The Gambia, shall not be qualified for election as President."

Section 62, subsection (3) states:

"A person who, while holding public office in The Gambia has been -

"(a) compulsorily retired, terminated or dismissed from such office; or

"(b) has been found guilty of any criminal offence by any court or tribunal established by law; or

"(c) has been found liable for misconduct, negligence, corruption or improper behaviour by any commission or committee of inquiry established by law

"shall not be qualified for election as President."

TERM OF OFFICE

Section 63 (1) states that:

"Except as provided in subsection (4), the term of office of an elected President is five years."

Section 63, subsection (2) states:

"A person elected President shall assume office on the expiration of his or her predecessor's term of office and before assuming office shall take the prescribed oaths."

VOTE OF NO CONFIDENCE

The members of the National Assembly may pass a motion of no confidence to remove the President from office.

Section 63, subsection (3) states:

"A person elected as President may at any time during his term of office be removed from office if a no confidence motion is passed in the National Assembly supported by two thirds of the members of the National Assembly."

Section 63, subsection (4) states that:

"Where a no confidence motion is passed in accordance with subsection (3), the Speaker shall request the Independent Electoral Commission to call a referendum within thirty days of the passing of such motion."

REMOVAL OF THE PRESIDENT FROM OFFICE FOR INCAPACITY

The President may be removed from office for infirmity of body or mind.

Section 66, subsection (1) states that:

"Where the Speaker receives a notice in writing signed by not less than one half of all the members of the National Assembly alleging that the President is, by reason of infirmity of mind or body, incapable of discharging the functions of his office, and giving particulars of the alleged incapacity, the Speaker shall request the Chief Justice to constitute, on the recommendation of the head of the medical services of The Gambia, a Medical Board comprising at least five independent medical practitioners of appropriate standing."

THE ROLE OF THE MEDICAL BOARD

Section 66, subsection (2) reads:

"The Board shall enquire into the matter and make a report to the Chief Justice stating the opinion of the Board whether or not the President is, by reason of infirmity of mind or body, incapable of discharging the functions of the office of President. The President, and if he or she so wishes,

his or her own medical adviser may appear, and shall have the right to be heard, before the Board."

THE ROLE OF THE CHIEF JUSTICE

Section 66, subsection (3) reads:

"Where the Board reports that the President is incapable of discharging the functions of his or her office by reason of infirmity of mind or body, the Chief Justice shall submit the report to the Speaker, who shall, if the National Assembly is not sitting, summon the National Assembly to meet within seven days."

THE ROLE OF THE NATIONAL ASSEMBLY

Section 66, subsection (4) reads:

"The members of the National Assembly shall deliberate on the report and vote on it and the President shall only be removed where two thirds of the members present and voting, vote for his removal."

THE SUPREMACY OF THE REPORT OF THE BOARD

Section 66, subsection (5) reads:

"The report of the Board shall be final and conclusive and shall not be enquired into by any court."

REMOVAL FROM OFFICE ON THE BASIS OF MISCONDUCT

The President can be removed from office for abuse of office, violation of the oath of allegiance, or violation of the Constitution, dishonesty or misconduct.

Section 67, subsection (1) (a) reads:

"The President may be removed from office in accordance with this section on any of the following grounds -

(a) abuse of office, wilful violation of the oath of allegiance or the President's oath of office, or wilful violation of any provision of this Constitution,"

Section -67, subsection (1) (b) reads:

"The president may be removed from office in accordance with this section on any of the following grounds

"(b) misconduct in that -

"(i) he or she has conducted himself in a manner which brings or is

likely to bring the office of President into contempt or disrepute; or

"(ii) he or she has dishonestly done any act which is prejudicial or inimical to the economy of The Gambia or dishonestly omitted to act with similar consequences."

THE ROLE OF THE SPEAKER

Section 67, subsection (2) reads:

"Where the Speaker receives a notice in writing signed by not less than one half of all the members of the National Assembly of a motion for the removal of the President on any of the grounds set out in subsection (1), specifying particulars of the allegations (with any necessary documentation), and requesting that a tribunal be appointed to investigate the allegations, the Speaker shall -

"(a) inform the President of the notice;

"(b) request the Chief Justice to appoint a tribunal consisting of a Justice of the Supreme Court, as Chairman, and not less than four other persons selected by the Chief Justice, at least two of whom shall be persons who hold or have held high judicial office."

THE ROLE OF THE TRIBUNAL

Section 67, subsection (3) and subsection (4) reads respectively:

"(3) The tribunal shall investigate the matter and shall report to the National Assembly through the Speaker whether or not it finds the allegations specified in the motion to have been substantiated. The President shall have the right to appear and be legally represented before the tribunal."

THE ROLE OF THE NATIONAL ASSEMBLY

Section 67, subsection (5) reads:

"Where the tribunal reports to the National Assembly that it finds that the particulars of any such allegation have been substantiated, the National Assembly may, on a motion supported by the votes of not less than two thirds of all the members, resolve that the President has been guilty of such abuse of office, violation of oath, violation of the Constitution, or misconduct or misbehaviour as to render him or her unfit to continue to hold the office of President; and where the National Assembly so resolves, the President shall immediately cease to hold office."

WHERE THE ALLEGATIONS ARE NOT SUBSTANTIATED

Section 67, subsection (4) reads:

"If the tribunal reports to the National Assembly that it finds that the particulars of any allegation against the President contained in the motion have not been substantiated, no further proceedings shall be taken under this section in respect of that allegation."

THE SALARY AND PENSION OR RETIREMENT BENEFITS OF THE PRESIDENT

Section 68, subsection (1) reads:

"The President shall receive such salary and allowances as may be prescribed by an Act of the National Assembly, and such salary and allowances shall not be altered to his or her disadvantage during his or her tenure of office."

Section 68, subsection (2) states:

"The President shall be entitled to such pension and retirement benefits as may be prescribed by an Act of the National Assembly and such pension and other benefits shall not be altered to his or her disadvantage after he or she has relinquished office:

"Provided that no such pension or other retirement benefits shall be granted to a President who ceases to hold office in accordance with section 67."

SALARY, ALLOWANCES AND PENSION OF PRESIDENT EXEMPTED FROM TAXATION

Section 68, subsection (3) reads

"The salary and allowances, and pension and retirement benefits, as prescribed by an Act of the National Assembly, shall be exempted from taxation, but the President shall be subject to taxation on all other chargeable income."

PROHIBITION FROM ENGAGING IN TRADE

Section 68, subsection (4) (a) reads:

"The President shall not -

"(a) while he or she continues in office as President, hold any other office of profit or emolument whether public or private, occupy any other position carrying the right to remuneration for the rendering of services, or

directly or indirectly carry on any trade, business or other undertaking;

"Provided that the President may undertake and carry on any agricultural business including farming, horticulture, livestock rearing and artisanal fishing;"

AVOIDANCE OF CONFLICT BETWEEN OFFICIAL CONCERNS AND PRIVATE INTEREST

Section 68, subsection (4) (b) reads:

"The President shall not -

"undertake any activity inconsistent with his or her official position or expose himself or herself to any situation which carries with it the risk of a conflict developing between his or her official concerns and his or her private interests;"

BAR ON SELF ENRICHMENT FROM OFFICIAL POSITION

Section 68, subsection (4) (c) reads:

"The President shall not -

"use his or her position as such or use information entrusted to or received by him or her in an official position directly or indirectly to enrich himself or herself or any other person."

WHAT TO DO WITH BUSINESS PRIOR TO ASSUMING OFFICE

Section 68, subsection (5) reads:

"Where the President was engaged in any trade, business or other undertaking before assuming the office of President, he or she shall, if he or she wishes to continue such trade, business or other undertaking, do so under a trusteeship."

THE PRESIDENT EXEMPTED FROM CIVIL AND CRIMINAL PROCEEDINGS

Section 69, subsection (1) reads:

"Except as provided in subsection (2), no civil or criminal proceedings shall be instituted or continued against any person while holding or performing the functions of the office of President in respect of anything done or omitted to be done by him or her whether in an official or a private capacity."

Section 69, subsection (2) reads:

"Nothing in subsection (1) applies to an action for a declaration under section 5 (enforcement of the Constitution), and any proceedings under that section against the President or a person performing the functions of that office shall be brought against him or her by his or her official title or style, and he or she shall appear, and be represented by, the Attorney General."

In this respect, the President can only be a subject of court proceedings while in office if a person alleges that his or her action has violated the provisions of the Constitution.

Once the court upholds the allegations, the President could be removed from office under section 67 of the draft Constitution.

IS AN EX-PRESIDENT ANSWERABLE TO ACTIONS DONE WHILE IN OFFICE?

Section 69, subsection (3) states:

"After a President has vacated the office of President -

"(a) no court may entertain any action against him or her in any civil proceedings in respect of any act done in his or her official capacity as President;"

"(b) a criminal court shall only have jurisdiction to entertain proceedings against him or her in respect of acts or omissions alleged to have been perpetrated by him or her while holding office as President if the National Assembly has resolved on a motion supported by not less than two-thirds of all members that such proceedings are justified in the public interest."

Part 2 of Chapter 6 deals with the office of Vice President, the Secretaries of State and the Cabinet. It indicates that the Vice President and Secretaries of State are appointed and can be removed from office by the President.

The President had these powers under the 1970 Constitution. The new element, however, is that the members of the National Assembly can also pass what is called a vote of censure to remove a Vice President or Secretary of State from office for misconduct or dishonesty.

The Vice President, like the President, can be removed from office for violation of the Constitution.

Let us proceed to examine the contents of Part 2.

THE VICE PRESIDENT, THE SECRETARIES OF STATE AND THE CABINET

Appointment Of Vice President

Section 70, subsection 1 reads:

"There shall be a Vice President of The Gambia who shall be the principal assistant of the President in the discharge of his or her executive functions and shall exercise such other functions as may be conferred on him or her by this Constitution or assigned to him or her by the President."

Section 70, subsection (3) states:

"The Vice President shall be appointed by the President."

QUALIFICATION

Section 70, subsection (2) reads:

"A person shall be qualified to be appointed as Vice President if he or she has the qualifications required for the election of the President under section 62."

REMOVAL FROM OFFICE

Section 66 of the draft Constitution would enable the National Assembly to remove the President from office for infirmity of mind or body. Section 67 would enable the National Assembly to remove the President from office for violation of the Constitution or misconduct. Section 70, subsection (4) also establishes the same grounds for removal of the Vice President from office. It reads:

"The provisions of sections 66 and 67 (which relate to removal for incapacity or misconduct) shall apply with the necessary variations to the office of Vice President as they apply to the office of President."

VACANCY OF THE OFFICE OF VICE PRESIDENT

Any person occupying public office can die or be removed from office. In that case the office becomes vacant. A Constitution should explain how that office is to be filled by someone else.

Section 70, subsection (5) reads:

"The office of Vice President shall become vacant:

"(a) on the termination of his appointment by the President;

"(b) on the Vice President assuming the office of President for the

unexpired term of his predecessor;

"(c) on the Vice President's death or resignation;

"(d) on his or her ceasing to hold office under the provisions of section 66 or 67."

Section 70, subsection (6) reads:

"Wherever there is a vacancy in the office of Vice President in the circumstances mentioned in paragraph (b), (c) or (d) of subsection (5), the President shall, appoint as Vice President a person qualified to be appointed to that office."

THE NATIONAL ASSEMBLY CAN REMOVE THE VICE PRESIDENT FROM OFFICE

Section 70, subsection (8) reads:

"Without prejudice to the right to revoke an appointment for any cause, the President shall revoke the appointment of the Vice President if the National Assembly adopts a vote of censure against the Vice President under section 75."

ON THE SECRETARIES OF STATE Number of Secretaries Of State

Section 71, subsection (1) reads:

"Unless an Act of the National Assembly otherwise provides, there shall not be more than fifteen Secretaries of State, including the Attorney General."

QUALIFICATION TO BE APPOINTED SECRETARY OF STATE

Section 71, subsection (2) reads:

"A person shall not be qualified to be appointed, or hold the office of a Secretary of State, if, he or she is a member of the National Assembly or if he or she holds the citizenship or nationality of any country other than The Gambia. In addition, a person shall not be qualified to be appointed Attorney General unless he or she is a legal practitioner of at least five years standing at the Gambia bar."

APPOINTMENT OF SECRETARIES OF STATE

Section 71, subsection (3) reads:

"Secretaries of State shall be appointed by the President and shall, before assuming the functions of their office, take and subscribe the prescribed oaths."

BASIS OF APPOINTMENT OF VICE PRESIDENT AND SECRETARIES OF STATE

Section 72, subsection (1) reads:

"The Vice President and Secretaries of State shall be responsible for such departments of state or other business of the Government as the President may assign to them. In making such assignments, the President shall have regard to the desirability of ensuring that such responsibilities are entrusted to competent persons with relevant qualifications or experience."

THE ROLE OF THE ATTORNEY GENERAL

Section 72, subsection (2) reads:

"The Attorney general shall be the principal legal adviser to the Government and shall have the right to audience in all courts in The Gambia."

SALARIES AND ALLOWANCES OF VICE PRESIDENT AND SECRETARIES OF STATE

Section 72, subsection (3) reads:

"The Vice President and Secretaries of State shall be entitled to such remuneration, allowances and other incidents of office as may be prescribed by an Act of the National Assembly."

CAN THE VICE PRESIDENT AND SECRETARIES OF STATE ENGAGE IN BUSINESS?

Section 72, subsection 4 (a) reads:

"The Vice President and Secretaries of State shall not -

"(a) while they continue in office, hold any other office of profit or emolument whether public or private, occupy any other position carrying the right to remuneration for the rendering of services, or directly or indirectly carry on any trade, business or other undertakings;

"Provided that the Vice President and the Secretaries of State may undertake and carry on agricultural business including farming, horticulture, livestock rearing and artisanal fishing;"

SHOULD PERSONAL ACTIVITIES CONTRADICT OFFICIAL FUNCTION

Section 72, subsection 4 (b) reads:

"The Vice President and Secretaries of State shall not -

"(b) undertake any activity inconsistent with their official position or expose themselves to any situation which carries with it risk of a conflict developing between their official interests and their private interests;"

Furthermore, Section 72, subsection 4 (c) reads:

The Vice President and Secretaries of State shall not -

"(c) use their position as such or use information entrusted to or received by them in their official position directly or indirectly to enrich themselves or any other person."

WHERE THE VICE PRESIDENT OR SECRETARIES OF STATE WERE ENGAGED IN TRADE PRIOR TO THEIR APPOINTMENT?

Section 72, subsection (5) reads:

"Where the Vice President or Secretaries of State were engaged in any trade, business or other undertaking before assuming their offices, they shall, if they wish to continue such trade, business or other undertaking do so under a trusteeship."

CABINET

The President alone cannot collect taxes and run the whole society single handedly. This is why he or she has assistants in the persons of the Vice President, the Secretaries of State and the Attorney General. These assistants often meet to establish government policies.

Section 73, subsection (1) establishes a Cabinet. It reads:

"There shall be a Cabinet which shall consist of the President, the Vice President and the Secretaries of State."

FUNCTION OF CABINET

Section 73, subsection (3) reads:

"The Cabinet shall be responsible for advising the President with respect to the policies of the Government and shall have such other functions as may be conferred by any other law."

THE DOCTRINE OF COLLECTIVE RESPONSIBILITY

Since the members of the Cabinet are responsible for policies of government, a member of the Cabinet who fails to resign when he or she disagrees with a decision is held responsible for the decision along with the rest of the members.

Section 74 reads:

"The Vice President and Secretaries of State shall be collectively responsible to the National Assembly for any advice given to the President in Cabinet, and the Vice President and each Secretary of State shall be accountable to the President and the National Assembly for the administration of the departments and other business of Government committed to his or her charge."

GROUND FOR VOTE OF CENSURE

The National Assembly has to have grounds to pass a vote of censure against Secretaries of State to remove them from office.

Section 75, subsection (1) reads:

"The National Assembly may, by resolution supported by the votes of two thirds of all the members pass, a vote of censure against a Secretary of State on the grounds of -

"(a) his or her inability, arising from any cause, to perform the functions of his or her office;

"(b) abuse of office or violation of any provision of this Constitution;

"(c) his or her misconduct in office."

HOW TO INITIATE A VOTE OF CENSURE

Section 75, subsection (2) reads:

"A vote of censure shall be initiated by a petition, signed by not less than one third of all the members of the National Assembly to the President through the Speaker stating the grounds on which they are dissatisfied with the conduct or performance of the Secretary of State."

WHAT SHOULD HAPPEN AFTER A PETITION IS SIGNED?

Section 75, subsection (3) reads:

"The President shall cause a copy of the petition to be given to the Secretary of State immediately he or she receives it."

Section 75, subsection (4) reads:

"The motion for the resolution of censure shall not be debated until after the expiry of fourteen days from the day the petition was sent to the President."

RIGHT OF THE SECRETARY OF STATE DURING DEBATE IN A VOTE OF CENSURE

Section 75, subsection (5) reads:

"The Secretary of State concerned has the right to attend and be heard during the debate on the motion."

WHAT IS MEANT BY MISCONDUCT OF OFFICE?

Section 75, subsection (6) reads:

"In this section, "misconduct in office" means that the person concerned has -

"(a) conducted himself or herself in a manner which brings or is likely to bring his or her office into contempt or disrepute;

"(b) dishonestly done any act which is prejudicial or inimical to the economy of The Gambia or dishonestly omitted to act with similar consequences."

Now, Part 3 of Chapter 6 deals with executive powers. The executive branch of government deals with the day to day work of running the country through ministries, government departments, public corporations and so on and so forth.

The laws which are made have to be executed. Foreign envoys have to be received, treaties signed, ambassadors appointed and so on and so forth. Who is to be responsible for all that? Is it to be the Cabinet or the President? Is the draft Constitution offering a Cabinet centred executive where the President is just a chairperson or a President centred executive where the President takes all the decisions?

EXECUTIVE POWERS

Section 76, subsection (1) reads:

"The executive power of The Gambia is vested in the President and, subject to this Constitution, shall be exercised by him or her either directly or through the Vice President, Secretaries of State or officers responsible

to him or her."

Section 76, subsection 2 reads:

"In addition to the powers conferred on him or her by this Constitution, the President shall have such powers and responsibilities as may be conferred on him or her by or under an Act of the National Assembly."

Section 76, subsection 3 reads:

"The President shall be responsible for making due provision for the execution of Acts of the National Assembly."

ON CONDUCT OF INTERNATIONAL AFFAIRS

Section 79, subsection (1) states:

"The President shall be responsible for -

"(a) the conduct of relations with other states and international organizations;

"(b) the reception of envoys accredited to The Gambia and the appointment of the principal representatives of The Gambia abroad;

"(c) the negotiation and, subject to ratification by the National Assembly, the conclusion of treaties and other international agreements;

"(d) subject to the prior approval of the National Assembly, the declaration of war and the making of peace."

Hence, it is clear that in certain areas such as establishing public offices, the conducting of relations with other states, reception of envoys and appointment of ambassadors, the President is to have the power to decide.

In the area of concluding treaties and other international agreements as well as in declaring war, the National Assembly has the authority to ratify the instruments.

According to Section 79, subsection (3),

"The National Assembly may, by resolution, establish procedures for the ratification of treaties and other international agreements."

REFERENDUM NEEDED FOR CONFÉDÉRATION AND FEDERATIONS

Section 79, subsection (2) reads:

"The Gambia shall not -

"(a) enter into any engagement with any other country which causes it

to lose its sovereignty without the matter first being put to a referendum and passed by such majority as may be prescribed by an Act of the National Assembly."

"(b) become a member of any international organization unless the National Assembly is satisfied that it is in the interest of The Gambia and that membership does not derogate from its sovereignty."

ON THE ESTABLISHMENT OF GOVERNMENT OFFICES AND THEIR MANAGEMENT

Section 80 states that:

"Subject to this Constitution and any Act of the National Assembly, the President may constitute any public office for The Gambia and make appointments to such office and terminate such appointments."

Section 81 states:

"(1) Where the Vice President or a Secretary of State has been charged with responsibility for any department of the Government, he or she shall exercise general direction and control over that department; and subject to such direction and control, the department shall be under the supervision of a permanent secretary whose office shall be an office in the public service:

"(2) The principal advisers on professional and technical matters in all the departments of the Government shall be professionally qualified persons."

ON THE RELATION BETWEEN THE NATIONAL ASSEMBLY AND THE PRESIDENCY

Section 77 of the draft Constitution states:

"(1) The President shall at least once in each year attend a sitting of the National Assembly and address a session on the condition of The Gambia, the policies of the Government and the administration of the State.

"(2) The National Assembly may request the President to attend a sitting of the National Assembly for the discussion of a matter of national importance.

"(3) The Vice President shall answer in the National Assembly for matters affecting the President, and the President shall be entitled to send a message to the National Assembly to be read on his or her behalf by the Vice President.

"(4) The Vice President or a Secretary of State shall, when requested

by the National Assembly, report to the National Assembly on any matter concerning a department or other business of Government committed to his or her charge, and shall be entitled to attend and speak in the National Assembly whenever any Bill or other matter concerning such department or business is being debated."

ON THE NATIONAL SECURITY COUNCIL

Section 78 states:

"(1) There shall be a national Security Council which shall consist of -

"(a) the President;

"(b) the Vice President;

"(c) the Secretaries of State responsible for defence and internal affairs;

"(d) the Chief of Defence Staff and two other members of the Armed Forces appointed by the President;

"(e) the Inspector general of Police;

"(f) the Director General of the national Intelligence Agency; and

"(g) the intelligence adviser to the President.

"(2) The national Security Council shall be responsible for advising the President on all matters relating to the security of The Gambia and the integration of domestic and foreign policies relating to its security; and, under the direction of the President, shall take appropriate measures to safeguard the internal and external security of The Gambia and to provide for the cooperation of the departments and agencies of the Government in that regard."

ON GRANTING PARDON FOR OFFENCES

Section 82 states:

"(1) The President may, after consulting the Committee established by subsection (2) -

"(a) grant to any person convicted of any offence a pardon either free or subject to lawful conditions;

"(b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;

"(c) substitute a less severe form of punishment for any punishment imposed on any person for any offence;

"(d) remit the whole or any part of any punishment imposed on any person for such an offence or any penalty otherwise due to the Republic on account of any offence.

"(2) There shall be a Committee on the exercise of the prerogative of mercy consisting of the Attorney general and three other persons appointed by the President subject to confirmation by the National Assembly."

ON THE AWARD OF HONOURS

Section 83 of the draft Constitution states:

"(1) The President may, after consulting the Committee established by subsection (2), confer honours and awards, including honorary honours and awards to friends of The Gambia.

"(2) There shall be a Committee to advise the President on the exercise of his or her powers under this section which shall consist of not more than five, and not less than three, persons appointed by the National assembly."

Who are to prove before courts that a person accused of a crime has actually committed it and is guilty? This is the prosecution.

Part 4 of Chapter 6 deals with the prosecution for offences. An office is established for prosecution headed by a Director of Public Prosecutions.

ON THE DIRECTOR OF PUBLIC PROSECUTIONS

Section 84 states:

"(1) There shall be a Director of Public Prosecutions whose office shall be an office in the public service.

"(2) The Director of Public Prosecutions shall be appointed by the President.

"(3) A person shall not be qualified to hold or act in the office of Director of Public Prosecutions unless he or she is qualified for appointment as a judge of the High Court.

"(4) Subject to the other provisions of this section, a person holding the office of the Director of Public Prosecutions shall vacate his or her office when he or she attains the compulsory retirement age.

"(5) A person holding the office of Director of Public prosecutions may be removed from office only for inability (whether by reason of infirmity of

mind or body or any other cause) to perform the functions of his or her office, or for misbehaviour or incompetence."

THE FUNCTIONS OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Section 85 reads:

"(1) The Director of Public Prosecutions shall have power in any case in which he or she considers it desirable to do so, and subject to the approval of the Attorney general -

"(a) to initiate and undertake criminal proceedings against any person before any court for an offence against the laws of The Gambia;

"(b) to take over and continue any such criminal proceedings that have been instituted by any other person or authority;

"(c) to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or herself or any person or authority:

"Provided that the Director of Public Prosecutions shall not-

"(i) take over and continue any private prosecution without the consent of the private prosecutor and the court; or

"(ii) discontinue any private prosecution without the consent of the private prosecutor."

ASSISTANTS FOR THE DIRECTOR OF PUBLIC PROSECUTIONS

Section 85, subsection (3) states:

"The powers conferred on the Director of Public Prosecutions under this section may be exercised by him or her in person under his or her direction and control."

THE RELATION BETWEEN THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

Section 85, subsection (4) of the draft Constitution states:

"In the exercise of his or her functions under this section, the Director of Public prosecutions shall be subject to the direction or control of the Attorney General."

Can other people other than the Director of Public persecutions or those authorized by him or her institute prosecution?

The draft Constitution makes room for private prosecution.

Section 85, subsection (5) reads:

"In this section, "private prosecution" means a prosecution instituted by any person or authority other than -

"(i) the Director of Public Prosecutions or any person acting under his or her direction or control;

"(ii) a police officer in the exercise of the functions of his or her office, or

"(iii) an officer in the public service in the exercise of the functions of his or her office."

Section 86 reads:

"An Act of the National Assembly may make provision for private prosecutions."

ANALYSIS

It is the role of the executive to run the day to day affairs of a State. Government ministers and departments are established to provide public services. These institutions rely on public funds to carry out their activities. They require policies to guide their activities. The executive manages these funds, supervises the operation of ministries and departments and provides general policy guidelines for their operation.

There are different conceptions on where power resides in an executive. There is the executive presidency where executive power resides in the President. He or she creates government offices, appoints and dismisses ministers who are now to be called Secretaries of State, signs treaties and so on and so forth.

Under the 1970 Constitution, the President had such powers. He or she could appoint nominated members and make them ministers. He or she was not obliged to follow the advice of cabinet. The ministers could not be removed by members of the House of Representatives. He or she could also appoint ministers from among the members of the House of Representatives and remove them from office according to his or her volition or preference. The 1970 Constitution produced an executive presidency where executive power resided in the President.

CABINET CENTRED EXECUTIVE

In a Cabinet centred executive, executive power resides in cabinet.

The President merely serves as chairperson of a body of policy makers known as the cabinet. They become collectively responsible for making executive decisions.

Furthermore, a National assembly may select members of the cabinet from among their rank or allow them to be chosen by the President subject to consultation and approval by the national Assembly. They are also subject to be removed from office for mental or physical infirmity, violation of the Constitution or misconduct.

ON THE DRAFT CONSTITUTION

The draft Constitution provides an executive where power resides in the President. He or she appoints ministers or Secretaries of State from outside the National assembly. In this respect, those who want to be Secretaries of State are likely not to wish to be members of the National assembly. This makes the National Assembly independent of influence from the executive.

It also empowers the national assembly to remove a Secretary of State for misconduct, violation of the Constitution or inability to perform his or her duties. This is also an improvement on the 1970 Constitution.

Now, many functions such as the conferring of honours, the appointment of committee members for exercising prerogative of mercy are all to be done in consultation with the national assembly.

In the area of foreign policy, the President, under the draft Constitution, shall negotiate treaties but they can only be concluded if the National assembly ratifies them.

The national assembly, shall also be empowered, if the draft Constitution is approved, to make laws to guide how the executive is to establish public offices and employ public servants.

In short, the draft Constitution does contain more limitations of the exercise of the powers of the presidency than what existed under the 1970 Constitution. It does not, however, do away with the executive presidency itself and this makes the decision of cabinet to be binding on all members of the cabinet including the President. In principle, this is the only way the doctrine of collective responsibility of cabinet can be judiciously applied.

ON THE SHORTCOMINGS

The position that a person who qualifies to be President of The Gambia

must be citizen by birth or descent is discriminatory.

The position of some people is that somebody who has naturalized will not be as loyal to the country as someone who is a citizen by birth. What must be borne in mind, however, is that a President does not elect himself or herself. It is the people who elect Presidents. Hence, whatever consideration people think legitimate in electing a President is entirely their prerogative. This is the first point.

Secondly, section 62 establishes that a person who is guilty of a crime while holding public office is not qualified to stand as a presidential candidate.

It is necessary to bear in mind that offences do vary. Some offences like traffic offences do exist which are sometimes beyond the control of the individual. In this case, the offences should be linked to corruption or professional misconduct.

Thirdly, it is reiterated in section 62 that a person shall not be qualified to hold public office if the person has been compulsorily retired, terminated or dismissed from such office.

This should be linked to corruption. For example, under the present General Orders, a person can be compulsorily retired, terminated or dismissed for making political speeches or join in demonstrations.

G.O 03104 reads:

"Every officer is entitled to his own political views, and may, if qualified, vote at elections. He may become a member of a political party or organization, but may not accept any office, whether paid or unpaid, permanent or temporary, in any political party or organization, nor may he make speeches, join in demonstrations or in any other way indicate publicly his support for any political party, or ganization, person or policy, nor shall he be required to do so in the course of his duties."

It is, therefore, best for the retirement, dismissal or termination to be linked to corruption.

What the draft Constitution can do by way of improvement to the 1970 Constitution is to further ensure that positions like that of Director of Public Prosecutions, Ambassadors, Secretaries of State, Attorney General are done in consultation with the National Assembly. We will deal with such an issue in the appropriate place

SEE BOOK 3 FOR MORE LESSONS

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