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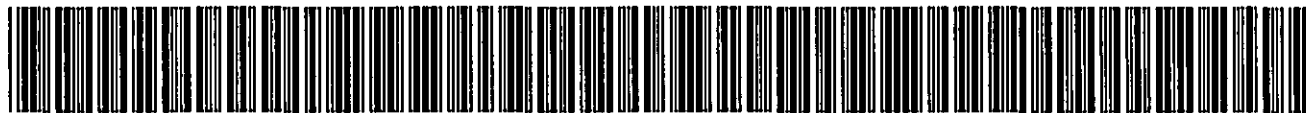
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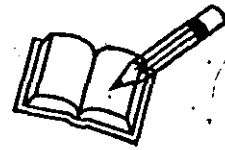


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A REVIEW OF THE DRAFT CONSTITUTION OF THE SECOND REPUBLIC



Book Nine



TRANSITIONAL AND
CONSEQUENTIAL
PROVISIONS

Schedule 2

INTRODUCTION

The 1970 Constitution arose a time when The Gambia was moving away from a constitutional monarchy into a Republic.

Hence, the fundamental question before the British monarch and the Gambian representatives was how to transfer power from the former to the latter. This is why Chapter 10 of the 1970 Constitution contained transitional provisions. It revoked the 1965 Constitution based on a principle of constitutional monarchy; explained what the status of the previous laws and offices would be; declared the continuity of the members of the House of Representatives elected under the 1965 Constitution up to new elections under the 1970 Constitution. The powers of Her Majesty and the Governor General were transferred to the President under section 128 of the 1970 Constitution. All the privileges and rights of Her Majesty and Governor General were transferred to the President under section 129 of the 1970 Constitution. This is why the President could appoint chiefs, etc. or issue or deny passports to Gambian citizens. These were royal prerogatives.

Now that The Gambia is to move from a government established after a coup d'etat into a Second Republic, transitional provisions are necessary to explain how power is to be transferred from the AFPRC to a new National Assembly and the new President.

This transitional provision should explain the status of laws, the funds, the public officers, etc. under the previous government once a new republic comes into being. In short, if we elect a President and members of the National Assembly, what is to determine who the AFPRC will hand over power to? The purpose of the transitional provisions under the draft Constitution is to facilitate the smooth transfer of power. Without such transitional provisions, there will be no law explaining how power will be transferred from the AFPRC to the elected representatives in order to move into the Second Republic.

Let us find out what Schedule II contains.

WHO IS THE FIRST PRESIDENT OF THE SECOND REPUBLIC?

Paragraph 2 of Schedule 2 of the draft Constitution reads: "Notwithstanding any other provision of this Constitution, the person duly elected President of The Gambia in accordance with the Electoral Decree 1996 shall be the first

cree 1996 shall, until other provision is made in accordance with Chapter V of the Constitution, be deemed to be single member constituencies for the purposes of the Constitution and the persons duly elected as members of the National Assembly for those constituencies in accordance with the said Electoral Decree 1996 shall be deemed to have been elected as such members for their respective single member constituencies. Such members shall hold their seats in accordance with the provisions of this Constitution."

OBSERVATION

This is to enable those elected as members of the National Assembly under the Elections Decree to become the members of the National Assembly of the Second Republic.

THE VALIDATION OF THE STATES OF THE COMMISSIONS OF ENQUIRY

Paragraph 11 of Schedule II reads:

"(1) Where any order, penalty or investigation has been made or commenced before the coming into force of this Constitution by any person or authority that has power for that purpose under any Decree establishing any Commission of Inquiry, that penalty, order or investigation may be carried on and be completed by the person or authority having power for the purpose after the coming into force of this Constitution, and it shall not be necessary for the person or authority to commence the investigation or make the Order or Penalty afresh.

"(2) For avoidance of doubt, any Commission of Inquiry established in accordance with a Decree of the Armed Forces Provisional Ruling Council before the coming into force of this Constitution shall continue to exist and shall exercise their functions in accordance with the Orders establishing them.

"(3) Any Order, Ruling, Finding of fact, seizure, sale or alienation of property or penalty imposed or thing done by or carried out under the authority of any Commission of Inquiry established in accordance with a Decree of the Armed Forces Provisional Ruling Council shall not be questioned or reversed by any Court or other authority under this Constitution or any other law."

**TRANSFER OF PROPERTY AND POWER OF GOVERNMENT
FROM THE JURISDICTION OF THE AFPRC TO THE GOVERN-
MENT OF THE SECOND REPUBLIC**

Paragraph 12 reads:

"As regards any property, assets or obligations-

"(a) the President shall be the universal successor as respects the office of a former President of The Gambia as established under any previous Constitu-
tion; and

"(b) the Government shall be the universal successor to a former Govern-
ment of The Gambia as so established and to the Armed Forces Provisional
Ruling Council."

OBSERVATION

This is to enable the country's properties and liabilities to be transferred from the AFPRC to the elected representatives.

INDEMNITY OR IMMUNITY OF AFPRC AND ITS AGENTS

Paragraph 13 reads:

"(1) No member of the Armed Forces Provisional Ruling Council, any person appointed Minister by the Armed Forces Provisional Ruling Council, or other appointees of the Armed Forces, Provisional Ruling Council shall be held liable either jointly or severally for any at or omission in the performance of their official duties during the administration of the Armed Forces Provisional Ruling Council.

"(2) After the coming into force of this Constitution, it shall not be lawful for any court or tribunal to entertain any action or take any decision or make any order or grant any remedy or relief in any proceedings instituted against the Government of The Gambia or any person acting under the authority of the Government of The Gambia, or against any person or persons acting in concert or individually to assist or bring about the change in Government which took place on the twenty second day of July 1994, in respect of any act or omission relating to, or consequent upon:

"(a) the overthrow of the government in power before the formation of

the Armed Forces Provisional Ruling Council; or

"(b) the suspension or abrogation of the Constitution of The Gambia 1970;

or

"(c) the establishment of the Armed Forces Provisional Ruling Council;

or

"(d) the establishment of this Constitution.

"(3) For the avoidance of doubt, it is declared that no action taken or purported to have been taken in the exercise of the executive, legislative or judicial power by the Armed Forces Provisional Ruling Council or a member thereof, or by any person appointed by the Armed Forces Provisional Ruling Council in the name of the Armed Forces Provisional Ruling Council shall be questioned in any proceedings whatsoever and, accordingly, it shall not be lawful for any court or tribunal to make any order or grant any remedy or relief in respect of any such act.

"(4) The provisions of subparagraph (3) shall have effect notwithstanding that any such action as is referred to in that subparagraph was not taken in accordance with any procedure prescribed by law.

"(5) It shall not be lawful for any court or tribunal to entertain an action instituted in respect of an act or omission against a person acting or omitting to act on the instructions or authority of the Armed Forces Provisional Ruling Council, or a member thereof, and alleged to be in contravention of any law, whether substantive or procedural, in existence before or during the administration of the Armed Forces Provisional Ruling Council."

OBSERVATION

After the 1981 suppression of the overthrow of the former government, an Act was introduced in 1982 to give immunity to the former government and its agents so that people who lost their lives, properties or freedom during the state of emergency would not be able to make claims against the government.

THE STATUS OF THE OFFICES ESTABLISHED BY THE AFPRC FOR THE TRANSITION

Paragraph 9 of Schedule II reads:

"(1) Subject to the other provisions of this Schedule, where any office has been established by or under an existing law and this Constitution establishes or provides for the establishment of a similar or corresponding office, any person who, immediately before the coming into force of this Constitution holds or is acting in the former office shall, in so far as it is consistent with this Constitution, be deemed as from the coming into force of this Constitution to have been appointed, elected or otherwise selected to or to act in the latter office:

"Provided that-

"(a) any person who, under the existing law, would have been required to vacate his or her office at the expiration of any period or the attainment of any age shall vacate his or her office on the expiry of that period or on the attainment of that age;

"(b) nothing in this paragraph affects the power of any person or authority under this Constitution to make provision for the abolition of any office or the removal of any person from office or to require any person to retire from office;

"(c) nothing in this paragraph shall apply to the office of Secretary of State or Secretary general.

"(2) For the purposes of any law relating to pensions or other retirement benefits, the continuity of service of any person holding a public office shall not be affected by the coming into force of this Constitution.

"(3) Any person who, by virtue of this paragraph, is deemed as from the coming into force of this Constitution to have been appointed, elected or selected to hold or act in any office shall, as soon as may be, take and subscribe the prescribed oaths."

OBSERVATION

The AFPRC has created offices and appointed officers. What would be

their status in the Second Republic. This provision strives to explain what would happen.

TRANSFER OF AUTHORITY TO MANAGE THE CONSOLIDATED REVENUE FUND

Paragraph 10 reads:

"(1) The Consolidated Revenue Fund and the Contingency Fund in existence immediately before the coming into force of this Constitution, shall, until otherwise provided by law, continue in existence as the Consolidated Fund and the Contingency Fund referred to in sections 150 and 151 of this Constitution.

"(2) Subject to this Constitution, every payment required or authorised to be made into a public fund or out of a public fund under any law in force immediately before the coming into force of this Constitution shall continue to be made into or out of that fund.

"(3) The financial estimates for the financial year in being at the coming into force of this Constitution shall, until provision is otherwise made by an Act of the National Assembly, continue and shall have full effect."

OBSERVATION

The AFPRC is now handling the Consolidated Revenue Fund, that is, the treasury of the country. This provision explains how to transfer the responsibility to the new government.

THE VALIDATION OF THE CHANGE OF JURISDICTION OF THE COURTS

Paragraph 7 reads:

"(1) The High Court established by this Constitution shall be the successor of the existing Supreme Court and-

"(a) proceedings commenced in the existing Supreme Court may be con-

tinued before the same judge in the High Court without any break;

"(b) after the coming into force of this Constitution, the judgements, decrees and orders of the existing Supreme Court shall continue in force and shall be given effect as if they were the judgements, decrees or orders of the High Court.

"(2) The existing Court of Appeal shall be deemed to have been established by this Constitution.

"(3) Until the Supreme Court is established in accordance with this Constitution-

"(a) the jurisdiction and powers of the Supreme Court under section 127 shall be exercised by the Court of Appeal; and

"(b) appeals shall continue to lie to the Judicial Committee of the Privy Council according to the existing law, and where any appeal, or petition for special leave to appeal, is entered with the Privy Council before the establishment of the Supreme Court, the proceedings may continue, and effect shall be given to any judgement or order of the Judicial Committee in such proceedings, according to the existing law.

"(4) Subject to the foregoing provisions of this paragraph, where any proceedings have been commenced before the coming into force of this Constitution in any existing court, they may be continued and concluded before the corresponding court as established or recognised by this Constitution, and judgements, decrees and orders of any existing court shall be given effect as the judgement, decrees and orders of such corresponding court."

OBSERVATION

This is to ensure that court decisions taken during the transition period will remain valid.

THE VALIDATION OF THE STATUS OF THE VARIOUS JUDGES

Paragraph 8 of Schedule II reads:

"(1) The Justices of the existing Court of Appeal shall be deemed to have been appointed as Justices of the Court of Appeal as established by this Con-

stitution.

"(2) The Justices of the existing Supreme Court who have been appointed as Justices of the High Court as a result of this Constitution."

THE RULES THAT SHOULD GOVERN THE BUSINESS OF THE NATIONAL ASSEMBLY

Paragraph 5 reads:

"(1) The President shall appoint a person to be the Speaker of the National Assembly until an appointment to that office is made in accordance with the provisions of this Constitution.

"(2) The Standing Orders of the National Assembly of the Constitution of The Gambia 1970 shall, in so far as they are not inconsistent with this Constitution, constitute the Standing Orders of the National Assembly. The Council may make other provision in accordance with section 106 of this Constitution."

OBSERVATION

This will enable the National Assembly of the Second Republic to

THE STATUS OF LAWS ENACTED BY THE NATIONAL ASSEMBLY BEFORE IT WAS RECEIVED BY THE COUNCIL

Paragraph 6 reads:

"(1) Where any matter that fails to be prescribed or provided for by this Constitution by an Act of the National Assembly or by any other person, is prescribed or provided for by or under any law (including any Decree) or is otherwise lawfully prescribed or provided for before the coming into force of this Constitution, that person shall, as from the coming into force of this Constitution, have the power to make such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution. The Council may also make such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution by an Act of the National Assembly or by any other authority or person."

"(2) Where, immediately before the coming into force of this Constitution, any existing law had not been brought into force or was to come into force on a date subsequent to the coming into force of this Constitution, the law may be brought into force in accordance with its terms, or it shall come into force on such subsequent date, as the case may be, in so far as it is not inconsistent with this Constitution.

"(3) Subject to subparagraph (4) and to it being consistent with this Constitution, in any existing law-

"(a) a reference to the exercise of a legislative function (other than a power to make subsidiary legislation) by the Government or the Armed Forces Provisional Ruling Council shall, after the coming into force of this Constitution, be read as a reference to the exercise of that function by an Act of the National Assembly;

"(b) a reference to a power to make subsidiary legislation by the Government or the Armed Forces Provisional Ruling Council shall, after the coming into force of this Constitution, be read as a reference to the President or to such Secretary of State or other authority as the President may by Order, published in the Gazette, direct;

"(c) a reference to the exercise of an executive function by the Government, or any function (other than a legislative function) or power by the Armed Forces Provisional Ruling Council or the Chairman thereof, shall, after the coming into force of this Constitution, be read as a reference to the exercise of that function or power by the President."

"(4) The President may, by Order published in the Gazette and made with the approval of the National Assembly, at any time within twelve months of the coming into force of this Constitution make such provision as may appear necessary for repealing, modifying, adding to or adapting any existing law for bringing it into accord with the provisions of this Constitution."

OBSERVATION

This provides for the transfer of legislative authority to the National Assem-

bly and to bring decrees into conformity with the Constitution.

CONFIRMATION OF CONFISCATIONS AND PENALTIES IMPOSED BY AFPRC

Paragraph 14 reads:

"Any confiscation of any property or any other penalties imposed by the Armed Forces Provisional Ruling Council or the Chairman thereof shall not be questioned or reversed by any Court or other authority under this Constitution or any other law."

OBSERVATION

Will the AFPRC find it safe to hand over power without guarantees that they will not be tried for overthrowing a government, etc.? This is why such indemnity clauses are included in such transitional provisions.

ABROGATION OF THE 1970 CONSTITUTION

Paragraph 15 reads:

"The Constitution of The Gambia 1970 (Act No. 1 of 1970) is hereby abrogated."

ON DEATH SENTENCE

Paragraph 16 reads:

"Where any law makes provision for a sentence of death in any case other than that provided for in section 18 (2), the law shall have effect as if imprisonment for life were substituted for that penalty."

PARAGRAPHS WHICH SHALL NOT BE AMENDED

Paragraph 17 reads:

"The National Assembly shall have no power to pass a Bill to amend or repeal this paragraph or paragraph 11, 12, 13 or 14 of this Schedule."

**SEE BOOK TEN WHICH DEALS WITH
AMENDMENTS OF THE CONSTITUTION, AND THE
CONSTITUTION AS THE FUNDAMENTAL LAW**

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