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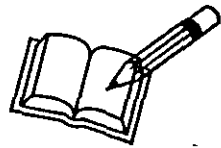


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A REVIEW OF THE DRAFT CONSTITUTION OF THE SECOND REPUBLIC



Book Ten



*Amendment Of The
Constitution And The
Constitution As The Fundamental
Law*

Chapters 22 and 2

INTRODUCTION

Constitutions of Sovereign Republics are fundamental laws. They are designed to be the embodiment of the collective will of a sovereign people. This is why they should be approved at a referendum. Once approved, the provisions are to be defended. This is why Chapter 2 of the draft Constitution empowers the people to resort to the courts for redress of any violations of the Constitution. Even the President could be removed from office for violation of the Constitution.

Since all the people in a Sovereign Republic cannot meet everyday to review constitutions with the view to improve on its provisions or build the schools, hospitals, roads, etc. that are needed, representatives are elected in a Sovereign Republic to manage the society for the people. These representatives are often empowered to make certain laws for the people, as well as to amend certain portions of the Constitution which do not affect the fundamental principles.

However, there are certain fundamental principles in a constitution which cannot be changed without destroying its foundation as the collective will of the people. Such provisions are entrenched clauses which cannot be changed without consulting the whole people at a referendum. The 1970 Constitution has provisions which explained what could or could not be changed by parliament.

It is obvious that once a Sovereign Republic is established by a people, it is not proper for representatives to transform the Sovereign Republic into a colony without the consent of a people. This is why Chapter 1 which stated that "The Gambia is a Sovereign Republic could not be changed without a referendum.

We will now proceed to examine whether the draft Constitution has made it necessary to consult the people before the representatives do anything to tamper with the sovereignty of the country, the fundamental rights and freedoms of the people, their rights to determine their representatives, their right to have an Independent Electoral Commission to monitor elections, their right to have representative institutions, their right to form political associations and so on and so forth.

Let us find out which provisions in the draft Constitution require referendum.

POWERS OF THE NATIONAL ASSEMBLY TO ALTER SOME PARTS OF THE CONSTITUTION

Section 229, subsection (1) of the draft Constitution reads: "(1) Subject to the provisions of this section, an Act of the National Assembly may alter this Constitution."

HOW THE NATIONAL ASSEMBLY CAN AMEND THE CONSTITUTION

Section 229, subsection (2) reads: "Subject to subsection (4), a bill for an Act of the National Assembly under this section shall not be passed by the National Assembly or presented to the President for assent unless-

"(a) a Bill in the National Assembly, the Bill is published in at least two issues of the Gazette, the latest publication being not less than three months after the first, and the Bill is introduced into the National Assembly not earlier than ten days after the latest publication;

"(b) the Bill is supported on the second and third readings by the votes of not less than three quarters of all the members of the National Assembly."

WHERE THE NATIONAL ASSEMBLY PASSES A BILL AND THE PRESIDENT REFUSES TO ENDORSE IT

Section 229, subsection (3) reads: "If the President fails to assent within thirty days to a Bill passed by the National Assembly in accordance with subsection (2), the Bill shall be returned to the Speaker who shall after refer it to the Independent Electoral Commission. The Independent Electoral Commission shall cause a referendum to be held on the Bill in accordance with subsection (4) and, if the Bill is supported on such a referendum by the majority provided for in that subsection, it shall again be presented to the President for his assent."

THE PROVISIONS OF THE CONSTITUTION WHICH CANNOT BE CHANGED WITHOUT A REFERENDUM

Section 229, subsection (4) and subsection (5) and subsection (6) read: "(4): A Bill for an Act of the National Assembly altering any of the provisions referred to in subsection (7) shall not be passed by the National Assembly or presented to the President for assent unless-

"(a) the Bill is published and introduced in the manner required by paragraph (a) of subsection (2);

"(b) the Bill is supported on the second and third readings by the votes of not less than three quarters of all the members of the National Assembly;

"(c) the Bill has been referred by the Speaker to the Independent Electoral Commission and the Commission has, within six months of such reference, held a referendum on the Bill;

"(d) at least fifty per cent of the persons entitled to vote in the referendum have taken part in the referendum and the Bill is supported in the referendum by at least seventy five per cent of those who voted.

"(5) The Speaker and, in the case of a Bill to which subsection (3) or (4) applies, the Independent Electoral Commission shall certify that the relevant provisions of this section have been complied with and such certificates shall be delivered to the President when the Bill is presented for assent.

"(6) Where a Bill which has been supported in a referendum by the majority provided for in subsection (4) is presented to the President for assent, the President shall assent to the Bill within seven days."

THE ENTRENCHED CLAUSES WHICH CANNOT BE CHANGED WITHOUT A REFERENDUM

Section 1 which states: "(1) The Gambia is a Sovereign Republic.

"(2) 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 in accordance with this Constitution."

These provisions cannot be changed without a referendum.

Section 4 which reads: "This Constitution is the supreme law of The Gambia and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void."

This cannot be changed without a referendum.

Section 5 (1) which reads: "A person who alleges that- "(a) any Act of the National Assembly or anything done under the authority of an Act of the National Assembly; or

"(b) any act or omission of any person of authority,

"is inconsistent with or is in contravention of a provision of this Constitution, may bring an action in a court of competent jurisdiction for a declaration to that effect."

This cannot be changed without a referendum.

Section 6 (2) which states: "All citizens of The Gambia have the right and the duty at all times to defend this Constitution and, in particular, to resist, to the extent reasonably justifiable in the circumstances, any person or group of persons seeking or attempting by any violent or unlawful means to suspend, overthrow or abrogate this Constitution or any part of it."

This cannot be changed without a referendum.

Section 8 which states: "Every person who, immediately before the coming into force of this Constitution, is a citizen of The Gambia, shall, subject to this Constitution-

"(a) continue to be a citizen of The Gambia;

"(b) retain the same status as a citizen by birth, by descent, by registration or by naturalisation, as the case may be, as he or she enjoyed immediately before the coming into force of this Constitution."

This cannot be changed without a referendum.

Section 13 (4) which states: "Nothing in this or any other provision of this Constitution

or any other law shall be construed as depriving, or authorising any person or authority to deprive, any citizen of The Gambia by birth or descent of his or her citizenship of The Gambia whether on account of such citizen's holding the citizenship or nationality of some other country or for any other cause."

This cannot be changed without a referendum.

Chapter 4 - The whole Fundamental Rights and Freedoms Provisions. This cannot be changed without a referendum.

Section 39 (1) which states that "Every citizen of The Gambia being of eighteen years or older and of sound mind shall have the right to vote for the purpose of elections of a President and members of the National Assembly, and shall be entitled to be registered as a voter in a National Assembly constituency for that purpose."

This cannot be changed without a referendum.

Section 42(1) which indicates that "There shall be an Independent Electoral Commission for The Gambia which shall be part of the public service.

This cannot be changed without a referendum.

Section 63 (3) which states: "A person elected as President may at any time during his (her) 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."

This cannot be changed without a referendum.

Section 71 which states: "Unless an Act of the National Assembly otherwise provides, there shall not be more than fifteen Secretaries of State, including the Attorney General.

"(2) A person shall not be qualified to be appointed, or hold the office of Secretary of State if, he or she is a member of the National Assembly or if he (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.

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

"(4) The office of Secretary of State shall become vacant-

"(a) on the assumption by a person of the office of President;

"(b) on his or her appointment being revoked by the President;

"(c) on his or her death or resignation."

This cannot be changed without a referendum.

Section 79 (2) which states: "The Gambia shall not-

"(a) enter into any agreement 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."

This cannot be changed without a referendum.

Section 85 (1) states that "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 law 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 judgement is delivered any criminal proceedings instituted or undertaken by himself or herself or any other 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."

Section 87 which indicates: "There shall be a National Assembly of The Gambia."

Section 100 deals with the legislative power of the National Assembly. It states: "(1) The legislative power of The Gambia shall be exercised by Bills passed by the National Assembly and assented to by the President.

"(2) The National Assembly shall have no power to pass a Bill-

"(a) to establish a one party state;

"(b) to establish any religion as a state religion;

"(c) to alter the decision or judgement of a court in any proceedings to the prejudice of any party to those proceedings, or deprive any person retroactively of vested or acquired rights,

"but subject thereto, the national Assembly may pass Bills designed to have retroactive effect."

Section 120, subsection (1) (a) which states: "The Courts of The Gambia are:

"(i) the Supreme Court;

"(ii) the Court of Appeal; and

"(iii) the High Court and the Special Criminal Court;"

Section 120, subsection (2) which indicates that "The judicial power of The Gambia is vested in the courts and shall be exercised by them according to the respective jurisdiction conferred on them by law."

Section 120, subsection (3) which states that: "In the exercise of their judicial functions, the courts, the judges and other holders of judicial office shall be independent and shall be subject only to this Constitution and the law, and, save as provided in this Chapter, shall not be subject to the control or direction of any other person or authority."

Section 121 (1) which states that "The Chief Justice shall be the head of the Judiciary and, subject to the provisions of this Constitution, shall be responsible for the administration and supervision of the courts."

This cannot be changed without a referendum.

Section 123 which states: "A judge or other person exercising judicial power shall not be liable to any action or suit for any act or omission by him or her in good faith in the exercise of his or her judicial function."

Section 126 which states that: (1) The Supreme Court shall be the final court of appeal for The Gambia and shall have such appellate and other jurisdiction as may be conferred on it by this Constitution or any other law:

"Provided that the Supreme Court shall not have original jurisdiction in respect of any criminal matter.

"(2) The Supreme Court may depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on a matter of law.

"(3) For the purpose of the hearing and determination of any matter within its jurisdiction, the Supreme Court shall have all the powers conferred by law on any other court established by this Constitution or any other law."

This cannot be changed without a referendum.

Section 127 which indicates: (1) The Supreme Court shall have an exclusive original jurisdiction-

"(a) for the interpretation or enforcement of any provision of this Constitution other than any provision of sections 18 to 33 or section 36(5) (which relate to fundamental rights and freedoms);

"(b) on any question whether any law was made in excess of the powers conferred by this Constitution or any other law upon the National Assembly or any other person or authority;

"(c) on any question as to whether or not any person was validly elected to the office of President or was validly elected to, or vacated his or her seat in, the National Assembly;

"(d) on any question whether any official document should be produced, or its contents disclosed, in proceedings before a court where such production is resisted on the grounds that its production or the disclosure of its contents would be prejudicial to the security of the State or be injurious to the public interest.

"(2) Where any question referred to in paragraphs (a), (b) or (d) of subsection (1) arises in any proceedings in any other court, that court shall stay its proceedings and refer the matter to the Supreme Court for its determination, and such other court shall give effect to any decision of the Supreme Court in the matter.

"(3) The proceedings in the Supreme Court on any question referred to in paragraph (d) of subsection (1) shall be held *in camera*."

This cannot be changed without a referendum.

Section 128 which states that: "(1) An appeal shall lie to the Supreme Court as of right-

"(a) from any judgement of the Court of Appeal on an appeal in any civil or criminal cause or matter from a judgement of the High Court in the exercise of its original jurisdiction;

"(b) from any judgement of the Court of Appeal dismissing an appeal from a sentence of death imposed by any other court;

"(c) in such other case as may be prescribed by Act of the National Assembly.

"(2) An appeal shall lie to the Supreme Court with the leave of the Court of Appeal from a judgement of the Court of Appeal in any cause or matter commenced in a court other than the High Court where the Court of Appeal is satisfied that the case involves a substantial question of law or it is in the public interest that the cause or matter should be heard by the Supreme Court.

"(3) An appeal shall lie to the Supreme Court with the leave of that Court from any

other judgement of the Court of Appeal.

"(4) An appeal shall lie to the Supreme Court, in any case referred to in subsection (1), (2) or (3) at the instance of a party to the proceedings in the Court of Appeal or, with the leave of the Supreme Court or the Court of Appeal, at the instance of any other person having an interest in the matter or, in a criminal cause or matter, at the instance of the Attorney General acting in the interest of justice and for the avoidance of abuse to the legal process:

"Provided that in any appeal at the instance of the Attorney General, the Supreme Court shall have no power to reverse any acquittal at a court of first instance or reverse a judgement allowing an appeal against conviction of a criminal offence."

Section 130 which deals with the Court of Appeal. It states:

"(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from judgements, decrees and orders of the High Court, and such other appellate jurisdiction as may be conferred on it by an Act of the National Assembly.

(2) The Court of Appeal shall have jurisdiction in appeals from Court Martial in the manner provided by law.

"(3) An appeal shall lie as of right to the Court of Appeal from any judgement, decree or order of the High Court.

"(4) For the purpose of hearing and determining any appeal within its jurisdiction, the Court of Appeal shall have all the powers vested in the court from which the appeal is brought."

Section 132 which deals with the High Court. It indicates: "(1) Save as provided in section 127, the High Court shall have original jurisdiction-

"(a) to hear and determine all civil and criminal proceedings;

"(b) to interpret and enforce the fundamental rights and freedoms as provided in sections 18 to 33 and section 36(5),

"and in the exercise of such jurisdiction, the Court shall have all such power and authority as may be conferred by this Constitution or any other law.

"(2) The High Court shall have such jurisdiction in appeals from courts subordinate to it (other than the Cadi Court) as may be prescribed by an Act of the National Assembly."

Section 133 which deals with the supervisory role of the High Court. It states: "The High Court shall have supervisory jurisdiction over all lower courts and adjudicatory authori-

ties in The Gambia, and, in the exercise of its supervisory jurisdiction, shall have power to issue directions, orders or writs, including writs of habeas corpus, orders of certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing its supervisory powers."

Section 135 (1) deals with the powers of the courts to hear criminal cases.

Section 135 (2) does not exist.

Section 136 (1) - Does not exist.

Section 138 (1) deals with the appointment of Chief Justice. It reads: "The Chief Justice shall be appointed by the President after consultation with the Judicial Service Commission."

Section 138 (4) relates to the swearing of judges. It states: "Before assuming the functions of his or her office, a judge of the superior courts shall take the prescribed oaths."

Section 138 (5) (6) - Does not exist.

Section 146, subsection (1) and section 148, subsection (3) which are supposed to relate to taxation and the withdrawal of money from public funds do not deal with taxation and the withdrawal of money from public funds, but are related to the Judicial Service Commission.

Section 157 (7) which is supposed to be entrenched clause does not exist.

Section 188 (1) which deals with the operational control of the armed forces. It reads: "Subject to the authority and directions of the President and of the Armed Forces Council, the Chief of Defence Staff shall be responsible for the operational control and administration of the Armed Forces."

Section 229, subsection (8) reads:

"No Act of the National Assembly shall be deemed to amend, add to, repeal or in any way alter any of the provisions of this Constitution unless the title of the Act clearly indicates that intention and the Act does so in express terms."

This is an entrenched clause.

THE STATUS OF AMENDMENTS

Section 229, subsection (9) states:

"In this section-

"(a) references to this Constitution include references to any law that amends or replaces any of the provisions of this Constitution;

"(b) references to the alteration of this Constitution include references to the amendment, modification or re-enactment with or without amendment or modification, of the Constitution or of any provision for the time being contained in this Constitution, the suspension or repeal or the making of different provision in lieu thereof, and the addition of new provisions to the Constitution."

This cannot be changed without a referendum.

CHAPTER 2

THE CONSTITUTION AND THE LAWS

THE CONSTITUTION AS THE SUPREME AND FUNDAMENTAL LAW

Section 4 reads: The Constitution is the supreme law of The Gambia and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void."

WHAT TO DO WHEN ONE ALLEGES THAT THE CONSTITUTION HAS BEEN VIOLATED

Section 5, subsection (1) reads: "Any person who alleges that-

"(a) any Act of the National Assembly or anything done under the authority of an Act of the National Assembly; or

"(b) any act or omission of any person or authority,

"is inconsistent with or is in contravention of a provision of this Constitution, may bring an action in a court of competent jurisdiction for a declaration to that effect."

POWERS OF THE COURT TO DEFEND THE CONSTITUTION

Section 5, subsection (2) reads: "The court may make orders and give directions as it may consider appropriate for giving effect, or enabling effect to be given, to such a declaration and any person to whom any order or direction is addressed shall duly obey and carry out the terms of the order or direction."

DUTY TO OBEY THE COURT DECISION

Section 5, subsection (3) reads: "The failure to obey or carry out any order made or direction given under subsection (2) shall constitute the offence of violating the Constitution and-

"(a) shall, in the case of the President or Vice President, constitute a ground for his or her removal from office in accordance with section 67; and

"(b) any other person who is convicted of that offence shall be liable to the penalty prescribed by an Act of the National Assembly."

IT IS TREASONABLE TO OVERTHROW THE CONSTITUTION

Section 6 (1) reads: " Any person who-

"(a) by himself or herself or in concert with others, by any violent or other unlawful means, suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act; or

"(b) aids to abets in any manner any person referred to in paragraph (a),

"commits an offence of treason and shall, on conviction, be liable to the penalty prescribed by an Act of the National Assembly for that offence.

DUTY OF CITIZENS TO DEFEND THE CONSTITUTION

Section 6, subsection (2) reads: " All citizens of The Gambia have the right and the duty at all times to defend this Constitution and, in particular, to resist, to the extent reasonably justifiable in the circumstances, any person or group of person seeking or attempting by any violent or unlawful means to suspend, overthrow or abrogate this Constitution or any part of it.

Subsection (3) reads: " A person who resists the suspension, overthrow or abrogation of this Constitution as provided in subsection (2), commits no offence."

THE LAWS OF THE GAMBIA

Section 7 reads: "In addition to this Constitution, the laws of The Gambia consist of-

"(a) Acts of the National Assembly made under this Constitution and subsidiary legislation made under such Acts;

"(b) any orders, rules, regulations or other subsidiary legislation made by a person or authority under a power conferred by this Constitution or any other law;

"(c) the existing laws;

"(d) the common law and principles of equity;

"(e) customary laws so far as concerns members of the communities to which it applies;

"(f) the Sharia as regards matters of marriage, divorce and inheritance among members of the communities to which it applies."

SEE BOOK ELEVEN WHICH DEALS WITH THE JUDICATURE

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