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Gambia's Long Journey to Republicanism:
A Study in the Development of the
Constitution and Government of The Gambia

by

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All the errors and shortcomings of this study are, of course, mine.

INTRODUCTION

Despite the impressive volume of literature on the constitutional development of Commonwealth African States, there has been no attempt to undertake a study of the development of the government and constitution of The Gambia. This is because of, as one contributor to the series "The British Commonwealth, the development of their laws and constitutions" has said, The Gambia's size and the uncertainty of its constitutional and political future. This study is, therefore, in part an attempt to bridge that gap.

"Gambia's Long Journey to Republicanism: A study in the Development of the Constitution and Government of The Gambia" is an examination of the metamorphosis of Gambia's Constitution and three organs of government from colonial period to present day. In recognition of the fact that in any such examination some knowledge of the country and its people is essential, a brief outline of the country's geography and the historical origins of the inhabitants thereof are outlined. During the early colonial rule Britain's policy in The Gambia could hardly be said to be decisive. Notwithstanding Britain's indecisiveness we have sought evidence to indicate that Britain made use of the law, either by treaties recognised by international law or by Acts of Parliament, to establish its colonial rule in The Gambia.

On the imposition of colonial rule, the institutions of government and the constitutions under which they were established were left to develop on the same line as the development of

other colonial governments. The legislature was under the effective control of the executive while the executive was subordinated to the Imperial Government. With the gradual liberalisation of the constitution the self-appointed champions of the political rights of the local inhabitants, whose "loose and gaseous talk" angered the local colonial administrators, began to displace the official majority in the legislature. The Executive Council however continued to be dominated by the Governor and the most important heads of government departments. The democratisation of the legislature provided the gateway to the executive council for the unofficial members and subsequent allocation of ministerial responsibility to some of them. Allocation of ministerial responsibility to unofficial members was accompanied by a constitutional arrangement unprecedented in the constitutional development of any colony in West Africa: the constitutional arrangement was the establishment of committees advisory to the Ministers. These developments started in the "era of partial self-government." As that era strongly indicated that the process of constitutional development which was begun could not be halted and that sooner or later entire responsibility for the Government of The Gambia would be transferred to Gambians, various electoral regulations were promulgated for the purpose of conducting fair elections. These regulations applied to the colony until the dawn of independence when they became applicable to the Protectorate on the extension of the franchise to that area. The electoral laws were necessary in

order to afford the people the right to elect their representatives. The law governing elections both in the colonial and post colonial period is examined in a single chapter because the post colonial era has not brought any drastic change in it. What changes were introduced were all in the nature of drafting techniques--all matters dealing with procedural and administrative matters are omitted from the main body of the statute and transferred to the Schedules.

The introduction of a representative legislature brought in its trail intensive political activity and all the parties engaged in a sort of rat race. The subsequent constitutional conferences demonstrated that these parties had no differing political philosophies, but then each party for the purpose of promoting the political fortunes of its leader adopted, at these conferences, positions that can hardly be said to be unanimous. During this period too, official membership of the executive council was terminated; termination of official membership of the executive council² was compensated for by arming the Governor with reserved powers. The change in the designation of the executive council to cabinet did not affect the Governor's chairmanship of that very important decision-making body until the attainment of independence. The legal and constitutional significance of that independence as contained in The Gambia Independence Act is examined to determine to what extent that Act is an improvement on the statute of Westminster. The Gambia Independence Order and the Act served, as we endeavour to indicate, as the springboard for the severance of links with the

British Monarch. The reasons why Gambian politicians resolved to adopt executive presidentialism are varied and attempts have been made to indicate these reasons and to argue the grounds on which Gambia's republican constitution can claim autochthony.

Under the republican constitution emphasis has shifted from division to the centralisation of power. With a change in the country's constitutional status the President became the power base. For this reason his powers in relation to cabinet, his role in the legislative process, his powers in relation to the civil service and the commissions established under the constitution are examined and the conclusion reached is that the difference between the autocratic colonial governors and the executive president is that the latter is elected while the former was not. But the study on the executive is not confined to a consideration of presidential powers; attention has been focused on the method of presidential elections and the removal of the President from office. In relation to the House of Representatives, the qualifications and disqualifications for membership thereof, its legislative role and other functions are discussed. But these discussions lead us to the lamentable conclusion that party discipline has greatly impaired the effectiveness of the House in the performance of its roles.

A sketchy survey of the development of the courts, their hierarchy and jurisdiction form the subject matter of chapter four. Political independence made it necessary to devise methods for preventing the attrition of judicial independence and

impartiality. The establishment of a Judicial Service Commission, the entrenchment of a cumbersome procedure for removal of judges and their tenure of office, reveal the devices employed to support that independence and impartiality. The adoption of a republican form of government raises questions as to the propriety for Gambia to maintain appeals to the Judicial Committee of the Privy Council. This appears to be inconsistent with her sovereignty. We have therefore suggested abolition of appeals to the Privy Council in view of its imperial character or in the alternative for Gambia to conclude a Treaty of Judicial co-operation under which the Privy Council shall advise the President of The Gambia and not the Queen.

The study proceeds to consider the age-old problem of all known systems of jurisprudence: individual freedom. The freedoms protected by the constitution are not group freedoms. But the constitution does recognise the need to reconcile the liberty of the subject with the need for the preservation of the state and continuance of democratic institutions. Reconciliation in that direction has led to numerous qualifications being attached to almost every head of freedom. The concluding chapter deals with the colonial power's employment of the law to subordinate customary law to English law and we have ventured to suggest that this was only done to indicate to the local inhabitants that their rules of law are not as good as the English law. It has also been shown that the national government has not given any indication of terminating that subordination, and, worse still,

the national government is, with respect to the jurisdiction of the District Tribunals, perpetuating the colonial system of discrimination. Since the institution of chieftaincy has ceased to be a traditional institution, it became, in the course of our concluding remarks, irresistible to question the propriety of the chiefs' membership of the District Tribunals.

The adoption of a republican constitution does not necessarily mean Gambia has reached the climax of its constitutional development. Of late there has been much talk on some form of Senegambian political union; the form of union that is favoured in many quarters is a federal one. As a federal union will necessarily give rise to various problems, one or two such problems have been singled out for comment. Because of her size, sight has not been lost of a possible disintegration of Senegambia as a federation if ever one is created in favour of a unitary state. In recognition of that fact we raised questions as to what would be the future of the institution of chieftaincy and whether Gambians will enjoy in a bigger Senegal the political freedoms they have become accustomed to. T

The purpose of this thesis is modest. It does not strive to bring out all the factors that have influenced the growth of the government and constitution of The Gambia nor does it claim to have exhaustively outlined the entire legislative process in The Gambia. But if through our analysis some understanding is brought to bear on the subject of this thesis then the efforts of this study will not have been in vain.

CHAPTER ONE

THE ESTABLISHMENT OF COLONIAL RULE

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Like many other African states, The Gambia as a territorial unit is the product of the colonial period. Before the initiation of Colonial rule The Gambia, along with other modern West African states, formed part of the ancient Empires of Ghana, Songhai and Mali when each of these Empires was at the height of its glory. It is not proposed to discuss the Constitutions and governments of these Empires as that is not the aim of this study, nor does the writer think himself competent to venture into an area which is the preserve of students of, and writers on, pre-colonial governments of Africa. Apart from the foregoing reasons the temptations to glorify and romanticise the ancient Empires of Africa are so great on the part of the writer that he might be found guilty of not portraying a sober and rational picture of the ancient Empires. Despite these confessions it may be pointed in passing that these Empires were often divided into principalities each principality being administered by a governor assisted by the Chief Judicial Officer of the Principality. The principalities were in turn divided into semi-autonomous regions with a regional administrator responsible to the Governor who was in turn responsible to the Mansa or King.

Because of the lack of contacts with the outside world little or nothing was known about the existence of these Empires and their enormous wealth and what was known about

them could only be found in the works of a few Arabic Scholars. The ignorance about Africa, naturally, resulted in its being tagged by Europeans as the "Dark" Continent; the idea that Africa was a "Dark" continent spurred the most adventurous of the Europeans to embark on voyages of discovery.

These voyages were not without motives. The explorers were soon followed by the merchants who established trading posts in many parts of Africa and in some places these posts formed the nucleus of a colony. When the Europeans came in first as traders and then as colonisers it became apparent to them that their activities could not be regulated by laws and governments evolved by savage and barbarous natives of Africa; in recognition of this fact the Europeans imported the system of government known to them even though this system was to operate along side with that of the natives. The imported system has been accepted by virtually all African States that were once colonies though with variations.

This study is therefore an attempt to chart in historical conspectus the development of the Constitution and government of modern Gambia from a crown colony to a Republican state. The significance of some knowledge of the country and people whose conducts are affected and controlled by the constitution and government is too glaring to call for emphasis. In recognition of this fact part of this chapter is devoted to a brief geographical description of The Gambia as well as an analysis of the historical origins of the people who live within the boundaries of the territory. The major part of this chapter

will address itself to the role of law in the process of establishing a colony and protectorate in The Gambia. While dealing with the gradual evolution of the colony and protectorate, casual evidence will be elicited to indicate Britain's indecisive attitude towards The Gambia, which has largely contributed to the slow constitutional progress in The Gambia.

THE COUNTRY AND ITS PEOPLE

The Gambia, which became independent in 1965, is situated in the extreme western portion of Africa. It lies almost entirely in the Savanah between the meridians of $16^{\circ} 48'$ and $13^{\circ} 47'$ west longitude and $13^{\circ} 3'$ and $13^{\circ} 49'$ north latitude. This savanah country, which has an east-west length of three hundred miles and not more than thirty miles wide, is a narrow strip of land bounded on the north, south and east by Senegal and on the west by the Atlantic Ocean. It has an area of some four thousand square miles which stretches in a narrow belt along each side of the River Gambia. The River Gambia--the country's greatest natural asset--is seven hundred miles long from its source in the Fouta Djallon mountains to its mouth; but only the last three hundred miles are navigable^c and this navigable portion lies within the territory of Gambia. Vessels of up to ninet~~ten~~ feet draught sail as far as Kuntaur 150 miles from Banjul (or Bathurst as it was called) and small ocean vessels can reach Georgetown 176 miles up river. River vessels

serve as far as Tatoto 288 miles from Banjul while launches can reach Koina the last reparian village in The Gambian territory.¹

The present boundaries of The Gambia have, as elsewhere in Africa, been drawn arbitrarily by the white men without regard to ethnic, historical and cultural affinities or geographic considerations. The arbitrary and artificial boundaries drawn here were thought to be temporary until the area could be exchanged for a more profitable position elsewhere--perhaps for Assini and Grand Bassam.² The Anglo-French diplomacy of exchange did not materialise because the Creole people registered strong protests against any such move. The inhabitants of The Gambia thus found themselves living within a boundary that separates them from the people of Senegal with whom they share a common ethnic, historical and cultural background.

The Gambia has a population of 500,000 inhabitants consisting of a hetrogeneous people which include the Mandingos, Fula, Wolof, Jola and Sarahuleh. The origins of these diverse peoples are still shrouded in mystery but ethnologists have postulated some theories--whether accurate or not--as to the origins of these people.

¹For a detail geography of The Gambia see H.R. Jarret, A Geography of Sierra Leone and the Gambia (London: 1954).

²For the various attempts to exchange the Gambia for another territory in the nineteenth century see H.A. Gailey, Jr., A History of The Gambia (Routledge and Kegan Paul, 1964), pp. 81-95.

The Mandingos, who constitute the largest single tribal grouping in The Gambia, were described by Richard Jobson as "being the people who are the Lords and Commaunders (sic) of this country."³ Jobson's description of these people cannot be wrong for there is historical evidence that they did not hesitate to impose their political rule over the less powerful and less affluent of their neighbours. Though their origin is in doubt, one theory suggests that the Mandingos are an intermixture of Bantu stock and indigeneous Negro while another school of ethnologists suggests that they are of mixed Negro and Arab origin. Other commentators are of the view that many Mandingos had come to The Gambia from Manding (many Gambian Mandingos assert that their original home is in Manding) during the expansion of the Mali Empire in the fourteenth century. During their westward movement from Mali they overran the people settled between the Cassamance and the Gambia river.⁴ Before the advent of the colonial rule the Mandingos have been DYULAS or traders and most of them acted as middlemen in the slave trade. They were among the first inhabitants of West Africa to embrace the Islamic religion. They are evenly spread in The Gambia with heavy concentration in the Lower River Division and North Bank Division. The abolition of the slave trade, the decline of the Mandingo states with their complex

³ Jobson: The Golden Trade (London: 1932), p. 51.

⁴ Charlott Quinn: Mandingo Kingdoms of the Senegambia (Longman, London), p. 10.

bureaucracy and the gradual introduction of colonial rule brought an end to the political hegemony exercised by the Mandingos over their less powerful neighbours and resigned themselves to farming, which has been, and still is, their primary occupation.

The Fulas--Fulbès, Fulas, Peul or Fulani--the first three variants used in Senegal and The Gambia--are the second largest ethnic group in The Gambia. Like the Mandingos their origin is in dispute but they are said to be the off-springs of the Shepard Kings of Egypt, while other ethnologists contend that they were intermarried with the Mande speaking people of the ancient Ghana Empire. They provided the ruling elite for Ghana until they were expelled. With their expulsion from Ghana, they migrated to Tekrur where they successfully established themselves as the rulers of the Wolofs and Tucklors but for some reason were rejected by their new subjects. The rejection of Fula rule by the Wolofs and Tucklors necessitated a quest for a new homeland and that quest brought them to the Fouta Djallon Plateau (this plateau is in the Republic of Guinea) where they lived with the Mandingos. The conditions in and around the Plateau compelled some of the Fulas to move northward towards Senegal across the middle valley of The Gambia. In The Gambia they settled in Fulladu, Jimmara, and Kantora though they are found in almost every part of the country. They were unduly exploited by their Mandingo neighbours who used them as the tillers of their lands and shepherds for their

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cattle.⁵ During the process of migration the Fulas lost many of their distinctive characteristics due to intermarriage with the Negro races. The pure Fula is markedly different from their more negroid neighbours in that they have oval faces, delicate lips and long hair.⁶ The majority of them are Muslims and some of the best Arabic scholars of The Gambia are to be found among them.

The Wolofs'--Jollofs as some West Africans prefer to call them--ancestry is traceable to the people of Yemen or Libya who conquered the valley of Niger in the seventh century and gradually expanded westward until they reached The Gambia. Another theory suggests that they are a hybrid of Sereres and such other tribes as the Mandingos, Fulas and Sarahuleh. They constitute the third largest tribal grouping in The Gambia with heavy concentration in Saloum District. In addition to the Wolofs of Saloum there are a number of Wolof people in Banjul and its environs who had migrated from St. Louis and the Island of Goree in Senegal. The Wolofs, like the Mandingos, produced great "GELEWARR"--warriors. The Wolofs of the Provinces are mainly farmers while those of Banjul are engaged in commercial activities.⁷ The younger generation of the Banjul Wolofs are gradually forming an intellectual elite group and seriously competing with the Creoles as the technocrats and bureaucrats

⁵The Fula/Mandingo relationship in the 19th century is well narrated by Jobson: The Golden Trade, pp. 47-48.

⁶Gailey, p. 16.

⁷Gailey, p. 10.

of the country. The majority of the Wolofs are Muslims.

Another group of people in The Gambia are the Jolas and they have been reputed to be the longest residents of The Gambia. They, unlike the other tribes, lived in a republican type of state without a paramount chief or any of the paraphernalia of the complex bureaucracy that was characteristic of the Mandingo, Wolof or Fula states. The head of the clan mediate in disputes among the members of his clan and was looked upon as the guardian of the public weal. At various times in the history of The Gambia the Jolas and Mandingos were in constant conflict; the causes of these conflicts were mainly due to the desire on the part of the Mandingos to destroy the republican states of the Jolas and introduce their own system of government and to impose vis et armis the Islamic religion on the Jolas who believed in the worship of their fetish gods. They demonstrated a great sense of unity and solidarity in the face of these invasions. At times they were content to be led by the Mandingos but in other times they were in an open state of rebellion. Their social organisation is based on rudimentary communal system; they are hardworking and industrious.⁸ They live in Fogni in the Western Division and though Christians--mainly Catholics--and Muslims are to be found among them, it is believed that some still worship their fetish gods.

Apart from the Mandingo, Fula, Wolof and Jola people

⁸Quinn, pp. 25-27.

there are the Sarahulehs who constitute the fifth and numerically the smallest ethnic group in The Gambia. They have long been associated with the Mandingos as long-distance traders from Senegal and Upper Niger regions.⁹ In the course of the Jihads in the nineteenth century in West Africa the Sarahulehs and Bambaras, mobile and without local ties, played important roles in providing mercenaries for the belligerent groups. Today, they are mainly found in the Upper River Division of The Gambia where they form the largest tribal grouping.¹⁰ Their primary occupation is farming but they have recently begun to make their mark on the commercial activity of the country. The affluent ones among them are playing an active role in giving Banjul and its environs a new cosmetic appearance; they constitute at least forty per cent of Banjul's absentee landlords.

Such are the historical origins of the inhabitants of present day Gambia; the historical survey reveals how diverse the ethnic groups of The Gambia is but the diversity of Gambia's ethnic group is really relative when compared to such heterogeneous societies as Nigeria or Ghana. A visitor to The Gambia can hardly notice the heterogeneous nature of the society and this is largely due to centuries of cultural interaction among the various ethnic groups. This cultural interaction has succeeded in joining "our diverse people to prove man's brotherhood."

⁹Ibid., p. 27.

¹⁰Gailey, p. 16.

THE BEGINNINGS OF COLONIAL RULE

While the Mandingos, Fulas and Wolofs were in a constant state of trying to impose their rule on each other, their efforts in that direction were frustrated by the advent of a new, powerful and more ambitious subjugator--the white man--whose rule was only to be terminated through a series of constitutional concessions that culminated in the establishment of a fully sovereign, independent Gambia in 1965.

Some Arab geographers and cartographers had spread rumours of the enormous wealth of the Senegambia valley among Europeans. The Portuguese were the first European nations to venture out on the verification of these rumours. A group of Portuguese merchants, first preceded by their explorers, visited the West Coast of Africa in the 1400s and concluded a number of commercial treaties with the natives in and around the Senegambia region. By these treaties they enjoyed exclusive trading rights in the region. The reputed wealth of the area proved illusory and conditions in Portugal forced the Portuguese to relinquish all their trading rights in the area to the British. In 1588 Queen Elizabeth of England granted Patent to some London and Exeter merchants to trade with The Gambia, but this enterprise, which was interested in legitimate commerce, did not prosper and its Patent was withdrawn. In 1618, James I granted a charter to Sir Robert and other London merchants to trade with The Gambia. Their enterprise was known as the Company of Adventurers

of London Trading in Africa. This company laid the foundations of subsequent British control in The Gambia for it built Fort James (now James Island) on a small island seventeen miles above the Island of Bathurst (Banjul). The charter granted to Sir Robert and his associates was withdrawn or surrendered and the years 1631-1752 saw the incorporation of various chartered companies to promote trade in Africa. But in 1752 the policy of issuing Royal Charters came to an end--at least for the Senegambia region. The companies now engaged in trade to Africa drew their existence from Acts of Parliament. One such Act was passed in 1750¹¹ to enable the Company of merchants trading to Africa to extend and improve the trade to Africa because "trade to and from Africa is very advantageous to Great Britain and necessary for the supplying of the Colonies and Plantations thereunto belonging with sufficient number of Negroes at a reasonable rate."¹² As Britain had no official representative in charge of the areas relinquished to her by the Portuguese in 1588, it was realised that in order to give the Act of 1750 its desired effect some form of control and administration of the area should be vested in some persons, whether individuals or a corporate body. The Company of Merchants was found as a suitable instrument for that purpose and to give legality to the exercise of their authority in the area an Act was passed in 1763¹³ vesting the administration

¹¹25 Geo. 2 C. 31.

¹²Preamble to the Act.

¹³4 Geo. 3 C. 20.

of the Forts of Senegal and its Dependencies in the Company of Merchants for the Protection, encouragement and defence of the trade to Africa. This Company, like its predecessors, soon ran into difficulties and in 1765 another Act of Parliament¹⁴ repealed the earlier Acts of 1750 and 1763 thereby putting to death the Company of Merchants. Section 2 of the Act of 1765 divested the Company of Merchants of all its forts and possessions from Port Salle to Cape Rouge and "fully and absolutely" vested them in His Majesty. With the vesting of the forts and possessions in His Majesty, the Province of Senegambia was established with a constitution modelled on the type prevalent in the American Colonies "as far as differences of circumstances will permit."¹⁵ The Crown's direct control of the colony was short-lived. The thirteen colonies in North America took up arms to dismantle a colonial rule that was gradually taking its roots in The Gambia; Britain's attention was wholly diverted to the rebellion in North America, and she concluded that it could not spend any more money in the Crown Colony of The Gambia. The decision of the British Government not to expend any more money in The Gambia led to repeal of the Act of 1765. The repealing Act¹⁶ vested Fort James and the River Gambia and their dependencies beginning at the Fort Salle to Cape Rouge in the Company of Merchants Trading to Africa. It may

¹⁴5 Geo. 3 C. 44.

¹⁵E.C. Martin: The British West African Settlements--1750-1821--Imperial Studies No. 2 (Longman, Green and Co. Ltd., London, 1927), p. 66.

¹⁶23 Geo. 3 C. 65.

also be pointed out here that in 1783, by the Treaty of Versailles, Britain ceded to France the Forts of Senegal and its dependencies on the guarantee that British possessions on Fort James and the River Gambia were to remain British. The Treaty brought an end to what was known as the Senegambia region. It seemed no further acquisition of territory was made in The Gambia during the period preceding 1807, but the Royal Assent to the abolition of the slave trade once again renewed British Official interest in The Gambia. British merchants had ceased participation in the traffic in human cargo almost immediately after the passing of the Abolition of Slavery Act but the British Navy had to keep watch over clandestine foreign slavers in and around The Gambia. Bathurst (Banjul), which is located at the mouth of the river, was considered a suitable and strategic place for this purpose and a military post was established at Bathurst (Banjul) a settlement that was to become the colony's capital.

In 1821 it was thought expedient that the Company of Merchants Trading to Africa should relinquish the government and management of the Forts and Possessions on the Coast of Africa and surrender the same to His Majesty. For this purpose an Act¹⁷ was passed whereby all the Forts and possessions on the West Coast of Africa were, with effect from 3rd July 1821, vested in the Crown. Section 3 of the Act further provided that all territories on the West Coast of Africa lying between 20°N and 20° S South latitude are annexed to and made a dependency

¹⁷1 and 2 Geo. IV, C. 28.

of Sierra Leone. The Governor of Sierra Leone was the chief Executive of The Gambia. The Gambia was subject to all laws, statutes and Ordinances in force in the said colony (of Sierra Leone) or shall at anytime thereafter be made, enacted or ordained by the Governor in Council in the same manner as if the said Forts, Possessions, Territories or Island (of the Gambia) had originally formed part of the colony of Sierra Leone. This Act brought an end forever to the period of Company administration for The Gambia and a new phase of relationship between The Gambia and Britain was inaugurated.

Gambia's dependence on Sierra Leone did not last long. In 1841 Dr. R.R. Madden was commissioned to study and report on the state of British Settlements in West Africa. His report was submitted to a Select Committee of the House of Commons which, acting on Dr. Madden's report, recommended the complete severance of The Gambia from Sierra Leone and the establishment of a separate legislature and judiciary for The Gambia. The Select Committee's recommendations were implemented by passing the West Africa Settlements and Falkland Islands Act of 1843¹⁸; under this Act The Gambia was erected as a separate Crown Colony with its own legislature, executive and judiciary.¹⁹ The increasing burden involved in the maintenance of the British Forts and settlements on the West Coast of Africa aroused opinion in England that favoured non-involvement in

¹⁸ 6 and 7 Vict. C. 13.

¹⁹ Letters Patent, 24 June, 1843.

the local affairs of the African natives and even pressed for a policy of complete British withdrawal.²⁰ The British Government, reading what may be described as the barometer of public opinion on the question of the West African Settlements, appointed Colonel H. St. George Ord--one time Commissioner to the Gold Coast--to investigate, inter alia, the administrative system and its revenue problems, and how far all the four settlements could be administered together more economically. He recommended in favour of a centralised administration with the seat of government in Sierra Leone. His report was submitted to a Select Committee of the House of Commons; it approved in principle that a complete withdrawal from the coast was the best policy for the British Government but nonetheless resolved that --

(a) it is not possible to withdraw the British Government, immediately, from any settlements or engagements on the West African Coast;

(b) the settlement on the Gambia may be reduced, by MacCarthy Island, which is 150 miles up river; and the settlement should be confined as much as possible to the mouth of the river;

(c) extension of territory, or conclusion of new treaties

²⁰T.O. Elias, Ghana and Sierra Leone: The Development of their Laws and Constitutions--Vol. 10 of the British Commonwealth, the Development of their Laws and Constitutions (Stevens & Sons Ltd., London: 1962), p. 25.

offering any protection to the native tribes should be eschewed;

(d) the object of British policy in the settlements should be to inculcate and encourage in the African peoples the exercise of those qualities which may render it possible to transfer to them the administration of all the Governments with a view to our ultimate withdrawals; and

(e) in order to retrench expenditure and promote a general increase of efficiency all the four British Settlements on the West Coast of Africa should be administered centrally from Sierra Leone.²¹

Following the above recommendations, all the four settlements on the West Coast of Africa were merged into one known as the British West African Settlements with the Governor of Sierra Leone as the Governor in chief while the administrators of the other three settlements were redesignated as Lieutenant Governors.²²

It is apposite at this stage, before dealing with the demise of the central administration, to discuss briefly how

²¹ C.W. Newbury, *British Policy Towards West Africa: Select Documents 1786-1874* (Clarendon Press, London: 1965), pp. 529-530.

²² *Ibid.*, p. 528, see also the Charter of February of 19, 1866, establishing the Government of the West African Settlement.

Britain, notwithstanding her policy of vacillation towards all the British Settlements on the West Coast of Africa, gradually established a colony and protectorate in The Gambia. As we have noted, Sir Robert and his associates founded Fort James in the 1600s and the abolition of the slave trade saw the establishment of a military post on the Island of Bathurst (Banjul) at the mouth of the River Gambia. Once British connections were established the acquisition of territory became the order of the day. In 1823 the Island of Lemain, now Maccarthy Island, was by a Deed, ceded to Great Britain.²³ In 1826 Brunay King of Barra, by and with the advice and consent of his chiefs and headmen, ceded to His Majesty the entire and unlimited sovereignty of the River Gambia.²⁴ Thereafter between 1827 and 1901 a series of treaties were concluded by the local rulers and the representatives of the British Government whereby Britain acquired control of The Gambia and established a colonial regime in return for the protection of the native inhabitants; and in 1894 a proclamation was issued announcing the annexation of Foreign Combo to the Gambia.²⁵

²³Hertslet, Map of Africa by Treaty, vol. 1, 3rd Ed. (Frank, Cass & Co. Ltd., 1967), p. 7.

²⁴Ibid., pp. 8-9.

²⁵Hertslet mentions about seventeen treaties concluded between the local rulers and the British between 1827 and 1901. In 1889, the present boundaries with Senegal were delineated by an agreement with France. In 1902 Musa Molloh, the King of Fulladugu, signed a treaty with the British which brought Fulladugu within the sphere of British influence in the Gambia and completed the process of colonisation. The 1889 agreement with France on the delineation of the Senegal-Gambia boundaries were ratified in 1904.

It is not proposed to go into the pros and cons concerning the validity of these treaties; it is sufficient for our purpose to raise the question whether the local chiefs, Kings and headmen, who purportedly surrendered the entire sovereignty of their people under the so-called treaties, fully appreciated ~~the~~ implications of their actions and whether both parties to the so-called treaties were equal parties without one exercising any form of duress over the other. The answer to the first question seems to be embodied in the reaction of Tomani Bojang one of the local chiefs, who surrendered absolute sovereignty over Brikama, when he learned of the Anglo-French diplomacy for the exchange of The Gambia for some other territory. Tomani requested Her Majesty "to return my territory to me as an act of friendship" if Britain was no longer interested in his territory. It may be that such a request would never have been made had he understood the full implications of the treaty he signed. It is hardly open to doubt that these so-called treaties were not contracts or treaties between equal partners. This assumption is strongly supported by Lord Palmerston who indicated that what was signed by the African Chiefs were not equal to treaties but that "the compacts to be made with the African Chiefs should be described as 'Arrangements' or 'Agreements' or by some other words which should exclude them from the class of Diplomatic Conventions to reserve to the Secretary of States for Foreign Affairs his own exclusive power of negotiating treaties--and to mark the distinction between

Agreements with barbarous chiefs and the international compacts of civilised states."²⁶

What prompted Lord Palmerston's comment is not clear, but one may safely assume that his desire to exclude "the Agreement with the barbarous chiefs" from the "international compacts of civilised states" may have been dictated by the fact that the barbarous chiefs were not in any way conversant with rules and principles of international law which they could call in aid when concluding treaties with the members of "civilised states." Ghai and McAuslan, quoting Oliver and Matthew, have indicated that "most tribes cannot have been aware of (their) real meaning; the stack of treaty forms collected in the Foreign Office files in London represented to the chiefs and elders, who agreeably inscribed them with their X-marks, considerably less than the familiar ceremony of blood-brotherhood."²⁷ But whatever misgiving we may have about the validity of these treaties they were, as far as the British Government was concerned, as effectual and binding as a written contract executed by two sane adult Englishmen.

While Britain, through her local representatives in The Gambia, was busy extending her influence into the hinterland there were intensive diplomatic manoeuvres by Britain and France for the exchange of Gambia for Assini and Grand Bassam.

²⁶Minute, 6 Sept. 1841 Colonial Office 87/25, quoted by C.W. Newbury in his *The West African Commonwealth* (Duke University Press, 1964), p. 7.

²⁷Ghai and McAuslan, *Public Law and Political Change in Kenya* (Oxford University Press, 1970), p. 6.

Such an exchange was thought as the best and most practical solution to the isolation--an isolation brought about by the creation of artificial boundaries--of the Mandingo and Wolof people from their neighbours in Senegal. The necessary diplomatic agreement for the exchange was postponed and eventually rejected in the 1870s after protests from British Commercial firms with interests at Banjul (then Bathurst) and because of fears on the part of the Creole British subjects. The petition of the latter group in 1874 opposed transfer to the French "because they are averse to the French, because as loyal subjects of the Queen, they are attached to British institutions, because they love political and religious liberty and because by their industry they have acquired property in these settlements, which the projected transfer will materially affect."²⁸ The negotiations having failed Britain brought an end to her policy of vacillation towards The Gambia.

Before concluding our historical survey of how Britain established herself as the colonial master of The Gambia, we should not in passing that the arrangements of 1866, whereby a central administration was created for the West African Settlements, was gradually put to death first with the separation of the Gold Coast and Lagos administration from the central administration and then the severance of The Gambia from Sierra Leone in 1888 and its establishment as a separate colony

²⁸C.W. Newbury: The West African Commonwealth, p. 86.

with its own executive and Legislative Councils.²⁹

SUMMARY AND CONCLUSION

Britain's primary interest in The Gambia and its surrounding regions was to tap the "vast" resources of black labour needed in the Plantations in the West Indies. But the eighteenth century witnessed a re-assessment of British policy towards the unconscionable traffic in human cargo not only in The Gambia but in other parts of Africa. This re-assessment of policy was brought about largely through the campaigns of such well spirited philanthropists as William Wilberforce and Granville Sharp. Gambia thus ceased in law as a supplier of slaves and came to be used instead as a strategic place for combatting clandestine slave trade. Though the Imperial Government took over the responsibility for administering the territory in 1821 there appeared to be no definite and concrete policy as to whether The Gambia should or should not remain a British possession. The indecisive policy of Britain led The Gambia to be twice amalgamated with Sierra Leone and was nearly exchanged for some other territory.

Despite the Imperial Government's vacillating policy, the local British administrators were gradually extending British influence into the hinterland until The Gambia was finally

²⁹ Letters Patent 28 November, 1888.

declared a colony and protectorate of Britain. One is compelled to ask by what authority did Britain exercise jurisdiction in The Gambia? As we have noted many of the local rulers concluded treaties with the local British administrators who were acting for and on behalf of the Imperial Government. By these treaties much of the hinterland were brought under British protection and though we have pointed out that these treaties provide very tenuous grounds for establishing British rule in any part of The Gambia, yet in the eyes of British Constitutional lawyers they were binding and effective. It has been argued that the exercise of jurisdiction in a foreign country by the Crown emanates from its prerogative power,³⁰ while the other view is that the exercise of the Crown's jurisdiction in a foreign country emanates not from its prerogative but from the Foreign Jurisdiction Acts.³¹ Whatever may be the views of academic writers on the legal basis for the exercise of the Crown's Jurisdiction in a foreign country, Lord Denning seemed to have settled the question for The Gambia in *SABALLY and NJIE Vs H. M.'s ATTORNEY-GENERAL*.³² With regard to the protectorate the exercise of the Crown's Jurisdiction in as ample a manner as if the Crown had acquired Jurisdiction over it by conquest or cession is based on the

³⁰ Sir Roberts-Wray: Commonwealth and Colonial Law (Frederick A. Praeger Inc., New York: 1966), p. 192.

³¹ J.E.S. Fawcett: The British Commonwealth in International Law (Stevens and Sons, London: 1963), pp. 124-126.

³² (1964) 3 W.L.R. 732.

the Foreign Jurisdiction Acts 1890³³ coupled with its exercise of jurisdiction in fact. The Foreign Jurisdiction Acts seem to swallow up whatever prerogative powers existed before. In the case of the colony, however, the Crown exercised Jurisdiction either under its prerogative rights or by virtue of the British Settlements Acts of 1887.³⁴ Both Acts vested in the Crown plenary legislative powers to make Orders and establish such institutions for the peace, order and good government for those subjects of the Crown who have resorted to and settled in places where there is no civilised government and to exercise jurisdiction over those in a foreign country. The British Settlement Acts and the Foreign Jurisdiction Acts provide the legal basis for the exercise of the Crown's Jurisdiction in The Gambia. One inescapable theory that springs to mind is that Britain's imperial presence could not have been established in The Gambia without doing so through the instrumentality of law. The role of law in establishing Britain's Colonial presence has not been all that too elegant; the law was used to impose a Colonial rule that began with the undue and inhuman exploitation of the natives for the sole purpose of promoting and concretely cementing Britain's trade interest in other parts of the world. One anomalous consequence ushered in by British rule was the differentiation in the status of the inhabitants of the Colony and the Protectorate: the inhabitants of the

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53 and 54 Vict. C. 37.

³⁴50 and 51 Vict. C. 54.

colony were for all purposes British citizens and enjoyed all the privileges that accompany British citizenship for the colony was in effect a territorial prolongation of Britain. The inhabitants of the protectorate were regarded at common law as foreigners living within a foreign country. The common law conception of protectorate inhabitants was, however, modified by rules of international law which recognised the inhabitants of a protectorate as nationals of the protecting power. Whatever modifications were effected in the common law concept of the status of a protectorate's inhabitants by the rules of international law, the fact still remains that a dichotomy persisted until independence. If law in establishing Britain's colonial presence in The Gambia did produce some negative results, it also did produce some admirable and positive results; the colonial regime that was established brought in some values and institutions that are today regarded as a sine qua non for any society that professes true democracy. The rule of law as opposed to the rule of men has been one of the greatest values the colonial regime has handed to the Gambians and it has, since independence, guided the action of both the governors and governed "towards the common good."

CHAPTER TWO

THE DEVELOPMENT OF THE LEGISLATIVE COUNCIL

The imposition of British rule over The Gambia led to the portioning of the territory into a colony and Protectorate. The colony was in strict constitutional theory a territorial prolongation of the United Kingdom and therefore under the complete legislative competence of the United Kingdom Parliament. The Protectorate was for all purposes and in strict constitutional theory a foreign country whose defence and external affairs are managed and controlled by the United Kingdom Government. Legislations for the protectorate could not in theory be passed by the United Kingdom Parliament though the practice has invariably been the exercise of unlimited jurisdiction over the internal affairs of the protectorate by the United Kingdom Parliament in the same manner that the crown possesses unlimited jurisdiction in the colony.¹ The unlimited legislative competence of the United Kingdom Parliament could not however be exercised in the colony and protectorate on account of distance; and this made it necessary for the British Government to devise methods whereby both the colony and protectorate could have an assembly similar to that in existence in the United Kingdom for the promulgation of laws. The physical structure of the assembly itself was not as necessary or imperative as its constitution. To enable the United Kingdom to divest

¹Kenneth Roberts-Wray, pp. 44-48.

itself of some of its legislative powers respecting the territory, a constitution was granted to the colony and protectorate of The Gambia. The development of this constitution was very much along conventional patterns. The government established in the territory was based on two principles of subordination, (1) the legislature was subordinate to the executive; and (2) the colonial government was subordinate to the Imperial Government.² The aim of this chapter is to indicate how, by the various constitutional instruments, the colonial government was subordinated to the Imperial Government, and how that principle of subordination was subsequently dismantled. As the subordination of the colonial government to the Imperial Government was in itself a defect in the constitution, we will, in our discussion on the development of the Legislature, attempt to expose the other defects of the various constitutions in so far as they related to the Legislature. A general account of all the constitutional conferences that followed the liberalisation of the constitution will be given. For our purposes, the development of Gambia's constitution, in so far as it affected the Legislature, may be divided into four broad periods:

- (1) the era of uncertainty; (2) the era of experimentation;
- (3) the era of partial self-government; and (4) the dawn of independence.

²Wight: British Colonial Constitutions, 1947 (Oxford University Press, 1952), p. 17.

1. THE ERA OF UNCERTAINTY

As we noted in the preceding chapter, the Province of Senegambia was declared a crown colony and placed under the immediate authority and direction of His Majesty. The direct consequences of such a declaration was the establishment of a government machinery responsible for the day to day administration of the colony. The Committee of the Council for Plantation affairs and the Board of Trade were mandated to submit proposals for the civil and military government of the colony.³ The Constitution of the colony, which was set out in an Order in Council of 1765, was modelled on the constitutions found in the American colonies "as far as the differences of circumstances will permit." The civil constitution consisted of a Governor and a council for the legislative and administrative responsibilities of the colony and a Chief Justice in charge of the judicial system. The Governor was assisted in the administration of the colony by a Council consisting of four ex-officio members and nine persons appointed by His Majesty. Though the appointment of the members of the council was the prerogative of the crown, the Governor was empowered to choose nine protestant inhabitants who with the ex-officio members were to constitute the council and might, in the case of

³E.C. Martin: p. 66 (The relevant historical material on the constitutional structure of the government of Senegambia is derived from E.C. Martin: Imperial Studies No. 2 -- The British West African Settlements 1750-1821 (Longmans, Green & Co. Ltd., London, 1927), pp. 66-71.

vacancies in the membership of the council, make temporary appointments until His Majesty's pleasure was signified.⁴

The Governor had unlimited powers to suspend any member of the council. He and the council could make Ordinances necessary for the colony but no such Ordinance must be repugnant to the laws of England.⁵ The Constitution expressly reserved power to His Majesty to revoke or annul any Ordinance made by the Governor in council. The 1765 Constitution was not in reality a constitution for the colony as such. It was a constitution designed to provide an outlet for the expression of opinion by the merchants, churchmen and military personnel. It did not only fail to take cognisance of the need to open up to Africans, however rudimentary their educational standards might have been, the opportunity to contribute in the deliberations of the council but it also shut out the Roman Catholics from its membership.

The Constitution had a very short lease of life; it was revoked in 1821 and the colony of The Gambia, which was now separated from the Province of Senegambia, was made a dependency of Sierra Leone⁶ and had to rely on the Governor and council in Sierra Leone for its legislations. The affiliation of The Gambia to Sierra Leone lasted for only twenty-two years for in 1843 it was separated from Sierra Leone. A legislative Council

⁴Ibid., p. 69.

⁵Ibid., p. 67.

⁶Letters Patent 1821.

composed of the Governor and not less than two public officers serving in the colony was established.⁷ Twenty-three years after Gambia's separation from Sierra Leone, articulate public opinion in England favoured Britain's withdrawal from, or at least no further British involvement in, the affairs of Africans. The British Government's response was the commissioning of Colonel Ord to investigate and report on the state of the African Settlements. His report was submitted to a Select Committee of the House of Commons.⁸ All the Settlements on the West Coast of Africa were placed under a central administration in Sierra Leone. The Legislative and Executive Councils established in 1843 were abolished.⁹ A small council composed of the Administrator, the Collector of customs and the Chief Magistrate was created. The Council acted in a merely advisory capacity as all important legislations and policy decisions were still made in Sierra Leone. The Council was, however, enlarged until, just before its abolition, it contained five officials and four unofficial members of whom two were Africans. The inclusion of two African members in the Council reflected a drastic departure from other constitutions that were granted since 1765. The African members might have been docile instruments of the Victorian colonisers but it nonetheless demonstrated the desire and willingness of Britain to inculcate in the Africans the basic techniques of running a "civilised government."

⁷ Letters Patent 24 June 1843.

⁸ Vide supra, pp. 12-14.

⁹ Letters Patent 20 February 1866.

2. THE ERA OF EXPERIMENTATION

Uncertainty over Gambia's constitutional status finally came to an end when she ceased to be a dependency of Sierra Leone. In 1888 The Gambia was once again granted a legislature that was, through a slow process of constitutional evolution, to mature into a House of Representatives.¹⁰ The Letters Patent and the Royal Instructions referred to the Officer responsible for the administration of the colony as "Governor" though the government of the colony was initially vested in an Administrator. The Letters Patent establishing the government did not spell out either the composition of the Legislative or Executive Council. These matters were dealt with in the Instructions issued to the Governor.

The Legislative Council consisted of the Governor, the Treasurer, the Chief Magistrate and Collector of customs and such other persons holding office in the colony as ex-officio members. Provision existed for the appointment of unofficial members who could hold office for five years and were eligible for re-appointment. The Governor could appoint extraordinary members to the council in order to advise on any matter about to be brought before the Legislative Council. The Governor was the President of the Council and any matter brought before the Legislative Council was to be decided by majority vote with the Governor having both original and casting vote.¹¹

¹⁰ Letters Patent November 28, 1888.

¹¹ Royal Instructions, 1888.

In the making of Ordinances, the Governor had a negative voice and any ordinance enacted by the Legislature could be disallowed by the Crown. Initially the Council was a legislature for the colony area only as the Letters Patent and Royal Instructions issued thereunder limited its legislative authority to the colony. In 1893 the Legislative Council for the time being of the colony was empowered to exercise ample and plenary legislative authority in the protectorate by Ordinance or Ordinances in order to give effect to any jurisdiction acquired or to be acquired by the crown under the Foreign Jurisdiction Acts.¹² The first Ordinance passed by the Legislature for the administration of the Protectorate was the Protectorate Ordinance 1894,¹³ the relevant provisions of which will be discussed in another context. The composition of the Council was enlarged in 1915 to include the Governor--the Administrator was upgraded to the rank of a Governor in 1901--and the Colonial Secretary as ex-officio members, four official and three unofficial nominated members: of whom one was to represent the business community and two to be filled by African Christians from Bathurst. In 1921 the African Christian representation was reduced to one to make room for the nomination of one Muslim member.¹⁴ The Protectorate, which was still inaccessible and where educated people could hardly be found, had no nominated representative on the Council

¹²Order in Council, 1893.

¹³Ordinance No. 11 of 1894.

¹⁴Alhaji Ousman Jeng was the first Muslim member of the Council.

until 1932. The enlargement of the Council and the inclusion of a protectorate representative seemed to give an impression that the Council was in reality a representative body and that the membership could clog the powers of the Governor. This concept was more apparent than real for as Sir Martin Wight explains, "the majority of the members of the Council are colonial officials, heads of departments who themselves with the Governor form the government of the colony."¹⁵ The preponderance of the official majority was indeed frustrating; the presence of the unofficial members only provided a mask to cover the undisputed gubernatorial powers.

This state of affairs could only be remedied by a revision of the constitution: a revision that would not only reduce the official majority in the Council but also introduce some measure of elective representation. The demand for elective representation was engineered by the Gambian branch of the British West African National Congress--a congress that had as its ultimate objective the achievement of self-determination by the colonised peoples. The Gambian branch of the Congress, like its counterparts in the other West African territories, drew its leadership from the legal profession and the business community. At that stage of the Colony's constitutional development the exponents of elective representation did not aspire to have unofficial majority representation in the

¹⁵Wight, p.22.

Legislative Council; the demand was for the purpose of having some moral influence on the representation of the people without really affecting the strength of the official majority in the Council. The demands of the Congress were scoffed at as "loose and gaseous talk" emanating from a self-appointed congregation of educated Africans who referred to themselves as the West African National Congress. Notwithstanding the scorn from the colonial administrations, the Gambian branch of the Congress continued to flood both the Colonial Office and Governor's Office with demands for elective representation.¹⁶ The Secretary of State for Colonies, unwilling to extend a liberal constitution to The Gambia, replied that "while I sympathise with their desire for elective institutions, I do not consider that education and political thought in the Colony, and still less in the protectorate (which could not be separated from the colony in any constitutional arrangement which might be made) have yet reached a level which could render elective institutions valuable."¹⁷

The end of the Second World War saw the emergence of nationalist movements on the West Coast of Africa. Britain had fought the war and dragged in her dependencies to fight against the Nazis on the grounds that democracy was threatened by the Nazis. The leaders of the nationalist movements thought,

¹⁶Ghana, Nigeria and Sierra Leone were given some degree of elective representation.

¹⁷Gambia 3/433 confidential M.P. No. 5.2831, 17 December 1942: Historical Notes on Executive and Legislative Councils, G.R.O. quoted in Langley's Pan-Africanism, p. 144.

and rightly so, that for Britain's adherence to democracy to be justified, the colonial people must be granted independence. Gambia, however, had no broad based nationalist movement that could act as a catalyst for the realisation of the political aspirations of its peoples. A group of individuals, notably Francis Edward Small, who was regarded by the colonial administration as a "self-appointed champion of non-existing grievances," spearheaded the struggle for the introduction of more liberal constitutions that would reflect the democratic structure of the government.

The first post-war major constitutional change took place in 1946. In that year, by the Gambia (Legislative Council) Order in Council 1946,¹⁸ the Legislative Council was reorganised. The Council now consisted of the Governor, three ex-officio members--the Attorney General, Colonial Secretary, and the Receiver General--three official members, six unofficial members, one of whom was to represent the protectorate and one elected member to represent Bathurst and Kombo St. Mary Division.¹⁹ The tenure of office of the nominated unofficial members and the elected member was three years. Though the new constitution provided for election of the elected member no Ordinance was passed to regulate this matter, but in 1947 the Governor, acting in pursuance of powers enabling him in that behalf, promulgated the Legislative Council (Electoral) Regulations, 1947.²⁰

¹⁸Gambia Gazette No. 4 Vol. 64 of 1947.

¹⁹The elected member was Hon. F.E. Small.

²⁰Regulation No. 7 L.N. No. 71 of 1947.

It might also be mentioned here that before the revocation of the 1946 constitution the number of elected members was increased to three.

The period of constitutional experimentation in The Gambia had not much to win the admiration of the nationalists. It was an era that strongly confirmed serious defects of colonial constitutions. The principle of official majority gave the debates in the Legislature an aura of artificiality. The Legislature was only used as the forum through which the Governor could give a summary of matters of interest in the colony; it acted as a veil on the autocracy of the Governor and provided an easy venue for sanctioning the decisions of the colonial administration. The paucity of the unofficial members made their presence on the council ineffective; though their opposition to any government measure would make the colonial administration reconsider its position, the Governor always had the official majority strongly lined to out-vote the unofficial members. The concept of nominated membership also meant that only those who were sympathetic to the colonial administration could ever find their way into the Council.²¹ The business of the Council was conducted as if it were a truly representative body. The Governor, as President, occupied the position of the Speaker; the officials sat to his right while the unofficials were on his left. This gave the impression that there existed

²¹ On the defects of colonial constitutions see Martin Wight: Colonial Constitutions, 1947. (Oxford University Press) and T.O. Elias: Government and Politics in Africa (Asia Publishing House, London, 1961), pp. 42-45.

in the Council an opposition and a government and the unofficial members unconsciously regarded themselves as the official opposition. But one Colonial Governor took opportunity to explain to the members that the notion of a government and an opposition was non-existent in a colony because "there is a difference between a Legislative Assembly and a House of Parliament. In the latter you have a government in contradistinction to an opposition, and if the opposition is strong enough it can throw out the government and take its place. In a Legislative Council, on the other hand, in no circumstances whatever can the unofficial members displace the official members and take over their duties from them. There is no such thing in an Assembly as a government and opposition--instead we have to realise that we form a single corporate body all of whose members are working equally towards the attainment of a single end."²²

The common end for which the corporate body was to work was the political independence of The Gambia, and the constitution which was still in operation left the territory many steps away from its goals.

3. THE ERA OF PARTIAL SELF-GOVERNMENT

The first post-war constitution did not last long; the

²²Gold Coast Legislative Council Debates, p. 21 quoted by Elias in his Ghana and Sierra Leone, the Development of their Laws and Constitutions (Stevens & Son Ltd., London), p. 36.

Governor announced that after reviewing the conditions in The Gambia from many angles he had come to the conclusion that the time was not only ripe for broadening the basis of representation in the Legislature but also for introducing an unofficial majority.²³ The Governor's proposals for a new constitution were submitted to the Secretary of State for Colonies who approved them. The Constitution was revised--a natural continuation of the 1947 Constitution--and embodied in The Gambia (Legislative Council) (Amendment) Order in Council, 1951.²⁴ The council was reconstituted to include three ex-officio members, three appointed official members, and eight unofficial members. Of the unofficial members, four represented the Protectorate and two were elected to represent Bathurst and one Kombo St. Mary Division. A Vice-President was appointed by the Governor to preside at the meetings of the Council in the absence of the Governor. Neither the Governor nor the Vice-President, when presiding, had a vote.

In 1953 Governor Percy Wyn Harris appointed a Consultative Committee to advise him on the future constitution of The Gambia in relation to the declared policy of Her Majesty's Government to help colonial territories to attain self-government within the Commonwealth and to establish in each territory institutions best suited to its circumstances. The Committee, which consisted

²³Gambia Gazette No. 31 Vol. 64.

²⁴SI 1951 No. 1169, Gambia Gazette No. 19 Vol. 68.

of members of past Legislative Councils and the Council then in being, met on six occasions in May of 1953. The four Portectorate representatives attended only two of the Committee's sittings as observers. The Committee after studying the outlines of the 1947 Constitution as amended in 1951 recommended, inter alia, that the people of The Gambia should be given an increasing share in the management of their own affairs.²⁵ The Committee's report was submitted to the Secretary of State for colonies. The Hon. Oliver Lyttelton, commended "the spirit of realism and co-operation" by which the members, who represented a wide variety of interests in The Gambia, have been able to submit an unanimous recommendation.²⁶ The report of the Committee, with minor modifications, formed the basis of The Gambia (Constitution) Order in council 1954.

The new constitution reconstituted the Legislative Council to consist of five official members and sixteen unofficial members. The Governor remained the President of the Council and continued the constitutional practice of attending the Council on formal occasions and addressed it when he wished. The office of Vice-President was abolished and in its stead the office of the Speaker was created. The Speaker henceforth presided at all the meetings of the Council unless prevented by illness or other incapacity.²⁷ Of the five officials, four were members

²⁵ Reports of the Consultative Committee Advisory to the Governor on the Constitution of The Gambia: Gambia Gazette No. 27 Vol. 70 of 31st July 1953.

²⁶ W.A.F. 39/1/01 Gambia No. 352.

²⁷ Sir John A. Mahoney was appointed first speaker of the Legislative Assembly.

of the Council ex-officio and they were the Colonial Secretary, the Financial Secretary, the Attorney General and the Senior Commissioner. The fifth official member was a Gambian public officer appointed by the Governor and named by office.²⁸ The sixteen unofficial members, except two, were elected. Three of the elected members represented Bathurst, one Kombo St. Mary Division and seven the Protectorate. Four of the seven Protectorate representatives were elected by Divisional Councils from names submitted by District Authorities and three by the Chiefs. The remaining three elected representatives from the Protectorate were selected by the Protectorate, Bathurst and Kombo St. Mary Division representatives from a list of nine names submitted by the Bathurst Town Council and the Kombo Rural Authority. The remaining two unofficial members were appointed by the Governor after consultation with the members of the Council.

The new constitution marked a gigantic leap in the country's constitutional development. It, along with the 1947 Constitution, dealt a serious blow to what has been described as "the plurality of the Governor's autocracy,"²⁹ namely the official majority. It also provided a direct link between the central administration in Bathurst with the traditional authorities and District Councils through the system of indirect elections. It also gave the Governor a large scope and field

²⁸Dr. S.H.O. Jones, then Director of Medical Services, was the fifth official member.

²⁹Wight, p. 22.

from which to choose members of the Executive Council. Probably the most significant consequence of the enlarged Legislature was the improvement and effectiveness of the unofficial members who, not being members of the Executive Council, felt more free to criticise Government policies; it also provided a large number of persons skill and experience in the affairs of Government. The greatest consolation of the Gambians about the new constitution was that it was not a constitution worked out by officials in Whitehall but one that emanated from their own spirit of co-operation and desire to meet the peculiar needs of The Gambia. As liberal as it was it had some defects, the most conspicuous of which was the Protectorate representation. Although the Protectorate had the largest number of elected seats in the Council, paragraph VIII of the Committee's recommendation excluded the inhabitants of Upper River Division from sending any representative to the Council as "they were not sufficiently close to Bathurst." The entire constitutional arrangement as it affected the Protectorate, though well intentioned, had the effect of denying franchise to the Protectorate people who formed the bulk of the territory's population and tended to create disparity in the political consciousness of the inhabitants of the same territory.

Three years after the introduction of the 1954 Constitution, a body of opinion in Bathurst held that the time had come for further constitutional change; the Governor was presented with several proposals from various bodies and persons in Bathurst. Though the proposals emanated from different bodies and persons with different interests they all had one common aim--the

removal from the Governor and the United Kingdom Government of all effective control of the internal affairs of the territory. The Governor found himself unable to concede to any of the proposals because they reflected the views of only Bathurst and the colony. The administration thought that any proposals for any form of constitutional change would have to take into account the views of the Protectorate people since they cannot be divorced from the colony in any constitutional arrangement that might be made. In the meantime Governor Harris was recalled and was succeeded by Sir Edward Windly who was Minister for African Affairs in the Kenyan Government. The new Governor conducted consultations with all interested groups on the future constitution of The Gambia. The consultations were held in Bathurst--The Bathurst Constitutional Conference of 6th to 11th March 1959--and was attended by unofficials from the colony and Protectorate. The conclusions of the Bathurst conference were embodied in The Gambia (Constitution) Order in Council, 1960.³⁰

The new constitution, by section 2, established a House of Representatives in the place of the Legislative Council. Membership of the House was increased to include the Governor, the Speaker, four ex-officio members--the Civil Secretary, the Financial Secretary, the Attorney General and the commissioner for Local Governments--not more than three Nominated Members

³⁰S.I. 1960 No. 701 published in Gambia Gazette No. 14 Vol. 77 of 1960.

and twenty-seven elected Members. The Speaker was to be appointed by the Governor after consultation with such Members of the House as were available. Seven of the elected members who were elected in accordance with the provisions of the Colony Elections Ordinance, represented Bathurst and Kombo St. Mary Division. Of the twenty Protectorate representatives, twelve were returned to the House in accordance with the provisions of the Protectorate Elections Ordinance and eight were elected by Head Chiefs to represent the traditional elements. Only persons born in the Protectorate could, under the new constitution, contest elections in the Protectorate.

4. THE DAWN OF INDEPENDENCE

Though the 1960 constitution did not go far to satisfy the aspirations of the Gambians, it nonetheless took the country one step nearer to independence. Organised party politics was earnestly begun. The Gambia Muslim Congress and the Democratic Alliance, which were respectively found by I.M. Garba-Jahumpa and the Reverend J.C. Faye, were merged into the Democratic Congress Alliance to put up a fight against the United Party and the People's Progressive Party. The United Party, like the Democratic Congress Alliance, drew its support from the urban population. It was founded in the 1950s when its leader Mr. P.S. Njie, a barrister, lost at the elections under the 1947 constitution as amended in 1951. The People's Progressive Party (P.P.P.) sprung from the Protectorate People's Society. At

its embryonic stage, the party was called the Protectorate Peoples Party but it was realised by the leadership that the use of the word "Protectorate" tended to give the impression of sectionalism. All the parties were interested to see independence achieved for the country as soon as possible. The political activism that followed the granting of the 1960 constitution signalled to the colonial administration that the wind of change was blowing at a high speed in The Gambia. An all party conference was convened in Bathurst from 4th to 11th May 1961 to discuss the next stage of Gambia's constitutional progress. The Bathurst conference did not produce agreement on a number of issues the most important of which were:

- (a) the composition of the House of Representatives;
- (b) the creation of a second chamber;
- (c) the number of chief's representatives and their voting right in the House; and
- (d) the appropriate time for holding elections under the proposed new constitution.

The Bathurst conference was followed by another conference in London, which lasted from 24th to 27th July 1961. Before the start of the conference the Gambian delegates met and agreed on the issues that were left unsettled at the May conference in Bathurst. A revision of the 1960 constitution was necessary not because of any inherent defects in it but because of the growth of political consciousness in The Gambia and the political developments in the surrounding countries of

West Africa. The innovations which were required in the country's constitutional structure were:³¹

- (a) an increased responsibility to be placed on Gambian Ministers;
- (b) reconstitution of the House of Representatives so that it more directly represents the people;
- (c) fresh general elections to elect representatives to the reconstituted House of Representatives.

Sir Dauda Jawara, the leader of the P.P.P., had gone to the conference with the hope that independence for The Gambia would be granted in January, 1963. He expressed the views that firm indications for the independence of the country ought to be given at the conference. Mr. M.E. Jallow, Mr. Sheriff Sisay and the leaders of the Democratic Congress Alliance agreed with Sir Jawara's views on the question of independence. Mr. P.S. N'Jie, who was then Chief Minister, considered it inappropriate to fix a date for independence at the conference; he considered it appropriate for the government which would emerge from the next stage of constitutional change to negotiate for a date for independence. The other independent delegates, Mrs. Rachel Palmer and Mr. Henry Madi, and the Chiefs' representatives at the conference, Seyfo Omar M'Bake, considered that, while the ultimate aim should be independence, the conference should not look forward further than to the creation of full internal

³¹Gambia Constitutional Conference, London 1961 Cmnd 1469, p. 2.

self-government.³²

The wishes and hopes of Sir Jawara and his supporters both at the conference and in The Gambia for the early attainment of nationhood by The Gambia were shattered. Mr. N'Jie and those sympathetic to his views emerged with moral victory, a moral victory that ultimately kept his party in the minority. The greatest achievement of all the delegates was the revocation of the 1960 Order in council. A new Constitution was granted by The Gambia (Constitution) Order in council, 1962.³³ The new constitution restructured the House of Representatives to consist of thirty-two elected members who would be returned from single member constituencies on the basis of universal adult suffrage. Seven of the elected members represented the Colony and twenty-five the protectorate. The number of chiefs' representatives was reduced to four and these were elected by chiefs in Assembly. The Attorney General continued to be a member ex-officio, without a vote, the nominated members were not to be more than two. The Speaker was appointed by the Governor after consultations with the Premier and provision was made for a Deputy Speaker to be elected by the House of Representatives from amongst its members. The most drastic change was the abolition of the requirement that candidates for protectorate constituencies were either to be born or registered in the protectorate. The usual legislative powers of the House were

³² Cmnd 1469.

³³ SI 1962 No. 826.

retained; and the leader of the party which commanded or appeared to command the majority in the House was to be appointed Premier. The Governor retained the responsibility for internal security, external affairs, defence and the public service.

One of the principal conclusions of the 1961 London conference was that a general election should be held under the 1962 constitution not later than May 1962 "if this is administratively possible."³⁴ Accordingly in May, 1962 a general election was held under the new constitution. Sir Jawara's Peoples Progressive Party swept 17 seats while Mr. N'Jie's United Party did with 15 seats. Jawara was in accordance with the letter of the constitution appointed Premier. The results of the 1962 general elections brought with it a constitutional impasse that added to the "small crop of eccentric cases in which the courts have been belatedly called upon to determine the ambit and competence of the Crown's legislative powers in relation to colonies."³⁵

In Mamadi Sabally Vs Ian Coghill, Mamadi Sabally an unsuccessful candidate in the protectorate constituency of Sabach-Sanjally filed a petition against Ian Coghill in the Supreme Court of the Protectorate seeking a declaration that the register of voters as compiled and certified by the defendant was invalid because of non-compliance with the Protectorate Elections (Amendment) Ordinance, 1961 which provided for the

³⁴ Cmnd 1469.

³⁵ Annual Survey of Commonwealth Law, 1965 (Butterworths London, 1966), p. 11.

revision of the 1959 register and not a compilation of a new register as the defendant did. Chief Justice Wiseham dismissed the claim but on appeal to The Gambia Court of Appeal the order of the Chief Justice was set aside. It was conceded that as a result of the Court of Appeal's decision the elections of the twenty-five Protectorate representatives were invalid. The government could not function as the required quorum for convening a meeting of the House of Representatives could not be obtained. The result was that there was no legally constituted government and the only solution to the constitutional impasse was either a fresh general election or legislative intervention by some other competent authority other than the House of Representatives. The situation was remedied by the Gambia (Validation) order in council, 1963,³⁶ which validated retrospectively the invalid elections of May 1962. Section 4 of the Order in council provided that "Section 6^A of the Protectorate Elections Ordinance (as inserted by Section 4 of the Protectorate Elections (Amendment) Ordinance 1961) shall have effect, and shall be deemed always to have had effect, as if the references therein to the registers of voters included references to the 1961 registers." Sabally and Mr. E.D. N'Jie dissatisfied with the Order in council brought an action against Her Majesty's Attorney-General sub nom Sabally and N'Jie Vs H.M. Attorney-General.³⁷ They contended that the Crown exceeded its

³⁶SI. 1963 No. 1051.

³⁷(1964) 3 W.L.R. 732.

powers in validating the invalid elections as there were no powers reserved to the Crown to revoke or amend the constitution and that section 74 only reserved to the Crown the power to make laws from time to time for the peace, order and good government of The Gambia. The trial Judge Salmon L.J. dismissed the action on the grounds that the constitution of 1962 was granted not only in the exercise of the Crown's prerogative powers but also by virtue of the British Settlements Act 1887³⁸ and the Foreign Jurisdiction Act³⁹ 1890 sections 5 and 10 respectively of which were wide enough to give the Crown plenary legislative powers to validate retrospectively the 1962 elections. The Court of Appeal (England) upheld the decision of the trial Judge despite the fact that there were differences in their reasoning. The doctrine that once a representative legislature is granted to a colony the Crown renounces its prerogative power to legislate for that colony found, in the particular circumstances of the case, no sympathy with their Lordships since "the implied renunciation of the Crown only applies while the legislative institutions are in existence and capable of functioning. If the legislative institutions set up by the Crown cease to exist, or are for any reason incapable of functioning, then the Crown must be able to resolve the impasse. It can in that event resort to its prerogative power to amend the constitution or set up a new one."⁴⁰

³⁸ 50 and 51 Vict. C54.

³⁹ 53 and 54 Vict. C37.

⁴⁰ Per Denning L.J. at p. 744.

The arguments of the appellants that the Order in council of 1963 was an Order granting a new constitution was perhaps based on the fact that the 1962 constitution could not work without the Validation Order and that reliance on the British Settlements Act and the Foreign Jurisdiction Acts was an attempt to write into the 1962 constitution a provision that was deliberately omitted. But in truth the Validation Order in council was not an Order granting a new constitution nor was it an Order amending the existing constitution for as the Court pointed out "Assuming for this purpose that what are called constituent powers can only be subject to the prerogative, I am of the opinion that section 28(3) of the Order of 1962, with which alone it is sought to interfere, has nothing to do with constitutional matters: it deals merely with the machinery for setting up voting registers and has no concern at all with the constitution or membership of the House of Representatives."⁴¹ The Validation Order was done in the exercise of the power to legislate which was reserved to the Crown by section 74 of the 1962 constitution.

The decision of the Court of Appeal (England) in the Sabally case cleared the way for the convening of another constitutional conference. One of the main conclusions at the 1961 constitutional conference was that independence for The Gambia in one form or the other should be shelved for consideration during the next stage after the new constitution had come into operation. The government outlined its proposals

⁴¹Per Harman L.J. p. 747.

for independence in Sessional Paper No. 12 of 1964 and therein indicated the various types of government that Gambia may opt for at independence. A conference was therefore convened at Marlborough House London from 22nd to 30th July 1964 to discuss and settle the form of constitution for The Gambia and the date on which independence should be attained. The Gambia delegation included Prime Minister D.K. Jawara and the members of his government, the Leader of the Opposition Mr. P.S. N'Jie and three Opposition members. The conference agreed that Gambia should become an independent nation within the commonwealth and that Queen Elizabeth the Second would continue to be Queen of Gambia and represented by the Governor-General. The retention of the British monarch was considered as a more practical and sensible approach to make transition to independence smooth with the minimum of dislocation. The Independence constitution, it was agreed, should be based on the Constitution as contained in The Gambia (Constitution) Orders in Council, 1962-1964.⁴² The most contentious issue at the conference was the date for independence. The government sought approval for independence to be attained on 18th February, 1965 but the Opposition could not commit themselves without a fresh general election being held before independence. The British Government, however, saw no compelling reasons which justified the holding of elections before granting independence. The conference

⁴² Cmnd Paper. 2345.

accordingly agreed that Gambia should attain nationhood on 18th February 1965.⁴³

LEGISLATIVE POWERS OF THE COUNCIL

Before concluding our survey of the growth of the Constitution we may take a brief look at the functions of the Legislatures established thereunder.

The Council was the principal law making institution in the country. It had authority to enact Ordinances for the peace, order and welfare of the Colony. All ordinances were enacted by the Governor with the advice and consent of the Legislative Council. Every Bill that received the assent of the Governor was numbered and the Governor had a negative voice in the making of Ordinances.

Any member of the Council could propose or bring before the Council any matter for discussion, but this was subject to the veto of the Governor. Where the Governor exercised his powers of veto--this was rarely done--he was bound to report the matter to the Secretary of State for Colonies and must state his reasons for so doing. It was only the Governor who was competent to bring before the Council any matter dealing with taxation or expenditure from the revenue.

⁴³Mr. P.S. N'Jie and his Opposition colleagues refused to sign the agreements reached at the conference on the grounds, inter alia, that (a) their demands for elections had not been accepted; and (b) the question of association with Senegal had not been put before the electorates of The Gambia.

Ordinances passed by the Legislature must not be repugnant to any order in force in the colony, nor were they to be repugnant to any law of England which was expressly made applicable to The Gambia or which by necessary implication applied to The Gambia. There were certain Bills to which the Governor could not give his assent without the signification of the Crown in the Colony unless a provision for the suspension of the ordinance was included. These were Bills dealing with divorce; grants of land or money to the Governor; currency or the issue of bank notes; imposition of differential duties; matters inconsistent with the treaty obligations of the Crown; the discipline of land, air or sea forces; the exercise of the royal prerogative; the rights and property of British subjects not resident in Gambia; the trade or shipping of the United Kingdom and dependencies. In addition to these the Governor was prohibited to assent to any Bill that had the effect of subjecting or making liable persons not of European birth or decent to disabilities or restrictions to which persons of European birth or decent are not subjected or made liable.⁴⁴

In the making of Ordinances all native customs as well as the rights of native inhabitants were not to be interfered with except in so far as these may be incompatible with the due exercise of the powers and jurisdiction of the Crown or clearly injurious to the welfare of the natives.⁴⁵

⁴⁴Royal Instructions, 1946, Section 16.

⁴⁵Ibid., s. 17.

SUMMARY AND CONCLUSION

The evolution of Gambia's Constitution as evidenced by the development of its Legislative Council corresponds to the pattern as in other dependencies in West Africa. The granting of a constitution and the subsequent establishment of the Legislative Council took place not because it was demanded by the native inhabitants but largely to satisfy the needs of the white "settlers" who found themselves on the shores of The Gambia. The Council provided the forum for deliberations on the affairs of the colony. Initially the entire establishment seemed to be personalised in the Governor, who occupied the position and carried out the functions of the Crown; he was practically for all purposes the Council though the 1765 constitution also required him to be assisted in the administration of the Colony by officials of the most important departments. Later constitutions, however, specified that membership of the Council was to consist of the Governor and such persons holding offices in the colony. It appears that these persons were not, so to speak, only to assist the Governor but were also for all purposes members of the Council. This therefore effectively removed from the Governor his powers of acting as the legislature and vested the entire legislative authority in a council the members of which still continued to be the officials of the Colonial service. In theory the Governor's powers were whittled but the presence of the official majority in the Council only helped to pluralise his powers. Legislations were easily

channelled through the Council. This was to be expected as no official member would vote against any measure brought before the Council because they constituted the spinal cord of the colonial administration. The Council acted as a forum for explaining Government policies to the unofficial members for the benefit of the local inhabitants; the unofficial members, numerically weak and ineffective as they were, could not put up any meaningful opposition to Government measures. It is, however, fair to say that when the Government found itself with solid and concerted opposition from the unofficial members on any measure, it invariably reconsidered its position.

As we noted, when the principle of nominated membership of the Council became intolerable to the politically conscious local inhabitants, demands were made for the democratic right of the citizens--the right to elect their representatives. These demands were channelled through the medium of the National Congress of British West Africa, a congress that had as its ultimate aim the liberation of British West Africa from colonial rule. Their demands were greeted with official scorn and it was not until 1947 when The Gambia was privileged to elect one representative to the Council. The principle of official majority lingered on until, in 1954 when it was abolished. Its abolition however only took away from the colonial administration one of its chief weapons but subsequent pre-independence constitutions including that of 1954 found a suitable substitute for it; namely the concept of the Governor's reserved

powers, which "simply unmask the ultimate responsibility of the Governor" and "more fittingly institutionalised in the system of reserved powers."⁴⁶ It is however fair to point out that the use of the reserved powers was rare and where they were used the exigencies of the circumstances called for it. It was equally essential to vest in the Governor such general powers as he was ultimately responsible to Whitehall for any matter pertaining to the administration of the Colony.

The Colonial administration, probably following the examples of the Gold Coast and Nigerian administrations, for the first time in 1954 allowed the Gambians to work out a constitution for The Gambia. That constitution, which in theory sprung from the deliberations of the Gambians themselves, abolished the concept of official majority and brought into the Council a large number of representatives from the Protectorate. One of its credits was the exposure of the traditional elements to the parliamentary system of government, a practice that has been continued even after independence, by providing for the local chiefs to elect their own representatives to the Legislature. This system served to marry the Legislature to the District Authorities. The constitution of that year, as benevolent as it was, sought to, and in fact did, impose on the Protectorate people representatives who could hardly represent them. As we observed earlier in this chapter, three of the Protectorate representatives were elected indirectly from a list of members

⁴⁶Wight: Colonial Constitutions, p. 32.

of the Bathurst Town Council and Kombo Rural Authority. This system amply demonstrates the defects in earlier constitutions that excluded the Protectorate inhabitants from membership of the Council. This had the unavoidable result of creating a big cleavage between the colony and Protectorate in the political awareness of their inhabitants.

When the liberalisation of the constitution and democratisation of the Legislature was begun in 1954 it became an on going matter. The political parties that were on the scene, devoid of ideology as they were, all had one common aim--the ultimate independence of the Colony. Their approaches to the political problems that were likely to beset the infant nation were not essentially dissimilar. All favoured some sort of association, if not a complete merger, with Senegal. But the political parties reflected the personalities of their leaders and they often adopted opposite view points just to promote the political fortunes of their leaders. This became more apparent at the constitutional conferences that took place on the dawn of independence though invariably their differences were always settled before facing the Officials of the Colonial Office. One of the contentious issues on which the parties at the last constitutional conference could not reach agreement was the method of safeguarding the institution of chieftaincy. While the Government was agreeable to protecting that institution by providing that any Bill abolishing the office of a chief could not receive Royal Assent unless supported by two-thirds

vote in the Legislature, the opposition considered such safeguard insufficient and suggested the alternative of entrenching the safeguards in a special provision.⁴⁷ It is not difficult to see the motive underlying the opposition's proposals and it can hardly fail to win the sympathy of those in the opposition party and those conversant with the party politics of the country in the first three years of the 1960s: it was the chiefs who sustained Mr. P.S. N'Jie in power as Chief Minister when his party was actually in the minority.

One more thing we ought to mention before concluding our discussion on the Legislature was the reserved power of the Crown to legislate for the peace, order and good government of The Gambia. The reservation of this power by the Crown after the establishment of a legislature to serve the same purpose only confirmed the subordination of the Legislature to the Imperial government. It only served to indicate that there exists for the colony two legislative authorities both concurrently possessing ample and plenary legislative powers in the Colony, and this fact has been amply demonstrated by the facts giving rise to the case of Sabally and N'Jie Vs H.M. Attorney General.⁴⁸ The virtues of the reserved powers of the Crown to legislate for Gambia rescued The Gambia from a constitutional impasse that would have temporarily halted its march to independence

⁴⁷ See The Gambia Independence Conference 1964, Cmnd 2435.

⁴⁸ (1964) 3 W.L.R. 732.

and delay the transfer of the conduct of Gambian affairs to men whose demands, for self-determination and democratisation of principal institutions of government, were at one point in history described as "loose and gaseous."

CHAPTER THREE

THE DEVELOPMENT OF THE EXECUTIVE COUNCIL

The introduction of colonial rule in Gambia meant the establishment of institutions that would cement and sustain the authority of the colonial administration. While, as we have seen, a legislature was established to make Ordinances for both the colony and Protectorate the implementation of these Ordinances and whatever regulations were made under them could not be left to the Legislature. The task of formulating policies and the preliminary steps necessary to implement them by legislation came within the province of a sister institution of the Legislature, namely the Executive Council. The Executive Council, which just before independence matured into a cabinet, was, as should be expected, for the most part of the colonial era the dominant institution as its members and President were answerable to no one in the colony. Its dominance was only limited with respect to its activity within the colony and in relation to the Legislature, which its members invariably used as a rubber stamp for endorsing its policies. It was as subordinate to the Imperial government as the Legislature was subordinate to it. Like the Executive Councils of the other colonial dependencies in West Africa, the Executive Council for the colony of The Gambia did not, at its embryonic stage, provide room for Unofficial Members; but the system of excluding Unofficial Members, particularly African members, was departed from when some of

the most articulate and vocal of the local inhabitants began to highlight the defects of the Colonial constitutions. This chapter, like the previous one, will trace the development of the Executive Council, and discuss how, by the various constitutional instruments, the Governor's autocracy was eroded when the principle of official majority in the Executive Council yielded to the principle of unofficial majority. But our discussion will indicate that the principle of official majority was a device to conceal the real powers of the Governor; these powers became more apparent when, with the disappearance of Official members from the Executive Council, the constitutions of the early sixties vested reserved powers in him. We will now consider the various constitutional instruments as they related to the development of the Executive Council and the relationship of the Council to the Governor.

As we have noted earlier, the system of organised government was introduced in Gambia when the territory, as part of the Senegambia Province, was vested in the Crown and accordingly declared a Crown colony. It is not certain whether the establishment of a Legislative Council was followed by the creation of an Executive Council, but it is safe for one to assume that both organs of government were established simultaneously or in the same period. This assumption is fortified by the fact that a Governor and four ex-officio Members of the Legislative Council were in existence, and further evidence to buttress the assumption lies in the fact that it is un-British to entrust

the formulation of policy and legislative powers to one and the same body. The Government of the Senegambia Province was, however, abolished and its constitution withdrawn. The administration of the Colony--now separated from Senegambia--was subsequently revested in the Crown but notwithstanding the Act of 1821,¹ it would appear that no Executive Council was established for The Gambia until in 1843. In that year the Letters Patent severing the administrative link between Sierra Leone and Gambia established an executive council for the Colony of The Gambia to advise and assist the Governor in the administration of the colony. This Council, which existed for only twenty-three years, was composed of only heads of the most important departments. It was abolished in 1866 when Gambia with the other British Colonies in West Africa were, as a result of the recommendations of the Select Committee of the House of Commons, put under a central administration with the seat of government in Sierra Leone. Gambia's affiliation to Sierra Leone came to an end in 1888 and that year marked the normal and undisturbed development of the Executive Council.

Letters Patent of November 1888 erected The Gambia into a separate crown colony with a government answerable only to the Imperial Government. The composition of the Executive Council, which was established as a result of the Colony's new acquired status, was defined in the Instructions to the Governor.² The Council consisted of the Lieutenant Governor

¹ 1 and 2 Geo. IV, C. 28.

² Royal Instructions 28 November 1888.

and all the Official Members of the Legislative Council. The Governor had power to appoint to the Executive Council any member who had special knowledge on any matter to be brought before it for discussion. He was required to consult the Council on all matters affecting the administration of the Colony except where the urgency of the situation makes any consultation impracticable, or the unimportance or trivial nature of the matter makes it unnecessary for him to hold consultations with the other members of the Council. Only the Governor could submit matters to the Council for advice but other members were at liberty to request the Governor to submit any matter to the Council for its consideration. He was not obliged or required by law to accede to a member's request but where such request was refused the Governor's refusal must be recorded on the minutes of the Council's meeting; in addition to the recording of the Governor's refusal, the records must indicate the written application of a member's request and the Governor's answer thereto.

In its deliberations the Governor could act in opposition to the Executive Council but must report to the Secretary of State for Colonies his ground for so doing and members may require their opinions to be recorded in the minutes, which were forwarded to the Secretary of State twice annually. The constitution seemed to vest extraordinary powers in the Governor in relation to the Executive Council. The Executive Council was in theory the principal policy making body of the

government but in reality it was only an advisory body which the Governor may consult. The Governor was not even bound to follow its advice; this imperfection in the constitutional arrangement demonstrated the impotence of the Executive Council. This impotence is further demonstrated by the fact that the clause requiring the Governor to consult with the Executive Council had an important exception tagged to it. No standards were laid to define what constituted an urgent situation or an unimportant matter or a matter of trivial nature. These were left for the determination of the Governor. The system of colonial administration lends justification to the unlimited powers vested in the Governor since "in a crown colony the direction of policy is in the hands of the Governor alone, subject to the supervision and control of the Secretary of State for Colonies. There is no one in the Colony with whom he shares that responsibility and there is no body in the Colony to which he is responsible."³ He was not only responsible for the direction of policy in the colony but was also the representative of the crown and in that capacity had authority to exercise the Crown's Jurisdiction and powers as he saw fit subject only to the instructions vesting the Crown's powers and jurisdiction in him. As the chief executive, the Governor was required to

³Statement by Sir Bernard Burdillon. Quoted by T.O. Elias in his *Nigeria: The Development of its Laws and Constitution* (Stevens & Sons, London, 1967), p. 29.

promote religion and education among the native inhabitants, and protect them in their persons and in the free enjoyment of their possessions, and by all lawful means to prevent and retain all violence and injustice which may in any way be practised or attempted against them. In a government where no cabinet system existed, it can hardly be expected for the head of the principal policy-making organ to be answerable to any group of individuals in the Colony. This may be the only explanation for vesting extensive powers in the Governor to the extent that he could act in opposition to the entire Executive Council. The composition of the Executive Council remained unaltered for the most part since the introduction of the 1888 constitution.⁴

The Governor and his principal aids continued to dominate the Executive Council; the Unofficial Members had to be content with airing the opinions on government policies in the Legislative Council. They could not propose or implement policy as the organ responsible for this was shut to them. The first post-war year was a significant year for the West African Colonies and even The Gambia, which had no major constitutional change in the pre-war days, benefited from the new constitutions Britain was granting her colonies in West Africa. The first "liberal" constitution, which did not only increase the membership of the Executive Council but also inaugurated unofficial membership was the Gambia (Legislative Council) Order, 1946.

⁴However, Sir Martin Wight indicates that there was an Unofficial Member on the Executive Council between 1892 and 1895-- Wight, The Development of the Legislative Council 1606-1945-- (Faber & Faber Ltd., London), p. 131.

Under that constitution, the Council was reconstituted to consist of the Colonial Secretary and such other persons who were styled ex-officio members. There were five ex-officio members including the Colonial Secretary. The unofficial members consisted of three unofficial members of the Legislative Council one of whom was the elected member for Bathurst and Kombo St. Mary electoral district. The tenure of office of the appointed members of the Council was three years or such earlier period as may be specified in the instrument appointing them or by resignation addressed to the Governor. An appointed unofficial member would vacate his seat in the Council on being appointed permanently to any office of emolument under the Crown or if he was absent from the colony without the permission of the Governor. The Governor was the President of the Council and he was required to preside at all its meetings if practicable. The extensive powers vested in the Governor under earlier constitutions continued to be vested in him and in addition he was empowered to suspend any member of the Council and effect temporary appointment.

The inclusion of unofficial members in the Executive Council was an attempt to bridge the gulf between the Executive and Legislative Councils;⁶ it also at the same time entrusted responsibility without power to the unofficial members. A further step was taken in 1953 when a consultative committee was set up to advise the Governor on the form of the next

⁶Ibid., p. 27.

constitution it was proposed to grant The Gambia. As we already noted, the Committee recommended the transfer of the management of the internal affairs of Gambia to Gambians. With an enlarged Legislative Council the Governor could appoint a lot more Gambians to the Executive Council and give them ministerial responsibilities. Giving ministerial responsibilities to Gambians, it was argued by the framers of the new Constitution, "will give real authority and prestige to the Ministers and they will be able to speak for us on equal terms with the outside world--particularly our neighbours in West Africa."⁷ These recommendations led to the restructuring of the Executive Council under The Gambia (Constitution) Order in Council, 1954;⁸ the Council was enlarged by increasing its membership to twelve, seven of whom were unofficials. The Senior Commissioner, who was de facto Minister for Local Governments, was given a seat in the Council to represent the Protectorate interest. Provision was made for the appointment by the Governor, after consultations with the unofficial members of the Legislative Council, of no less than two and no more than three Ministers with portfolio responsible for certain departments. In pursuance of this constitutional arrangement, the Governor acting under section 19 of the Constitution appointed three Ministers to be assisted by a committee which had advisory function only.⁹ The idea

⁷Gambia Gazette No. 27 Vol. 70 of 31st July 1953, p. 180.

⁸S.I. 1954 No. 1145.

⁹See L.N. No. 69 of 1954.

of an advisory body assisting a Minister was the baby of the Consultative Committee; it was an awkward arrangement that really left enough room for struggle between a Minister and the appropriate heads of departments that constitute the advisory committee. While the Committee would want to see a Minister endorse a particular proposal given in pursuance of their expert advice, the tendency of resistance by a Minister, who for all purposes regarded himself as the political head of the department and ultimately answerable to the Legislature, was always great. The intention underlying the setting up of the Committee was, it is submitted, to indicate to the Gambian Ministers that their responsibilities for the departments assigned to them were to be shared with the civil service heads of these departments and that ultimate responsibility for the departments were still vested in the Governor. This ultimate responsibility of the Governor was clarified by the provision that though a Minister was not bound to follow the expert advice of a committee, he was, when requested to do so by the Committee, bound to refer the matter to the Executive Council. This was a position akin to the position of a colonial governor in relation to his executive council. He was not bound to follow any advice tendered by the Council, but any councillor may ask the Governor to forward his views to the Secretary of State.¹⁰

The inauguration of the concept of ministerial responsibilities called for guidance and enlightenment of those upon whom the

¹⁰W.E.F. Ward, *Government in West Africa: 4th Revised Edition* (Allen & Unwin Ltd. London, 1972), pp. 174-175.

responsibilities were thrust if their duty and their interest were not to come into conflict.¹¹ To avoid the situation where the members of the Executive Council, and in particular those assigned ministerial responsibilities would find their public duty in conflict with their private interests, certain guidelines were laid by the Secretary of State for the guidance of all the members of the Executive Council.¹² These guidelines or rules of obligations required Ministers upon assumption of office:

- (a) to resign all directorships except honorary directorships;
- (b) to resign paid official positions in trade unions and cease to actively participate in the affairs of trade unions;
- (c) not to enter transactions whereby their private pecuniary interest would be in conflict with their public duty;
- (d) not to use official information which comes to him in his capacity as Minister for private gains;
- (e) not to put himself or allow to be put in a position that could lead him to use his influence as a Minister in support of any scheme or in the furtherance of any contract in regard to which he has an undisclosed private interest;
- (f) not to use his influence to support a candidate

¹¹T.O. Elias: Ghana and Sierra Leone, p. 252.

¹²Dispatch No. 517; Gambia Gazette No. 46 Vol. 71 of 15 November 1954.

- for admission to or promotion in the civil service;
- (g) to reject favours from persons negotiating with or seeking to enter into contractual relations with government;
- (h) not to speculate investments in securities as to which from their positions and their special means of early or confidential information they may have advantage over other people in anticipating market change.

These rules of obligations or conflicts of interest code were not formally enshrined in the constitution; they were based on the custom and practice of the constitution as practised in the United Kingdom.

The reconstitution of the Executive Council in 1954 was a landmark in the constitutional development of The Gambia as it associated the Gambians not only with policy initiation but also with its implementation. It began the earnest transfer of both power and responsibility to Gambians and the gradual erosion in the executive powers of the Governor. It, however, left The Gambia many steps away from the total committal of power and responsibility in the hands of the local inhabitants. The next step towards this direction was taken in 1960 under The Gambia (Constitution) Order in Council, 1960.¹³ Under the 1960 Constitution the composition of the Executive Council was redefined; it consisted of four ex-officio members' (the

¹³S.I. 1960 No. 701.

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Gambian appointed official Member of the Executive Council under the 1954 constitution Dr. S.H.O. Jones, then Director of Medical Services was dropped) and not more than six appointed members. The six appointed members were to be selected from the elected or nominated members of the House of Representatives of whom not less than three were to be charged with responsibility for any matter that might be assigned to them. Members who were charged with responsibility for specific matters were styled Ministers and those without specific responsibilities were styled Ministers without portfolio. The Governor, as usual, continued to preside at all the meetings of the Council and he was responsible for co-ordinating the activities of all the ministries.

In 1961 it was considered that the time was ripe for the appointment of a minister to co-ordinate the functions and activities of the other ministers. It was not easy to select any particular individual acceptable to all the parties in the House of Representatives. Hon. D.K. Jawara's P.P.P. commanded eight seats while Hon. P.S. N'Jie's U.P. had six elected seats to its credit in the House of Representatives. The chiefs, who at this time were a powerful political force in the House, tilted the scale in favour of the U.P. and Hon. P.S. N'Jie was appointed Chief Minister. Jawara, who thought that he was unfairly by-passed for appointment as Chief Minister, resigned from the Executive Council with his party colleagues. There is some argument for the resignation of Jawara and his

colleagues from the Executive Council. If from the political atmosphere then prevailing in the House of Representatives, it was desirable to appoint a Chief Minister, the tradition and practice of the British Constitutional Convention, which was being taught to the Gambians, ought to have been followed. Jawara and his party certainly had not commanded an impressive majority in the House. Be that as it may, the practice of according the leader of the majority party in the House the title of Chief Minister ought, it is submitted, to have been accorded him until it is shown that his party could not, in the face of the formidable opposition by the United Party and Chiefs' Representatives in the House of Representatives, attain the objectives and execute the responsibilities which the office of the Chief Minister entailed. However, that was the price Jawara's P.P.P., which drew its leadership from inexperienced men and novices at the art of party politics, had to pay for their open antagonism to the Chiefs. The Constitution itself was an improvement on its predecessors. While the 1954 constitution had provided for the appointment of not more than three Ministers, the new constitution did not limit the number of persons who may be charged with ministerial responsibility though it did specify a minimum number—~~not less than three~~ members of the House of Representatives were to be given ministerial responsibility. Another improvement was the abolition of the advisory committee set up to advise ministers. A minister was no longer obliged to follow the advice of the expert civil servant nor was he bound to refer any matter to the Governor

and the executive council in the event of his decline to follow an advice tendered by the civil service head of his department.

Not long after the granting of the 1960 constitution it was recognised by all the political parties and indeed by Great Britain that the gradual committal of power and responsibility to the Gambians must now be accelerated for obvious reasons, the principal one being the political development in both French and British colonies in West Africa. It was also felt that the fostering of any meaningful relations between The Gambia and her neighbours, particularly Senegal, could not be effected by an executive council which was not only limited in its powers but one that also drew its membership from British Colonial civil servants. In recognition of these facts a new constitutional instrument--The Gambia (Constitution) Order in Council 1962¹⁴--was drafted to enable the British Government transfer increased responsibility to Gambian Ministers. The Constitution provided for the post of a Premier on whose advice the Governor was to act subject to certain exceptions. The Executive Council composed of the Governor as President, a Premier and not fewer than eight ministers appointed from among the elected members of the House of Representatives. The Premier was to be an elected member of the House and must be the leader of the party that commands the support of the

¹⁴S.I. 1962 No. 826.

majority in the House or if there is no person whose party commanded the support of the majority, the elected member who, in the Governor's opinion, was most likely to command the support of the majority. Ministers were appointed by the Governor on the advice of the Premier. The Financial Secretary, Chief Commissioner and Civil Secretary disappeared from the Council. The Financial Secretary attended the meetings of the Council only when appropriate. The post of Civil Secretary was abolished and in its place the office of Deputy Governor was established. The Deputy Governor was to assist the Governor in matters for which the Governor still had responsibility, and to administer the Government of The Gambia in the absence of the Governor. The Governor continued to be responsible for internal security, external affairs and defence, and the public service. Though the Governor continued to be the President of the Council, the Premier could also under instrument authorising him in that behalf, preside at meetings of the Executive Council in the absence of the Governor or the Deputy Governor when the latter was administering the government. The only Colonial Officer who remained a member of the Executive Council was the Attorney-General. As a member of the Executive Council, the Attorney-General was not a minister but a public servant who was privileged to receive papers and attend the meetings of the Council in an advisory capacity.¹⁵

¹⁵Hon. D.K. Jawara who resigned from the executive Council in protest was appointed first Premier of The Gambia in 1962 and has since been the captain of The Gambian Ship of State.

The 1962 Constitution was modified in 1963 by The Gambia (Constitution) Order in Council, 1963.¹⁶ Under the 1963 Constitution the Executive Council was put to death and from its remains sprang a cabinet system of Government. The Cabinet consisted of a Prime Minister and no less than six Ministers appointed from the members of the House of Representatives. The Prime Minister was, as in the previous constitution, required to be the leader of the party that commands the majority in the House; he was responsible for selecting his ministers for formal appointment by the Governor. The cabinet was now made responsible to the House; and the British Constitutional Convention of collective responsibility of ministers became part of our cabinet system of government. The Governor had powers to dismiss the Prime Minister if the latter no longer commanded the support of the majority in the House or suffered a vote of no confidence in the House. The 1963 constitution did not follow the practice of the British Convention that where a Prime Minister suffers a vote of no confidence he either resigns or asks for a dissolution.¹⁷ Under the Gambian constitution of 1963 where a vote of no confidence is carried against the Prime Minister, he has three days to decide whether to resign or ask for a dissolution; if at the expiration of the three days period he has not resigned or advised a dissolution the Governor may dismiss him. The Prime Minister took over the

¹⁶S.I. 1963 No. 135.

¹⁷Ward, p. 209.

the functions of the Governor as President of the cabinet but the Governor still continued to be in charge of the matters specifically reserved to him under the 1962 constitution.

SUMMARY AND CONCLUSION

The Executive Council, as our survey has attempted to show, was the principal organ of the colonial administration for influencing and qualifying official policy. As central as it was in cementing the authority of the colonial administration, and for that matter the Governor, it has not had a continuous development as its sister organ, the Legislative Council. The lack of continuity in its development was essentially due to the absence of a coherent and defined policy of Britain until one hundred and twenty-three years after Gambia was formally declared a Crown Colony. The idea or philosophy underlying the establishment of an executive council in the colony was essentially to enable the Governor, the Crown's representative, to exercise on behalf of the Crown all the powers and jurisdictions of the Crown in the colony and to protect the interest of the native inhabitants, on the advice of the Council. It cannot be denied that those who were better suited to advise the Governor on matters relating to the protection of the native inhabitants' interest were the native inhabitants themselves, but the membership of the Executive Council, up to the late 1940s, reflected only the colonial civil servants. It

might be argued in extenuation that the right calibre of men were not available to live up to the expectations of an Executive Council member, but it is the view of the writer that if the colonial administration had confidence in the ability and competence of some Gambians to the extent of providing them seats in the Legislative Council there can be no reason for excluding them from the Executive Council.¹⁸ The truth of the matter is that the Executive Council reflected the very basic principles of colonial administration, that is, the exclusion of local inhabitants from the policy initiating organ of the government until at such time that the colonial and Imperial governments think it right to gradually commit responsibility and authority in the local inhabitants. The democratisation of the Legislative Council and the appearance of nascent political parties began to change the cosmetic appearance of the Executive Council as constituted under the 1946 constitution. From 1951 onwards the Executive Council ceased to be the exclusive preserve of the colonial civil servants; the gulf between the Executive and Legislative Councils began to be bridged and a real committal of power and responsibility to Gambians both in form and practice was inaugurated. Though most of the colonial civil servants disappeared from the Executive Council, the central and most prominent figure in the colonial administration--

¹⁸Hon. Sam Forster was one of the first Gambian Unofficial members of the Legislative Council. All his colleagues in the Legislative Council, both Official and Unofficial Members had high regard for his ability and competence.

the Governor--still continued to wield extensive powers. He was still, so to speak, the chief executive of the colony; his role and the powers vested in him continued to elude the destructive sentences and phrases of the constitutional draftsman until on independence when his powers were vested in an executive council that could be said to be thoroughly representative of the people.

CHAPTER FOUR
ADMINISTRATION OF JUSTICE

The concept of justice and its administration is not alien to Africa and for that matter to The Gambia. As we indicated in our survey on the genesis of Colonial rule in Gambia, prior to the imposition of the colonial system of administration there existed in Africa such empires as Mali and Manding and that Gambia formed a constituent part of these empires at their various times of existence. These empires were, as we noted, divided into provinces for administrative purposes and each province was serviced by a Chief Judicial Officer. The Chief Judicial Officer and his subordinates administered Islamic law and customary law for the resolution of disputes between litigants. In the chiefly societies, the machinery of Justice seemed to be highly organised especially in those places where the religion of Islam had begun to root itself firmly. Such known features in the British or European administration of Justice as the services of counsel in litigation were already known among the Mandingos of Gambia and other tribes in West Africa. Dr. Elias, quoting from Sierra Leone: A Modern Portrait, tells us the impression Mungo Park gathered in respect of administration of justice among the Mandingos of Gambia in these words: "This frequency of appeal to written laws, with which the pagan-natives are necessarily unacquainted, has given rise in their palavare to (what I little expected to find in Africa) professional advocates, or expounders of the law, who are

allowed to appear and plead for plaintiff or defendant, much in the same manner as counsel in the law courts of Great Britain. They are Mohamedan Negroes who have made, or affect to have made, the laws of the Prophet their peculiar study; and if I may judge from their harangues, which I frequently attended, I believe that in the forensic qualification of procrastination and cavil, they are not always surpassed by the ablest pleaders in Europe."¹ Dr. Elias quotes this passage as a probable argument against the exclusion of lawyers from native courts; the author of this study also thinks that the above quotation is ample evidence to indicate that the civilising influence of an organised administration of justice existed in Gambia before the imposition of colonial rule.

British rule, however, brought with it an alien system of justice which was administered side by side with the existing traditional laws in so far as the latter was not inconsistent with morality nor incompatible with the exercise of the Crown's powers and jurisdiction. This course was inevitable, even though the traditional system of administration of justice may not have been surpassed by the system in Europe, as the European traders and those in the service of the Crown in the colony could hardly be expected to submit to the jurisdiction of tribunals whose laws were, for the most part, not only unwritten and vague but were also susceptible to change from one district to another and in some cases from tribe to tribe within the same

¹Elias, Government and Politics in Africa, p. 156.

district. The assumption of power and jurisdiction in Gambia by Britain could have led to the complete abrogation of the customary or native laws prevailing in the area.² The benevolent paternalism of British colonial policy preserved the existing native laws and customs. The courts were specifically directed to observe and enforce the observance of any native law or custom existing in the Gambia and not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any law for the time being in force.³ The preservation of native law and custom has had the inevitable consequence of creating a dualism in the administration of justice in Gambia, namely, law administered by native tribunals and law administered by the British types of courts. Both systems of court operate on parallel basis within an organic whole and converging at one point through the system of appeals. It is common ground that where two differing systems of law are administered side by side the incidence of internal conflict is bound to rise. It is not the task of this study to highlight the internal conflicts; these have been adequately dealt with by specialists on African law and their expositions, though specifically restricted to particular jurisdictions, are nonetheless generally applicable to any African

²For the constitutional consequences of a change of sovereign on local laws see Nwabueze: Machinery of Justice in Nigeria (Butterworths Ltd., London, 1963), pp. 3-4.

³Law of England (Application) Ordinance cap. 3 since amended and restyled Law of England (Application) Act cap. 104.

country that was once under British rule.⁴ The main purpose of this chapter is to survey the development of the courts, another branch of government, their compositions, jurisdiction, and the laws applied by them.

A. NATIVE COURTS

DISTRICT TRIBUNALS

At various stages of their development, the courts established by statutes to adjudicate between native and native have been variously called District or Native Tribunals. For purposes of consistency of terminology we shall employ the term "District Tribunal" to refer to those courts which administer justice between native and native.

The Law of England (Application) Ordinance, since amended and restyled the Law of England (Application) Act,⁵ empowers the courts to observe and enforce the observance of such native law and custom as are not repugnant to natural justice. The direction to the courts to respect native law and custom was re-enacted by the Protectorate Ordinance⁶ with the addition that the native law and custom must not only conform to natural

⁴See A.N. Allot: Essays in African Law, with special reference to Ghana (Butterworths Ltd., London, 1960), p. 152 et seq.; A.E.W. Park: The Sources of Nigerian Law (Sweet & Maxwell London, 1963), p. 98 et seq.; Elias: British Colonial Laws (Stevens & Sons Ltd., London, 1962), p. 198 et seq.

⁵Cap. 104 Laws of The Gambia Vol. IV.

⁶Ordinance No. 11 of 1894.

justice but also had to conform to any Ordinance or regulation of the colony that was applicable to the Protectorate. This declaration of principles, particularly the observance and enforcement of native law and custom, could be best implemented by a tribunal whose members were natives and knowledgeable in native law and custom. The 1894 Ordinance therefore authorised the Governor (who was then called the Administrator) to appoint fit and proper persons, not exceeding five, in each District to constitute District Tribunals for the purpose of trying breaches of any regulation made for promoting the peace, good order and welfare of the Protectorate, or of any native laws or custom; and to exercise civil and criminal jurisdiction in causes or matters in which all the parties were natives.

The 1894 Ordinance was repealed by the Protectorate Ordinance of 1902⁷ which confirmed the jurisdiction of the District Tribunals under the 1894 Ordinance and regularised their establishment and area of jurisdiction. Tribunals which were to be constituted by the Governor consisted of three or more native members; the Commissioner of the Division, in which a particular District Tribunal was located, could sit with the native members of the Tribunal and when he so sat he was the President of the Tribunal and his judgment was the judgment of the Tribunal. In some cases the Commissioner sitting alone constituted a Tribunal:

The acute shortage of qualified personnel to man the

⁷Ordinance No. 7 of 1902.

British types of courts in the Protectorate hindered their establishment in the Protectorate. As those persons born in the colony and subjects of civilised nations were not ordinarily subject to the jurisdiction of the District Tribunals and the latter certainly not amenable to native law and custom, the criminal jurisdiction of the Police Court at Bathurst, including the power to commit offenders for trial before the Supreme Court of the colony, was conferred on the District Tribunals. Also the civil jurisdiction of the Court of Request in personal actions, actions for ejectment or other like matters was conferred on each District Tribunal if the defendant or at least one of the defendants was resident within the territorial jurisdiction of the Tribunal. The District Tribunals were, in exercising the criminal jurisdiction of the Police Court or the civil jurisdiction of the Court of Request, to be governed by the same practice and procedure prevailing in those courts.

It does appear, and the present writer believes this to be so, that the District Tribunals were only native courts in name only. Their criminal and civil jurisdiction as well as their composition, especially when presided over by the Commissioner or when constituted by the Commissioner alone, made them anything but native courts in stricto sensu. They were, apart from administering native law and custom according to procedures known to customary law, required to exercise criminal and civil jurisdiction in matters governed by laws foreign to them and in the exercise of that jurisdiction followed

cumbersome procedures which were by and large not only unknown to customary law but at times not easily comprehensible to those trained in those systems. It is submitted, with respect, that though the native inhabitants were familiar with the administration of justice, the policy of entrusting the District Tribunals, even when presided over by the Commissioner who was invariably not a professional lawyer, with the responsibility of administering the laws worked out and drafted by professional lawyers constituted a mockery of justice. But, more than this, the Commissioner who was the President of the Tribunal invariably carried the day. The native members sat with him as mere assessors whose opinions were not binding on him; the ridiculous aspect of the whole situation was that whatever judgment was given by the Commissioner sitting alone was recorded in the name of the other members of the Tribunal. In cases where the Commissioner sat alone, it is not clear whether he applied native law and custom in the resolution of disputes between native and native, and to disputes relating to land held under native tenure or his own idea of what constituted native law and custom. It is hard not to agree with the views of one commentator who said, "the (District) Commissioner had a natural predilection to apply the law with which he was familiar, namely, English law, or rather his notions of it."⁸

It may be argued in exentuation that, though it was unfair to allow the Commissioner alone to constitute a District

⁸Nwabueze: Machinery of Justice, p. 60.

Tribunal, the new acquired jurisdiction of the District Tribunals over criminal and civil matters called for an arrangement whereby a person who had some idea and knowledge of the law governing those matters should be allowed to sit alone and determine the issues involved. This was particularly desirable in view of the fact that subjects of "civilised nations" and native borns of the colony had begun to take up their abodes within the jurisdictions of the various District Tribunals. The cost of prosecuting a case by a resident of George Town in an action for ejection before the Court of Request in Bathurst would certainly have been prohibitive. The only way out of the dilemma was to confer the necessary jurisdiction on the District Tribunals presided over by the Commissioner. It could also be argued that the District Tribunals though empowered to administer customary law were not the creation of customary law and as such were not native institutions whose membership was confined only to natives. As creatures of the Legislature they could, and were in fact, presided over by both natives and non-natives applying such laws as the Legislature decreed.⁹

The District Tribunals Ordinance 1933, cap. 49, reorganised the District Tribunals. That Ordinance, after a series of amendments, now regulates the administration of justice in native courts under an Act now called the District Tribunals Act.¹⁰ Before proceeding to consider the provisions of the

⁹ See also the arguments of Graham Paul J. in *Egba Native Authority Vs Adeyanju* (1936) 13 N.L.R. 27 at 30; quoted by Nwabueze, *Machinery of Justice*, p. 58.

¹⁰ Cap. 52 Laws of the Gambia 1966 Vol. 3.

Act we may note that in 1938 when the District Tribunals Ordinance was passed, Provincial Courts were established in each administrative division to serve as a Court of Appeal for the District Tribunals in each division. The judges of these courts were, invariably the Commissioners or their assistants. The Provincial Courts were, however, abolished by the Protectorate Courts Ordinance, 1944¹¹ in an effort to streamline the administration of justice.

Under the reorganised system, District Tribunals may be established in the Provinces by warrant to exercise jurisdiction over Africans within the territorial limit specified in such warrant. Subject to the District Tribunals Act and to any limitation that may be specified in the warrant establishing it, each Tribunal has authority to administer the customary law prevailing within its jurisdiction; Mohammedan law relating to civil status whenever the parties are Mohammedans; by-laws made by a council or by a commissioner in force within the jurisdiction of the Tribunal; provisions of any Act or regulation which the Tribunal is either empowered under that Act, regulation or under the Provinces Act to administer; and provisions of the criminal code. Two grades of District Tribunals have been set up, namely Group Tribunals and Single District Tribunals. Group Tribunals may try all criminal cases which can adequately be punished by imprisonment not exceeding 12 months or a fine not exceeding one hundred and twenty-five delasis (five

¹¹Ordinance No. 13 of 1944.

dalasi is the equivalent of one pound sterling) or both such imprisonment and fine. Single District Tribunals may now try all criminal cases that can adequately be punished by imprisonment not exceeding six months or a fine not exceeding fifty dalasis or both such imprisonment and fine. In civil matters, the Group Tribunals have jurisdiction over causes and matters in which the demand, debt or damage does not exceed five hundred dalasis while the jurisdiction of Single District Tribunals in civil cases is limited to the value of two hundred and fifty dalasis. There is however one restriction imposed on the District Tribunals in the exercise of their customary criminal jurisdiction. The District Tribunal Rules took away from the District Tribunals the power to try any offence against native law and custom if such offence also constitutes an offence under any Act which a Tribunal has jurisdiction to enforce, and consequently may be disposed of by the Tribunal in exercise of the jurisdiction under such Act. The Group Tribunals on their part are generally prohibited from entertaining any action, cause or matter where there is a Single Tribunal with jurisdiction in that cause, action, or matter unless the Commissioner of his own motion or on the application of a party, directs.

The procedures in these courts are informal; the rules of evidence are not followed to the letter. Proceedings in criminal matters cognisable by a District Tribunal are commenced by complaint or information made to the Tribunal during sitting of the court, or if the court is not in session to the President

of the Tribunal. The Tribunal or President on hearing the complaint or information decides whether the court will entertain the matter. Where the court decides to entertain the matter a summons is issued against the accused person to appear before the Tribunal at the time and place indicated on the summons. The same procedure for initiating criminal proceedings applies in civil matters. The summons may be in writing or may be verbally communicated to the person against whom it is issued. All Tribunals must report cases tried by them to the Commissioners of their Division. Records of court, which must contain entries of all cases tried by the Tribunal, the particulars of the parties in a civil action or an accused in a criminal case, are kept. Despite the fact that section 3 empowers the Tribunals to exercise jurisdiction over Africans, members of the Armed and Police Forces, Government employees, Members of the House of Representatives, Justices of the Peace and members of Banjul City Council are exempt from the jurisdiction of the District Tribunals. Legal practitioners are not allowed to appear before the Tribunals; even prior to the reorganisation of the Tribunals under the 1933 Ordinance, Legal Practitioners were not only forbidden to appear and plead cases in the Tribunals but also to argue a case before a Commissioner or the Supreme Court without special leave if the case involved some question of customary law.

The District Tribunals are under the supervision of the Divisional Commissioners who have access to them and their records. The Commissioners exercise wide revisionary powers including the power to order a retrial before the same Tribunal

or another Tribunal of competent jurisdiction. A Commissioner's revisionary powers are not exercisable in any case in which an appeal has been duly filed before the Supreme Court or in a case, other than a case for an order relating to guardianship or custody of a child, after the expiration of three months from the termination of the proceedings in the District Tribunal. By section 26 of the District Tribunals Act any person, who feels aggrieved by the judgment of a District Tribunal or an Order of a Commissioner in exercise of his revisionary power, may appeal to the Supreme Court in the same manner as if such appeal were an appeal from a subordinate court.

MOHAMMEDAN COURTS

Mohammedan Courts, which are mainly located in Banjul and Kanifing in the Kombo St. Mary Division, may conveniently be classified as customary or native courts even though they do not, in the strict sense of the word, administer native law and custom nor do they exercise jurisdiction over all Africans irrespective of their religious beliefs. The logic of classifying these courts as customary or native courts lies in the fact that the law administered by their judges, namely Mohammedan Law, "has no privileged position; it prevails, where it does prevail, because it is there the local law and custom."¹² This view was recently re-stated and applied by the Gambia

¹²Per Ames J. in *Bornu Native Authority Vs Abatcha Magudama* quoted by J.N.D. Anderson: *Conflict of Laws in Northern Nigeria* (1957) 1 J.A.L. 88.

Court of Appeal when it stated that "in West Africa, which includes The Gambia, Moslem law forms part of customary law."¹³

The Mohammedan Court at Banjul was first established by The Mohammedan Law Recognition Ordinance, 1905,¹⁴ and Kombo St. Mary Mohammedan Court was established by the Kombo St. Mary Division Ordinance 1946.¹⁵ The latter Ordinance empowered the Governor in council, by Order, to confer upon the Mohammedan Court, established under the Ordinance, jurisdiction to enforce any of the provisions of any Ordinance that may be specified in such order and to impose penalties on persons who offend against such provisions. Both Ordinances have been consolidated into one Act known as the Mohammedan Law Recognition Act.¹⁶ The consolidating Act restates the establishment of the courts constituted by a Cadi who is appointed by the Judicial Service Commission. The court may be constituted by a Cadi and two Assessors¹⁷ where it is shown that the Cadi is not a man of uncontested ability. The courts administer the Mohammedan Law of the Maliki School in all matters and causes contentious or uncontentious, between or exclusively affecting Mohammedan Africans, relating to civil status, marriage,

¹³Per Adeyinka Morgan J.A. in Theresa Saidi Vs Saika Saidy civil Appeal No. 4/73 reported in (1974) 18 J.A.L. 190 at 197.

¹⁴Ordinance No. 10 of 1905.

¹⁵Ordinance No. 15 of 1946.

¹⁶Cap. 124 Vol. 6 Laws of The Gambia 1966.

¹⁷An Assessor must be a person of the Mohammedan faith and must be a Justice of the Peace of the City of Banjul and Kombo St. Mary. The Chief Justice of the Supreme Court selects the Assessors.

succession, donations, testaments and guardianship. Their jurisdiction does not cover criminal or quasi criminal matters, the constitution of religious trusts and civil contracts other than marriages. The procedure and practice of the courts are governed by rules of Mohammedan law. The Chief Justice may however, with the consent of the House of Representatives, make rules, inter alia, regulating the practice and procedure of the courts; limiting and defining their jurisdiction relating to land; making provision for the avoidance of conflict of law or jurisdiction between the courts and any other court or tribunal in Gambia. Appeals from the decision of a Mohammedan Court lie to the Surpeme Court which is assisted by a Tamsir if an appeal involves a question of Mohammedan Law.

B. ENGLISH OR BRITISH COURTS

Apart from the native courts another system of court, which for want of better terminology we may call the English or British Courts, was established to administer generally all Acts of the United Kingdom Parliament declared to extend to Gambia subject only to local circumstances and to any existing or future local Ordinance. The Berlin Act had imposed an obligation on the signatory powers to establish in their various spheres of influence institutions for extending the civilising influence of the colonisers. Britain's civilising influence through the judicial institutions found expression in the

setting up of a Supreme Court and a series of subordinate or inferior courts. These courts were initially established in the colony and as such their jurisdiction were for the most part exercised in that area until 1944 when the Protectorate saw the establishment of English Courts on the pattern of those operating in the colony. We shall for the purpose of our exposition deal with the courts of the colony first and then with those of the Protectorate before a single court system was inaugurated for the whole country.

SUPREME COURT OF THE COLONY

In 1765 a significant event took place in Gambia. In that year what was later known as the Crown colony of The Gambia, as part of the Province of Senegambia, was declared a Crown colony. The constitution of the Crown colony provided for the establishment of a Supreme Court to be presided over by a Chief Justice with full powers to hear and determine all criminal cases, and all manner of civil pleas in the territory. Criminal and civil matters of inferior nature were dealt with by justices of the peace who had all the powers of justices of the peace in England, subject only to local circumstances. Appeals from the decision of the Supreme Court in all cases of error in the common law proceedings and in cases of equity, when the cause of the suit did not exceed one hundred dalasis, lay to the Governor in council with a further right of appeal to the Privy Council.¹⁸ The subsequent affiliation of Gambia led to the

¹⁸Martin, Province of Senegambia, pp. 67-70.

abolition of the Supreme Court of the colony; its jurisdiction and powers became vested in the Supreme Court of Sierra Leone which conducted criminal trials in the more serious cases and exercised jurisdiction in civil matters that could not be handled by justices of the peace. The severance of the administrative link between the two colonies inevitably led to the severance of their judicial systems. A Supreme Court was therefore established for the colony of The Gambia.

The Supreme Court so established continued to function until the Ordinance establishing it was amended and replaced by the Supreme Court Ordinance 1889.¹⁹ The Ordinance confirmed the establishment of the Supreme Court of the colony as a Superior Court of Record with unlimited jurisdiction and powers similar to those vested in the High Court of Justice in England except the jurisdiction vested in and exercised by the High Court of Admiralty unless such jurisdiction became exercisable by the Supreme Court by virtue of an Imperial Act. The Court exercised the same powers and authorities of the Lord High Chancellor of England with regard to infants, lunatics and idiots. The exercise of the Court's jurisdiction in probate, divorce and matrimonial causes was, subject to the provisions of the Ordinance, to be exercised in conformity with the law and practice for the time being in England. The laws administered

¹⁹ Ordinance No. 4 of 1889. Upon the separation of Gambia from Sierra Leone the first Ordinance that dealt with the establishment of the Supreme Court was Ordinance No. 5 of 1888.

by the court were the common law, the doctrines of equity and statutes of general application in force on November 1, 1888; all Imperial Acts declared to extend to Gambia; and customary law between native and native. All criminal cases were tried before the Chief Magistrate (as the Chief Justice was then called) with a jury of twelve men where the crime is punishable with death. Persons charged with an offence not punishable with death may elect to be tried by the Supreme Court with the aid of assessors while the Attorney-General had an option to apply for an order for trial by assessors instead of trial by jury.²⁰ Civil causes were tried before the Chief Justice without a jury.

THE BATHURST AND KOMBO ST. MARY MAGISTRATE'S COURTS

The Bathurst Magistrate Court was established by the Bathurst Magistrate's Court Ordinance 1916²¹ and was presided over by the Colonial Magistrate, any two or more Justices of the Peace or any person appointed to be a Magistrate of the court. The Colonial Magistrate was a stipendiary magistrate. Justices of the Peace were not, and still are not, by virtue of their being Justices of the Peace, magistrates though in some cases limited judicial powers of magistrates are conferred on them.

The Kombo St. Mary Magistrate Court was first established by the Kombo St. Mary Division Ordinance and, like the Bathurst

²⁰J.H. Jearey, Trial by Jury and with the aid of Assessors in Superior Courts of British African Territories (1960) Vol. 4 J.A.L. pp. 139-141.

²¹Ordinance No. 28 of 1916.

Magistrate's Court, was subordinate to the Supreme Court. It exercised the same jurisdiction in criminal matters as the Bathurst Magistrate Court. It was presided over by the Colonial Magistrate, in which case the court was regarded as a Magistrate Court of the first class; and when presided over by two or more justices of the peace for the colony, a subordinate court of the second class. The practice and procedure of the court in exercise of its criminal jurisdiction were assimilated, as nearly as circumstances permitted, to the practice and procedure observed in the Bathurst Magistrate's Court.

Both subordinate courts, apart from trying summary conviction offences, were also required to conduct preliminary investigation into indictable offences for the purpose of determining whether the evidence adduced against a person is sufficient or establishes a prima facie case for his committal to the Supreme Court. If on a fair appraisal of the evidence adduced the magistrate comes to the conclusion that there was no sufficient evidence or prima facie case to warrant an accused person's committal he was bound to acquit him; in all other cases he was bound to commit him.

Both subordinate courts were, under the Ordinances that set them up, required to forward a monthly return of the cases decided by them to the Supreme Court for the purpose of review. In addition to the power vested in the Supreme Court, every subordinate court was required to keep a register containing all complaints and offences. The Attorney-General, Colonial

Secretary and Principal Auditor had access to this register at all times. Another additional means of the control of the courts was provided for in the Criminal Procedure Code which, by section 65, stipulated that if upon the hearing of any (criminal) proceedings under this code it appears that the cause or matter is outside the limits of the jurisdiction of the court, such court shall direct the case to be transferred to the court having jurisdiction. The court having jurisdiction has invariably been the Supreme Court as there was no intermediate court between the Supreme Court and the Magistrate Courts. The difference in the power of the Magistrate courts was their jurisdiction to punish; while the Colonial Magistrate could, as a Magistrate of the first class, impose a heavier penalty, a Magistrate of the second class could not though he could try the same offence as a magistrate of the second class.

As we have had occasion to observe, the subordinate courts operating in the colony were not established in the Protectorate. To extend the criminal jurisdiction of the Bathurst Magistrate Court to the Protectorate, the Protectorate Ordinance of 1894 provided that the Commissioner was to exercise the same criminal jurisdiction over British subjects or subjects of civilised powers as was exercised by two justices of the peace or the Manager of Maccarthy Island. Subsequently, by Ordinance No. 7 of 1902, the Police Court (as the Bathurst Magistrate Court was then known) was declared to have in respect of matters within the Protectorate the same criminal jurisdiction as it

possessed in respect of matters occurring within the colony.

In their criminal jurisdiction both courts were under duty to apply and administer the same law as applied and administered by the Supreme Court except Customary and Islamic Laws. Both courts had no appellate jurisdiction.

COURT OF REQUEST

This was perhaps one of the oldest subordinate courts of Gambia. It was established by the Court of Request Ordinance 1882²² but later amended by the Court of Request Ordinance, 1899.²³ The Court held sittings in the colony on every Friday of the week and was presided over by the Colonial Magistrate or two commissioners of the court who had jurisdiction in:

- (a) all pleas of personal action where the debt or damage was not more than two hundred and fifty dalasis whether on balance of account or otherwise;
- (b) any action in which the debt or demand claimed consisted of a balance not exceeding two hundred and fifty dalasis after an admitted set off recoverable by the defendant from the plaintiff;
- (c) all actions of ejection or in which the title to any corporeal or incorporeal hereditaments was in question and the value in dispute did not exceed two

²² Ordinance No. 6 of 1882.

²³ Ordinance No. 15 of 1899.

hundred and fifty dalasis;

All actions were tried summarily. The court had no jurisdiction in actions relating to malicious prosecution, libel, slander, criminal conversation, seduction or breach of promise of marriage. Minors were allowed to sue for any sum of money due for wages or for piece of work or for work as a servant as if he were an adult.

The Kombo St. Mary Magistrate Court exercised the same civil jurisdiction as the Court of Request at Bathurst and followed the practice and procedure as were observed by the Court of Request. The jurisdiction of the Court of Request was exercised by the commissioners in the Protectorate, and subsequently, under Ordinance No. 7 of 1902, by the District Tribunals. In the exercise of its jurisdiction the court is subject to the same control as the magistrate Courts; it administers the same law as the Supreme Court with the exception of Customary and Islamic Laws.

HIGH COURT OF THE PROTECTORATE

The High Court of the Protectorate was established by the Protectorate Courts Ordinance, 1944²⁴ as the principal court of Judicature for the Protectorate. It was constituted by the Chief Justice of the colony, and any Deputy Judge of the Supreme Court of the colony was ipso facto a Deputy Judge of the High

²⁴ Ordinance No. 13 of 1944.

Court. It exercised the same jurisdiction, in respect of matters occurring within the Protectorate both civil and criminal, as the Supreme Court of the Colony. The Governor in Council had power to direct that the High Court may not exercise original jurisdiction in any suit which involved any issue relating to title to land or title to any interest in land which was subject to the jurisdiction of a District Tribunal or in any matter relating to marriage, family status, guardianship of children, inheritance, or disposition of property on death and subject to the jurisdiction of a District Tribunal.

In the exercise of its civil and criminal jurisdiction, the High Court was required to apply and administer all statutes, Ordinances and Rules of general application in the colony and in force therein in so far as the same were consistent with the Protectorate system. All native laws and custom existing in the Protectorate were, where not repugnant to natural justice nor incompatible with the laws of England or with any Ordinance of the colony applying to the Protectorate, to be enforced and applied in all matters arising in or relating to the Protectorate.

SUBORDINATE OR MAGISTRATE COURTS

These were established by section 12 of the Protectorate Courts Ordinance in every Division of the Protectorate. All subordinate courts of the Protectorate were styled the Magistrate Court of the Division in which the subordinate court is situated and were presided over by a magistrate who exercised

jurisdiction within the Division in which the court is constituted. There were two grades of Magistrate's Courts established in each division. The Colonial Magistrate, Senior Commissioner were all First Class Magistrates in each and every Division while every commissioner was constituted a First Class Magistrate within his administrative division. Every administrative officer was by virtue of his office a Second Class Magistrate in the division in which he was appointed as such.

All subordinate courts exercised both civil and criminal jurisdiction in matters arising within their territorial jurisdiction and exercised concurrent jurisdiction with District Tribunals established under the District Tribunals Ordinance, 1933. First Class Magistrates had jurisdiction in all criminal cases punishable with imprisonment not exceeding two years; a fine not exceeding one thousand dalasis or corporal punishment when confirmed by the Supreme Court. Magistrates of the Second Class had power to try all criminal offences punishable by imprisonment for a term not exceeding six months; a fine not exceeding two hundred and fifty dalasis, or corporal punishment when confirmed by the Supreme Court.

The civil jurisdiction of these courts extended to:

(1) all pleas of personal actions:

(a) where the debt or damage claimed did not exceed one hundred dalasis whether on balance of account or otherwise;

- (b) where in an action the debt or demand claimed consisted of a balance not exceeding one hundred dalasis after an admitted set off recoverable by the defendant from the plaintiff; or
 - (c) where a demand not exceeding one hundred dalasis was the whole or part of the liquidated balance of a partnership account or the amount or part of the amount of a distributive share under an intestacy or any legacy under a will.
- (2) all actions of ejectment or actions in which title to any coporeal hereditaments where the value of the lands etc. did not exceed one hundred dalasis;
 - (3) all claims of relief by way of interpleader where the debt, money, goods or chattles or the proceeds or value of any such goods or chattles did not exceed one hundred dalasis,
 - (4) any action or matter which was cognisable by the Court of Request.

Every subordinate court was required to submit to the High Court returns of cases tried by it. The High Court had authority and power to order any civil case pending in any Protectorate court to be transferred to another court of equal or superior jurisdiction or to the Court of Requests. A subordinate court likewise had power at any stage of civil or criminal proceedings to order such proceedings to be transferred for trial by any District Tribunal having jurisdiction to

entertain such civil or criminal proceedings.

The subordinate courts like the High Court administer the law in force in the colony so far as it is applicable, together with such local laws and customs as are not repugnant to natural justice or incompatible with the principles of the laws of England.

C. APPELLATE COURTS

A colony subject to British rule and sovereignty is governed by the general principles of administration of law including appellate jurisdiction. The appellate courts in Gambia are hierarchically graded with varying degrees of authority in their judicial pronouncements.

The District Tribunals as we have seen, though not belonging to the category of British subordinate courts, were courts subordinate to the Supreme Court or High Court of the Protectorate to which appeals lie from all decisions of the District Tribunal or a commissioner exercising his powers of review. Decisions of the Magistrate Court were appealable to the High Court, in the case of the Protectorate Courts, and to the Supreme Court, in the case of the colony courts. In civil matters the leave of trial or appellate court must be obtained if the value of the matter at issue did not exceed twenty-five dalasis.

By an Order in Council of 1891, the Supreme Court of Sierra Leone was constituted a Court of Record to hear and determine appeals from the Supreme Court of the Colony of The

Gambia. A person aggrieved by any final judgment or decree of the Supreme Court of The Gambia may appeal to the Supreme Court of Sierra Leone within three months; appeals from interlocutory proceedings may be filed within fourteen days. A supra national Court of Appeal--the West African Court of Appeal (W.A.C.A.)-- was established or more correctly re-established in 1928 to receive and hear appeals from the Supreme Courts of the four British West African Colonies. The Order in Council establishing W.A.C.A. was subjected to many amendments which were consolidated into the West African Court of Appeals Orders in Council, 1928-1935;²⁵ the Orders in Council created the office of the President of the Court. Hitherto the court consisted of the four Chief Justices of the colonies which were serviced by the appellate court. By the West African Court of Appeal Rules of that year appeals from judgment and orders of the Supreme Court of Gambia were to be heard and determined either in Gambia or Sierra Leone. The time limit for appeals was the same in interlocutory matters and final decisions of the Supreme Court as that which governed appeals to the Supreme Court of Sierra Leone; but, subject to the discretion of the Appeal Court, the time limit could be enlarged. Application for special leave to appeal was to be made within 14 days and where such leave was granted the appeal must be filed within 14 days. In civil matters, for an appeal to be entertained by the court, the

²⁵S.I. 1948 No. 1330.

cause or matter must not be less than two hundred and fifty dalasis.

The attainment of nationhood, first by Ghana and then Nigeria, led to the disintegration of the West African Court of Appeal by the withdrawal of these two nations from the jurisdiction of the court. A Court of Appeal was set up for Gambia and Sierra Leone by the Sierra Leone and Gambia (Court of Appeal) Order in Council 1959.²⁶ Procedure for appeals and the appellable value in civil matters to the new court of appeal continued to be governed by the W.A.C.A. rules and exercised all the powers of W.A.C.A. in relation to Sierra Leone and Gambia. The Judicial Union--at least at the appellate level--between Gambia and Sierra Leone was put to death when Sierra Leone established its own Supreme Court that was not, and is not, supreme in name only but in law as well. A Court of Appeal named The Gambia Court of Appeal, which has the practice of hearing appeals twice annually, was established to receive and hear appeals from the Supreme Court of Gambia. Its practice and procedures are the same as those of its predecessors. Appeals lie from the Gambia Court of Appeal to the Judicial Committee of the Privy Council whenever the substance of the suit is worth at least two thousand and five hundred dalasis. An aggrieved person could apply for leave to appeal under section 5 of the West African Court of Appeal--this should now be read as The Gambia Court of Appeal--(Appeal to Privy Council) Order in

²⁶S.I. 1959 No. 1977.

council. This section provides that "Applications to the court for leave to appeal shall be made by motion or petition within 21 days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application." The Privy Council however did not, in *Attorney-General of The Gambia Vs P.S. N'Jie*,²⁷ think that the statute was intended to say what it said. The Privy Council, through Lord Denning, argued that "if section 5 is construed literally, it does seem to lead to the result reached by the West African Court of Appeal: for an application remains an 'intended application' until it is heard in court. But this would mean that the application itself would have to be heard within 21 days. That cannot have been intended. . . . All that was intended was that notice should be lodged with the court within 21 days: and a copy served on the opposite party as soon as possible and in any case a reasonable time before the date of the hearing."²⁸ The court took it upon itself to redraft the statute in terms that would avoid what it believed to be an undesirable consequence resulting from a literal reading of the clear words. But there is no justification for this as the duty of a court is to expound and apply the words of a statute where these are unambiguous; to adopt a technique to circumvent the clear meaning of words and place upon them interpretations to avoid what the court considers as an unjust result, amounts

²⁷(1961) 2 W.L.R. 843.

²⁸Ibid., p. 854.

to a usurpation of the functions of the Legislature.²⁹

GENERAL OBSERVATIONS

This sketchy survey of the development of the courts in Gambia is not exhaustive and does not claim to be exhaustive. It only gives in general outline the development of the courts and the administration of Justice therein. As we have already noted, when a Supreme Court of Judicature was established for The Gambia after its separation from Sierra Leone, that court had its jurisdiction limited only to the colony. The Protectorate was serviced by District Tribunals, which administered all sorts of laws though with limitations set out in the warrant establishing them. The statutory recognition given to the District Tribunals to administer native law and custom was intended to use the District Tribunals as organs for promoting an efficient system of native administration and this could only be achieved by maintaining intact some of the institutions and traditions of the native Gambians. The District Tribunals themselves were, in some cases constituted by men who were not traditional office holders³⁰ but men chosen by the colonial government for the purpose of administering justice to their peers. The President of the Tribunal, who invariably was the head chief of the District in which a particular tribunal is

²⁹See generally E.A. Driedger: Construction of Statutes (Butterworths & Co. Canada Ltd.), pp. 1-26.

³⁰This is particularly true of the present era.

situated, owes his allegiance to the administration by which he could be removed from office at any time. He of course did have a great influence on the other members of the tribunal. His position both as head chief of the District--in which capacity he served as a strong link between his district and the central administration--as well as President of the Tribunal amounted to conferring judicial and executive power on the same individual and thereby associating the District Tribunals with the administration. The only faith one can place in the administration of justice by the District Tribunals is the system of appeals to the Supreme Court. We did observe that legal practitioners are prohibited from appearing in the District Tribunals; at some point in the development of our legal system, legal practitioners were even forbidden to appear before the Supreme Court in appeals from the District Tribunals. This has however been abolished; legal practitioners may appear before the Supreme Court in appeals from District Tribunals.³¹ One questionable aspect in the administration of justice by the courts has been the equation of native law and custom with Moham- medan or Islamic Law. Indeed section 11 of the District Tribunals Act does draw a distinction between Islamic law and customary

³¹The abolition of the practice of excluding legal practitioners to appear in the Supreme Court to argue appeals from District Tribunals has not been given any statutory force. The writer stumbled over a correspondence between the Attorney General of Gambia and the Chief Justice wherein the former suggested that consideration should be given to allowing legal practitioners appear in the Supreme Court to argue cases involving questions of customary law.

law by enjoining the Tribunals to administer both laws. The distinction is further made by the Mohammedan Law Recognition Act, which established courts primarily for the administration of Mohammedan Law. The Gambia Court of Appeal by its adherence to precedent seem to ignore this distinction.³² The approach of the court apart from being influenced by precedent was perhaps influenced by the fact that the District Tribunals, and for that matter the appellate courts, which are staffed by men who are themselves not Tamsirs, are unlikely to draw any distinction between Mohammedan law and customary law since it appears that it was not envisaged that the law of the books as distinct from practice of the people would be enforced under the District Tribunal Act.³³

The British established courts did not, in the opinion of the present writer, fulfill the ideals for which they were set up. The Protectorate had no court until 1944; the Supreme Court of the colony, which was supposed to exercise jurisdiction over matters outside the competence of the subordinate courts, was under staffed--only one judge--and far removed from the people, and even when a High Court was established for the Protectorate the Judge of the Supreme Court of the colony was made the judge of the High Court. The resulting consequence of this was the entrusting of judicial responsibility to the administrative officers who dispensed "administrative justice" instead of justice according to law. At the close of the colonial period

³²Theresa Saidi Vs Saika Saigy (1974) J.A.L. 190.

³³J.N.D. Anderson: Islamic Law in Africa (Frank Cass & Co. Ltd., 1970), p. 227 and footnote 10 thereof.

some changes were introduced in the court system. The distinction between the colony and Protectorate Court system was abolished and a single Supreme Court established for both areas. The Colonial Magistrate's Court was abolished and three grades of Magistrate Courts created. The Court of Request was substituted for by the Subordinate Courts which exercised civil jurisdiction in matters within the jurisdiction of the Court of Request. By far the most significant change brought about by the amalgamation of the Protectorate and colony systems related to trial by jury. Hitherto in the colony a jury system was in operation for the trial of serious offences whereas in the Protectorate the Judge of the High Court tried all cases without jurors or even assessors. The new system without abolishing the jury system, modified it in such a way as to make trial by jury for the most serious offences operative throughout The Gambia.

We only want to mention that the system first introduced by the colonialists has endured even after independence. The Personnel of the courts--the subordinate courts--has not radically changed. Administrative officers are gradually yielding their judicial functions to what are termed in Gambia as Travelling Magistrates. The majority of the Travelling Magistrates are of course non professional magistrates drawn mainly from court Registrars and justices of the peace. Their presence on the Magisterial bench only serves to divorce the administration of justice from the executive but they do not serve to solve

the long standing problems of Gambia, namely administration of justice by lay men. The system, like the laws administered by the courts, has been inherited by The Gambia and Gambia grew with it to nationhood. But whatever may be the defects of the legal system and its administration the erstwhile colonial masters of Gambia can proudly boast that the Britain's important legacy to Gambia at the end of the colonial period was the introduction of the Rule of Law and British conceptions of justice which has had the effect of civilising and enlightening the native Gambians.

CHAPTER FIVE

THE ELECTORAL MACHINERY AND THE GROWTH OF THE FRANCHISE

The era of constitutional experimentation was dominated by demands for the introduction of some measure of elective representation in the Legislative Council. Since the establishment of the Council in 1765 unofficial membership was based on nomination. The device of the nominative principle gave the Governor extraordinary powers to thrust on the community representatives who did not ordinarily represent the public opinion of the community, and in many cases were only used to mask the undemocratic nature of the Council. When, therefore, the various territorial committees of the National Congress of British West Africa began to put pressure on the local colonial administrations for the introduction of elective principle in the Councils, The Gambia branch also flooded both the Colonial Office and the Governor's Office with demands for elective principles. Gambia's demands were, however, modest and realistic. It was not the intention of the local territorial committee to wrestle from the colonial administration the complete responsibility for the administration of the colony, nor was it its intention to abolish the Governor's autocratic powers masked in the principle of official majority. The demands for elective measures were, at that stage of the country's constitutional development, intended to achieve a limited franchise that would have far reaching moral influence on the representation of the

people and also initiate the first portent crack in the powers of the Governor.¹

These demands, modest and realistic as they were, were brushed aside by the colonial administration because the administration felt the demands emanated from a group of individuals who did not represent the majority of the local inhabitants. Thus Gambia had to content herself with representatives who were chosen for them by the Governor.

The era of partial self-government, however, ushered in liberal constitutions that were aimed at involving the local people in the management of their own affairs. It was an era that gave the green light for the active, though gradual, dismantling of the powers of the colonial regime. The process of dismantling the powers of the colonial regime also involved the process of not only transferring responsibility but also power to the local inhabitants who would thenceforth take their seats in the Legislature, not as nominees of the Governor but as elected representatives articulating the opinions of the community they represent. In order to achieve a stable transition from nominative to elective representation various electoral laws were formulated. It is proposed to devote this chapter to an analysis of the electoral laws and the gradual granting of the franchise. The analysis of the electoral laws will not be confined to a mere outlining of these laws as they were or are to be found in the statute books; where possible, the defects in these laws

¹For the arguments put forward by the advocates of elective representation and its opponents see Dr. J.A. Langley: Pan Africanism and Nationalism in West Africa 1900-1945 (Oxford University Press, 1973), pp. 141-153.

will be pointed out: It is also proposed to point out one or two isolated instances of the court's approach in applying some of the provisions of the electoral laws to disputed elections. As the courts of The Gambia have not attempted to explain the object of some of the provisions relating to disputed elections, we will, relying on judicial decisions from other jurisdictions that have electoral laws similarly worded as that of Gambia, attempt to provide that explanation.

By section 20 (2) of The Gambia (Legislative Council) Order in Council, 1946² provision was made for the election of the Elected Member to the Legislative Council. It is pertinent to note that only one Elected Member was provided for and this was confined to Banjul and Kombo St. Mary area where enough educated persons could be found. The Order in Council did not spell out the procedures for election nor did it mention any of the matters that are usually covered by election laws; it merely specified a list of matters for which laws may be made. The Governor was empowered under section 20 (3) to make regulations regarding the election of the Elected Member. The Governor, by virtue of, section 20, (3) of the Order in Council, promulgated The Legislative Council (Electoral) Regulations, 1947.³ Under the Regulations the colony area was declared an electoral district (s.6). Any British subject or British protected person who had attained the age of twenty-five years and had, for a period of at least twelve months preceding

²S.R.O. 1946, No. 2084 and S.R.O. 1947 No. 2580é.

³Regulation No. 7 of 1947 L.N. No. 71 of 1947.

the day on which the Registering Officer issues notices for the registration of voters, been ordinarily resident in the Electoral District was qualified to have his name inserted on the register of voters. Persons convicted by any competent British Court of felony or any offence punishable by death or imprisonment exceeding six months and had not received a free pardon, or a person of unsound mind so found under any law in force in the colony, or a person employed or retained on behalf of a candidate at the elections as an agent, clerk, messenger, or in other capacity, were all disqualified to vote (section 6 (2)). The qualifications for voters applied, mutatis mutandis, to the qualifications of a candidate. No income or property qualification was essential as was in the case of Ghana, Sierra Leone and Nigeria.

The Registering Officer was empowered under the Regulations to conduct investigations as to the qualifications of any person claiming to be qualified to vote. He had ample discretion to require evidence to be given on oath or affirmation.⁴ It would appear that the Registering Officers exercised a dual function, one administrative and the other quasi judicial. The quasi judicial function is exercisable when he takes evidence to determine the entitlement or otherwise of a claimant to be registered as a voter. His determination as to the issue of a person's entitlement to be registered is not final. An aggrieved person had a right to appeal to a Revising Court within ten

⁴S.7.

days after the compilation of the register of voters.⁵ In hearing appeals, the Revising Court was to apply the law and rules of evidence as are applied by Magistrate Courts in civil cases. Further appeals lay to the Supreme Court (colony) on points of law material on the result of the case.⁶

Other related matters dealt with by the Regulations were the nomination of candidates. A candidate had not only to possess the qualifications of a voter but he must, in order to be eligible for election, be nominated by at least three voters. The nomination papers, which must reach the Returning Officer not later than seven days before the election date, must be subscribed to by both the candidate and his three nominators. A person who objects to the nomination of a candidate could serve notice of his objection on the Returning Officer at least forty-eight hours before the opening of the election. The Returning Officer's ruling on any such objection was final, subject to any action that may be brought by way of an election petition. Voting was by secret ballot; but the secrecy of the voting method was more apparent than real since an illiterate voter was required to deliver his ballot paper to the Presiding Officer, who places a cross against the name of the candidate of the voter's choice. Though the Presiding Officer was required to read the names of all the candidates on the ballot paper and to put a cross against the name of the candidate of the

⁵S. 10.

⁶S. 26.

voter's choice in the presence of the voter; the system had little to commend itself since it could be open to a lot of abuses. An unscrupulous Presiding Officer could easily determine the outcome of the election as there was no guarantee that he would do exactly as directed by a voter. The chances of abuse were really great as the majority of the colony residents were still illiterate.

The 1947 Electoral Regulations were revoked by the Legislative Council (Electoral) Regulations, 1948.⁷ The new Regulations did alter some of the provision under Regulation No. 7 of 1947 though the alteration were not so fundamental. The scope of a voter's disqualification was now widened. In addition to the disqualifications under the 1947 Regulations, a person serving or has within the immediately preceding ten years completed serving a sentence of imprisonment of or exceeding six months in any part of His Majesty's Dominions or in any territory under His Majesty's protection and has not received a free pardon, or was by virtue of his own act under any acknowledgement of allegiance, obedience or adherence to a foreign power was disqualified to vote. Votes continued to be given by ballot but with the variation that the ballot of each voter contained the full names of candidates as indicated on their respective nomination papers. The ballot papers had numbers printed on the back and each had a counterfoil attached

⁷Regulation No. 5 of 1948, L.N. No. 36 of 1948.

with the same numbers printed on the face.

The most significant change introduced by the 1948 Regulations was the relaxation of the rule that a voter had to vote at the polling station located in his registration area. It was necessary not to apply the strict letters of this particular rule since it would have the effect of denying persons, employed to assist the Presiding Officer in the supervision of elections, the right to cast their votes. Constables on duty at, or assistants to or clerks employed by the Presiding Officer at any polling place, were allowed to vote at polling places other than at the polling place designated for them by the register in which their names appeared. To prevent double voting the constable, assistant or clerk, as the case may be, was required to produce a certificate under the hand of the Returning Officer stating that the constable or other officer, as the case may be, was registered as a voter before he was allowed to vote. A copy of the certificate was invariably furnished to the Presiding Officer at the polling place for which the person to whom the certificate related was registered. Regulation No. 5 of 1948 did not effect any fundamental change in the electoral laws. The illiterate was still obliged to cast his votes through a third person. The problems of identifying voters were not solved and the persistence of this particular problem was open to abuse as many Gambians bear the same name and same family name. This was bound to lead to impersonations; the answer of the administration was to

enact a provision which stipulated that if a person representing to be a particular voter named in the register of voters applies for a ballot paper after another person has voted as such voter, the applicant shall, upon satisfactory proof of the fact that his name is on the register of voters and that he did not vote at any other polling station, be entitled to mark a ballot paper in the same manner as any other voter. These ballot papers were categorised as tendered ballot and were not counted for the purpose of determining the outcome of an election. The administration's panacea to the problem of impersonation did not provide a solution.

The 1948 Electoral Regulations were amended in 1949 by the Legislative Council (Electoral) (Amendment) Regulations 1948.⁸ By that amendment the Registering Officer was required, on the publication of the election date, to furnish the Returning Officer with copies of the register of voters for the Electoral District bearing in each case a certificate under the hand of the Registering Officer certifying such copy to be true and accurate copy of the last register of voters then in force. The responsibility of certifying registers of voters was vested in the Revising Officer. Nomination papers for candidates were not only to be subscribed to by the candidate and his nominators, but were now required to be submitted within ten days before elections and before four o'clock in the afternoon of the last

⁸Regulation No. 10 of 1949 L.N. No. 51 of 1949.

day for delivery of nomination papers. The most striking change in the law was the introduction of representative symbols. A candidate was required under section 37 to submit to the Returning Officer a paper bearing representation in black ink of some symbol by which the candidate wished to be identified during election. The wisdom of that amendment is too glaring to be over-emphasised. In a community that is predominantly inhabited by illiterate voters, the method of casting vote through the intermediary of the Presiding Officer did not only militate against the concept of voting by secret ballot but it was also fraught with the dangers of possible abuse of the system. A voter, whether illiterate or literate, was no longer required to put a cross against the name of the candidate of his choice. A voter merely presented himself to the Presiding Officer at the appropriate polling station and the Presiding Officer, upon satisfying himself that the name of the person who claimed to be entitled to vote appeared in the register of voters, makes the official mark on the ballot paper, record on the counterfoil thereof the number appearing opposite the name of the voter on the register. The marking of the ballot paper and recording on the counterfoil thereof the number appearing opposite the name of the voter had as its object the elimination of the danger that some one might come a second time and might get another ballot paper, perhaps from another clerk at the polling station and so record his vote twice.

The Electoral laws discussed above were operative only in the colony and had no application to the Protectorate. Colony representation by direct election was increased from one to

four,⁹ but the procedures for registration, nominations and voting that existed under amended Electoral Regulations continued to govern elections in the four constituencies that were created by the 1954 Order in Council. Protectorate representation was increased by three but elections were not, as we noted in an earlier chapter, direct. The representatives were elected through what might be called an electoral college which consisted of the Divisional Councils and the chiefs of The Gambia. Towards the end of the 1950s the franchise was extended to the Protectorate. The selection of their representatives was no longer to be by indirect elections. The Legislative Council then in existence was empowered by The Gambia (Electoral Provisions) Order in Council¹⁰ to make provision for the election of Members to the new House of Representative which was proposed to be established for The Gambia by The Gambia (Constitution) Order in Council 1960, and to enable registration of voters in pursuance of any such provision to take place.

Pursuant to the Electoral Provisions Order in Council, the Legislature enacted the Protectorate Elections Ordinance and the Colony Elections Ordinance.¹¹ Both Acts were amended in 1960 to make linguistic qualification as an additional prerequisite for membership of the House of Representatives. The amendments made it mandatory for prospective candidates to

⁹Gambia (Constitution) Order in Council 1954 S.I. 1954 No. 1145.

¹⁰S.I. 1959 No. 1771--Gambia Gazette No. 32 Vol. 76.

¹¹Cap. 6 and Cap. 44.

submit themselves to a test prior to nomination so that it could be ascertained whether a particular candidate was sufficiently fluent and understood the language that is used in conducting business in the House. The decision of the person conducting the linguistic test was conclusive and its efficacy cannot be questioned in any proceedings. The amendments restrict the rights of a prospective petitioner to rely on some other facts other than irregularity in the holding of elections in order to succeed in an election petition. The memorandum attached to each of the amending Bills made it clear that the Bill was for an Ordinance to amend section 40 of the Colony Elections Ordinance and section 27 of the Protectorate Elections Ordinance (which dealt with election petitions) so as to make it clear that the linguistic tests and their results cannot be questioned in any proceedings. The amendment to the Protectorate Elections Ordinance further made conclusive any decision of the Electoral Commission appointed under the rules set out in the Third Schedule (this dealt with the election of Head Chiefs' representatives) to the Ordinance on the grounds that the commission wrongly decided that any person has or has not the required linguistic qualification.

The Protectorate Elections Ordinance and the Colony Elections Ordinance were consolidated and enacted as the Election Ordinance 1963,¹² which was subsequently revised and

¹²Cap. 27.

is now found in the Elections Act.¹³ The Elections Act has retained most of the matters covered by earlier statutes though some of the provisions were spelt out in Schedules. Provision is made under the Act for the appointment of a Supervisor of elections who is empowered to exercise general direction and supervision over the administrative conduct of elections, and to the best of his ability, to enforce on the part of all election Officers fairness, impartiality and compliance with the provisions of the Act. There now exists a thirty-five member constituency each constituency returning one elected member. Qualifications of voters is now limited to Gambian citizens who have attained the age of twenty-one years and have been continuously resident for six months in a constituency in which he claims to be registered. Provision is made for a change of register at any time, other than the period immediately following the last supplementary registration, before a general registration. This is designed to enable a person who has ceased to reside for a period of six months in a constituency to request transfer of his name to his new constituency. General registration of voters is conducted in constituencies in every general registration year. The Elections (General Registration) (Initial Stages) Rules govern the conduct of registration and adjudication on claims. The adjudicators determine the validity of any claim and they are entitled to reject a claim if the evidence adduced in support thereof is unsatisfactory. Under

¹³Cap. 58 Laws of The Gambia 1966.

the Elections (voter's cards) Rules the registering officer is required to prepare a voter's card, with a photograph of the voter portraying his face and shoulder, in respect of each claimant. Only persons who are in possession of voter's cards or a replacement voter's cards and have their names on the register in a constituency are allowed to vote. The adoption of the voter's card system for all the constituencies makes it easier for election officers to identify a voter and lessens the danger of impersonation.

The Constituency Election Rules of 1963 deal, inter alia, with linguistic test and nomination of candidates. The Rules stipulate that on the 4th, 5th and 6th day after the return of the writ for elections candidates must present themselves for nomination and to such tests as the Returning Officer may deem fit for the purpose of satisfying himself that a prospective candidate has or has not the linguistic qualification that may be required for membership of the House of Representative. The Returning Officer, after conducting the test, issues a certificate under his hand stating whether or not a particular candidate possesses the requisite linguistic qualifications. A candidate, who is aggrieved by the decision of the Returning Officer, may appeal to the Chief Justice by presenting himself to the Chief Justice, who may administer such test as he may deem fit. The decision of the Chief Justice is final and conclusive. Candidates for elections do not only have to fulfill the qualifications necessary for a voter and pass the required linguistic test, but must also be nominated by three registered voters who must

subscribe to the nomination papers. The candidate must also deposit an amount of one hundred and twenty-five dalasis, which may be forfeited to the state if in a contested election the candidate is unable to obtain more than one-fifth of the votes cast for the elected candidate. Votes are cast not by ballot papers but by ballot tokens all of which must be identical. Ballot boxes are equipped with an internal baffle plate, which produces a slight ringing noise as in a bell, when the ballot token is dropped into the ballot box. The internal baffle plate prevents a person from casting more than one ballot token when he votes. It also reduces the danger of ballot boxes being stuffed by ballot papers.

Section 32 provides that no election and no return to the House of Representatives may be questioned in any proceedings except by way of election petition. A petition complaining of an undue return or undue election may be presented to the Supreme Court within ten days after the declaration of the results of the election. The petition must be presented by a person who voted or had a right to vote at the election to which the petition relates or by a person who claims to have had a right to be returned or elected at the election or a person who alleges himself to have been a candidate at such election.

The Attorney General may at any time, after the presentation of an election petition, inspect any document filed in connection therewith or the record of the trial of such petition. He may address the court at any stage of the proceedings. The court is required to notify the Attorney General if, during the

proceedings, the presiding judge considers it probable that the result of an election petition may turn upon a matter of law rather than a matter of fact. Deviations from the election rules do not necessarily vitiate the results of an election if it is shown that, notwithstanding such deviation, the elections were conducted substantially in accordance with the law and that the acts or omissions did not affect the result of the elections.

There have been few election petitions presented to the Courts in Gambia, the most outstanding and significant one of those being the case of Sabally Vs Ian Coghill which we have had occasion to discuss. The Gambia Court of Appeal's decision in that case was cured by a Validation Order in Council. To avoid a similar situation which led to the passing of that Validation Order, the House of Representatives amended the Election Act by providing that every register purported to be compiled under the Election Ordinances then in operation shall be deemed to be made under the Election Act 1963. This therefore takes away from a petitioner the right to invalidate an election solely on the grounds that registers of voters have not been compiled according to law.

One interesting petition recently presented to the Supreme Court is to be found in the case of N.H. Allen Vs H.R. Monday (Sr).¹⁴ In his petition the petitioner, an unsuccessful

¹⁴E.P. No. 2/1977.

candidate in the By-Election held in Banjul Central, challenged the validity of the Respondent's election to the House of Representatives on the grounds, inter alia, that the Respondent was constitutionally disqualified in that he owes allegiance to a foreign power, namely Great Britain, by virtue of his decoration as a Commander of the British Empire. The petition was dismissed and the Petitioner appealed to The Gambia Court of Appeal, which also dismissed his appeal¹⁵ on the grounds that under section 34 (5) of the Elections Act, the determination of the Supreme Court in an election petition proceedings is final. The provision of the Elections Act on which the Court of Appeal pegged its decision might leave an aggrieved person at the mercy of an arbitrary tribunal without any right of appeal. But then the Court of Appeal like any other court does attempt to do substantial justice in any matter brought before it, including appeals from the determination of the Supreme Court in election petitions; like any other court, the Court of Appeal is bound by the clear and express words of the Legislature and if the Legislature says there is no power for the court to entertain appeals from the Supreme Court in certain specified matters it is impossible for it to exercise its appellate jurisdiction over those specified matters. The application of the provision could indeed be misused by an executive that has no respect for the independence of the judiciary by intimidating the presiding judge into giving a judgment in favour of a

¹⁵See G.C.A. Civil Appeal No. 16/77.

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government candidate. The philosophy or object of the enactment under discussion is to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes and not make that decision subject to the review of an appellate court.¹⁶ Another explanation for denying the appellate courts jurisdiction to entertain appeals in election petition proceedings has been based on public interest. It is important in the interest of the public to secure at an early date a final determination of the matter so that the constituency affected by the petition could at an early date be represented in Parliament.¹⁷

It does appear that an elected member of the House of Representatives may be unseated by other means other than by an election petition. The Elections Act is silent as to the circumstances in which an elected member could be unseated by other means; but the language of the Act puts beyond doubt what procedures are to be adopted when it is proposed to unseat an elected member. Under section 36 (1) of the Elections Act, the Speaker of the House of Representatives is required to consult the Attorney-General for advice if he (the Speaker) is of the opinion that an elected member has become disqualified or entitled to be a member of the House. If, upon such consultation, the Attorney-General advises the Speaker that the member, whose membership is in question, is disqualified to be a member, then the Speaker must publish a notice in the

¹⁶Arzu Vs Arthurs and Ors (1965) I.W.L.R. 675.

¹⁷Senanayake Vs Navarante (1954) 3 W.L.R. 336.

Gazette declaring that member disqualified. A member, who is declared disqualified, may apply to the Supreme Court within twenty-one days to set aside the notice; the Supreme Court's decision in any such proceeding is final. As observed earlier, it is not specifically stated in the Act in what circumstances the provisions of section 36 (1) become operative. But it is unlikely that the Speaker will invoke that provision except in cases where a member of the House has been convicted of an offence punishable with imprisonment for a term exceeding six months and that conviction and sentence have not been set aside by the appellate courts. The provision may be invoked for any breach of the conditions set out as disqualifications for membership of the House, or where a member, without the permission of the Speaker, consistently absents himself from the sittings of the House.

Fundamental alterations to the constitution are required to be put to the electorate by means of referendum. The law governing the conduct of any referendum is the Constitutional Referendum Act.¹⁸ That Act does not specify what procedures are to be adopted when it is necessary to hold a referendum on any issue; but by section 3 (1) of the Constitutional Referendum Act, it is provided that the provisions of the Elections Act and any subsidiary legislation made thereunder are to apply to the holding of a referendum as they apply to the holding of an election. The Supervisor of Elections,

¹⁸Cap 30 Vol. 11 Laws of The Gambia, 1966.

however, has a discretion to specify what provisions of the Elections Act and subsidiary legislation made thereunder may be applied in the conduct of a referendum.

CONCLUSION

Africa has seen many sham and mock elections, all of them conducted in the name of democracy; all of them conducted with the avowed intention and desire of sending representatives to national assemblies through the will--may be free will--of the electorate. These sham and mock elections have invariably led the soldiers, who think they have a duty to protect democracy from the poisonous doses of the politicians, to overthrow governments. This is not to say that those countries in Africa, which have abandoned fair and free elections, do not have the necessary laws that could ensure a free and fair election; but the calibre of honest men required to enforce these laws are wanting. It is not an over exaggeration to say that Gambia has both the necessary laws and calibre of honest men to ensure a free and fair election. Minor scale violations of the law, such as treating, and buying of voters' cards, do occur here and there but no one has ever challenged the validity of an election on such grounds since the people who usually engage in such outrageous things do so clandestinely and the possibility of adducing evidence to substantiate such violation is remote. Buying of voters' cards, though prohibited by the Elections

Act, are problems that the Act cannot easily combat; these problems can be solved, only by the voters by refusing to sell their voters' cards (selling one's voter's card amounts to selling one's voting rights). The independence of the Supervisor of Elections of the executive in the performance of his duties under the Act, and the remedies available to a voter or a candidate, in the event of a violation of the Act, are all intended to ensure free and fair elections. The problems attendant to the administration of the elections are solved by efficient and independent bodies of administrators and judges. No system, however elegant, can command public confidence if it is administered by men under the direct orders of the government of the day, and if these men have full powers to decide all disputed questions of fact and law.¹⁹ Public confidence in the electoral system of Gambia is secured by extending the powers of the courts--Revising Court and the Supreme Court--widely enough for them to play an impartial part in the working of the system.

The problem of impersonation in a country where the voters are predominantly illiterates has been solved partly by the system of voters' cards with the photograph of the voter attached to it. The abolition of voting by ballot paper and the adoption of marble stones in the shape of a piston ring, which when dropped in the ballot box produces a

¹⁹W.J.M. Mackenzie: Free Elections (George Allen and Unwin Ltd., London, 1958), p. 19.

sound that could be heard by those outside the polling booth, all have the effect of avoiding stuffing of ballot boxes and double voting.²⁰ But then no device can make elections honest unless supported by political opinion²¹ and this support is forthcoming from the politicians, the administrators and the electorate.

²⁰The writer has information that a neighbouring country, after studying the electoral system of Gambia, especially the method of voting, came to the conclusion that the system is not only too complicated but also too honest.

²¹Mackenzie and Robinson: Five Elections in Africa (Oxford University Press, 1960), p. 464.

CHAPTER SIX

FROM MONARCHY TO REPUBLIC

At the Marlborough House constitutional conference of June 1964, it was agreed that Gambia should become an independent monarchy on February 18, 1965. The Queen should continue to be the sovereign head of state whose executive powers are to be exercised on her behalf by the Governor-General. The Governor-General is to be appointed by the Queen on the advice of the Prime Minister, and all executive acts performed by the Governor-General on behalf of the Queen are performed on the advice of the Queen's ministers of The Gambia. Thus on February 18, 1965 the Duke of Kent, on behalf of Her Majesty, handed to Prime Minister Jawara the constitutional instrument for Gambia's independence. By this simple but solemn act The Gambia, the smallest and perhaps oldest British dependency in West Africa, became the twenty-first independent member of the Commonwealth with a constitution that has been described as a sophisticated version of the Westminster export models.¹

The conventional method of relinquishing British rule over its dependency² was adopted in the case of The Gambia by passing an Act of Parliament on December 17, 1964 to make provision for the attainment by The Gambia of fully responsible

¹S.A. de Smith: 1965 Annual Survey of Commonwealth Law, p. 68.

²Roberts-Wray in Changing Law in Developing Countries by J.N.D. Anderson (ed.) (George Allen and Unwin Ltd., London, 1963), p. 44.

status within the Commonwealth. This Act is known as The Gambia Independence Act, 1964.³ The constitution of the new independent state was provided for in the Third Schedule to the The Gambia Independence Order, 1965.⁴ The constitutions of the older members of the dominions are contained in Acts of the United Kingdom Parliament (e.g. The B.N.A. Act) but for reasons of expediency this practice was departed from in the case of the emergent nations of the Commonwealth. The reason for not including the constitution in a Bill to be formally enacted by the United Kingdom Parliament is because the Bill to become an Act of Parliament would have to be subjected to all the legislative procedures as required by the rules of Parliament; "delicately balanced compromises, arrived at after strenuous negotiations, may be upset, and even if suggested amendments are defeated the ventilations of every contentious issue may have unfortunate repercussions in the territory concerned."⁵ An order in council is not subject to the ordinary parliamentary procedures.

Since it was the desire of the Gambian leaders that The Gambia should remain part of Her Majesty's dominions⁶ it became necessary that the Protectorate, which was not a British territory, be merged with the colony to form the "Dominion of The Gambia." The merger of the two separate territories cleared

³ 12 and 13 Eliz. 2 C. 93.

⁴ S.I. 1965 No. 135.

⁵ S.A. de Smith (1957) M.L.R. 347.

⁶ Sessional Paper No. 12 of 1964.

the way for any possible constitutional anomalies that could have arisen at independence.⁷ Section 1 (1) of the Independence Act (herein after called the "Act") therefore provides that on the appointed day--February 18, 1965--all those territories comprised in the colony or Protectorate of The Gambia are to form part of Her Majesty's dominions under the name of The Gambia. The same subsection further provides that as from the appointed day the Government of the United Kingdom ceases to be responsible for The Gambia. Section 1 (2) of the Act, which follows closely the language of section 4 of the Statute of Westminster, 1931,⁸ clogs the legislative authority of the United Kingdom Parliament over The Gambia. Section 1 (2) of the Act provides that "No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to The Gambia as part of its law; and on and after that day the provisions of Schedule 1 to this Act shall have effect with respect to the legislative powers of The Gambia;" and section 4 of the Statute of Westminster provides that "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof." Like section 4 of the Statute of Westminster, section 1 (2) of the

⁷For the likely constitutional difficulties that could have been faced see (1957) J.A.L. 99.

⁸25 Geo. V, C. 4.

Act makes inoperative in The Gambia any Act of the United Kingdom Parliament passed on or after the appointed day. But, unlike section 4 of the Statute of Westminster, the incapacity imposed on the United Kingdom Parliament by section 1 (2) of the Act is absolute. Under section 4 of the Statute of Westminster the power of the Imperial Parliament to pass any law and extending it to, say, Canada, remains in theory unimpaired; the Imperial Parliament can, as a matter of abstract law, repeal or disregard section 4 of the Statute of Westminster. No such possibility, even in abstract law, could happen to the Act as there has been a complete abdication of legislative authority by the United Kingdom Parliament in favour of the Gambian Parliament and any purported repeal of the Act or any part of it would be invalidated by section 1 (2). The Act is an improvement on the Statute of Westminster and leaves no doubt as to the sovereign legislative powers of The Gambia Parliament.

The renunciation of responsibility for the government of The Gambia and the abdication of absolute legislative powers in favour of The Gambian Parliament by the United Kingdom logically meant the vesting of responsibility and legislative power in the government of The Gambia and Gambian Parliament respectively. The legislative powers thus transferred to the Gambian Parliament were set out in the First Schedule to the Act. Paragraph 1 of the Schedule makes the provisions of the Colonial Laws Validity Act, 1865⁹ inapplicable to any law enacted by the parliament

⁹28 and 29 Vict. C. 63.

of The Gambia. The obvious purpose and meaning of this restrictive statute as applied to colonial legislatures, it has been explained, was to preserve the right of the Imperial Parliament to legislate for the colony, although a local legislature had been established, and to make it impossible, when an Imperial statute had been passed expressly for the purpose of governing that colony, for the colonial legislature in that sense to enact anything repugnant to an express law applied to that colony by the Imperial Legislature itself.¹⁰ The removal of this restrictive fetters on the legislative competence of the Gambian Parliament is a recognition of the fact that the sovereign legislative body of The Gambia has exclusive legislative authority for the peace, order and good government of Gambia unimpeded by the doctrine of repugnancy; the unlimited authority thus conferred is as plenary and ample as the Imperial Parliament in the plenitude of its powers possessed and could bestow.¹¹ The non-applicability of the Colonial Laws Validity Act and all its attendant consequences is not the only liberating provision that asserts the sovereign legislative powers of The Gambia Parliament. Prior to the passing of the Act, the legislative competence of the Gambian Parliament was confined within the territory of Gambia; any statute enacted by her legislature, however wide and all embracing its language might be, was operative within the colony only and applicable

¹⁰R. Vs Marais Ex parte Marais (1902) A.C. 51.

¹¹British Coal Corporation Vs R. (1935) A.C. 500.

to those within the territorial limits of the colony.¹² The inability of a colonial legislature to enact legislation having extra-territorial operation is said to have been prompted by broad considerations of policy, namely not to render the United Kingdom government internationally responsible for acts of an irresponsible colonial legislature.¹³ The incapacity of The Gambian legislature to enact legislation having extra-territorial operation has been removed by paragraph 2 of the First Schedule which provides that the legislature of The Gambia shall have full power to make laws having extra-territorial operation.¹⁴ It has been suggested that the word "full" implies that there was some power in the colonial legislatures to make laws having extra-territorial operation.¹⁵

The attainment of independence only means the termination of Gambia's dependence on the suzerain power. The sovereign and executive powers of the country were still vested in an

¹²R. Vs Macleod (1891) A.C. 55.

¹³D.P. O'Connell: Colonial Legislative Incompetence; (1959) 75.L.Q.R. 318.

¹⁴Thus in 1974 the Gambian Parliament amended the criminal code by the Criminal Law (Amendment) Act, 1974 to confer jurisdiction on the courts of The Gambia to try any person who, while abroad and in the employment of The Gambia government or a corporation, steals any property of the government or corporation. This amendment is intended to cover persons working in Gambian missions abroad and to ensure that objections based on jurisdiction of courts do not succeed. In fact the amendment was done in the light of objections raised on the jurisdiction of Gambian courts in Inspector General of Police Vs Dennis N'Jie (unreported).

¹⁵Ghai and MacAuslan, p. 179.

absentee monarch, represented by the Governor-General. The exercise of the sovereign and executive powers of the state by the Governor-General on behalf of the absentee monarch and the separation that exists between the head of state and head of government are notions hardly understood by the mass of the population. To the majority of the Gambian people not to vest the executive authority in the men who brought them political independence means that the independence of the country is still incomplete. The people, and in particular the politicians in power, desired the formal authority vested in Her Majesty abroad to be transferred or expatriated to Gambia in order to reflect more realistically her independence and sovereignty. The expatriation of the formal authority vested in Her Majesty necessarily involved the revision of the independence constitution and the promulgation of one that would abolish the crown in The Gambia and usher in a presidential system of government.

The adoption of a presidential system of government would give the nationalists the satisfaction that our independence is unalloyed. Apart from these nationalistic aspirations, to maintain the monarchy would necessarily entail a diffusion of authority and power between the monarch and the Prime Minister. Such diffusion of power and authority--whereby the executive power resides in the monarch exercisable on the advice of the Prime Minister--may not augur well for a developing country where the institutions of government and the practice of the constitution are creation of the law. In the United Kingdom

the practice of diffusing power is not likely to produce any constitutional impasse because the practice of the constitution has grown up and matured with the people. For a small country like Gambia, whose emergence into nationhood has aroused a great deal of skepticism internationally, with meagre financial resources at her disposal, it will certainly be an unpardonable luxury for her to hang on to the monarchical system of government in which the Governor-General draws very heavily on the treasury for doing virtually nothing, except signing bills and performing ceremonial duties. Gambia had other compelling reasons to move quickly to a republican form of government: the Gambian leaders had in the early sixties started negotiations with Senegal, a republic, for closer union, and the parity of constitutional status could undoubtedly assist in the negotiation. The parity of constitutional status of both countries will clear any suspicion on the part of Senegal as former French territories look upon the independence of former British territories with suspicion because of the retention of the Queen of the United Kingdom as head of state¹⁶ even though the Queen is Queen of The Gambia in the right of the crown of The Gambia. One last reason for the desirability of adopting a republican form of government is that the Gambian leaders will win international respect and be accorded with all the pomp and majesty that surrounds a head of state.¹⁷

¹⁶ Newbury: West African Commonwealth, p. 69,

¹⁷ This really has no practical constitutional significance, it is only to edify the status of whoever is head of state.

To change the form of government was within the contemplation of the framers of the proposals for independence. Those proposals clearly indicate that the possibility of a change to a republican form of government is a development which could be more sensibly be held over for consideration in the future.¹⁸

The power to change the form of government is provided for by paragraph 5 of the First Schedule to the Act, which confers power and authority on the Gambian Parliament to amend, repeal or modify the Act or the constitutional provisions in accordance with the procedures set out in section 48 of the constitution.

Accordingly on June 1, 1965, barely three months after independence, the government introduced in the House the Republic of The Gambia Bill, which sought to transform the system of government from a monarchy to a republic under an executive president. The country was scheduled to become a republic within the commonwealth on February 18, 1966 subject to the approval of the electorate at a referendum. The Bill had an easy passage in Parliament but it was not easy to sell the idea of an executive president to the electorate whose approval was a sine qua non. As we have attempted to indicate above, the retention of the monarchy necessarily involves a diffusion of power and the same diffusion of power between the president and the cabinet would still persist if the country were to adopt a republican constitution with a president as head of state on the Westminster pattern; the constitutional strains

¹⁸Sessional Paper No. 12 of 1964.

that may arise from this are any body's guess.¹⁹ The devolution of executive power in one person is not unusual and it does provide great troom for unanimity, dispatch and strength--these a developing country needs to accelerate social and economic development. The desirability of vesting executive power in a single individual has been commended by Blackstone in these words: "This (executive power) is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and despatch. Were it placed in several hands, it would be subject to many wills: many wills if disunited and drawing different ways, creat weakness in a government; and to unite these several wills, and reduce them to one, is a work of more time and delay than the exegencies of state will afford."²⁰

Notwithstanding the expediency of vesting executive power in a single person as Blackstone's testimony bears, the opposition parties and groups saw the proposals of the government as a means of inaugurating a reign of tyranny, dictatorship and the persistent perversion and desecration of the constitution. The opposition contended, and very forcefully too, that if the president, in whom the executive power of the state would be vested under the proposed constitution, and therefore the father of the nation, is himself a partisan politician, to whom could his opponents turn for redress as an impartial arbiter when

¹⁹ For practical cases where conflict have occurred between the President and Prime Minister under such a system see Nwabueze: *Presidentialism in Commonwealth Africa* (C. Hurst and Co. Ltd., 1974), pp. 58-92.

²⁰ Blackstone: *Commentaries on the Laws of England*, Book 1, p. 249.

the government, which he leads, indulges in the desecration of the constitution.²¹ The opposition parties' fears may have been justified in the light of events happening in some of the neighbouring countries under executive presidents. But the republican constitutions of some of these neighbouring countries were markedly different from that proposed for Gambia. There was no guarantee that if Gambia were to adopt a presidential system of government on the Westminster model, the president would not be a person who in fact has partisan political tendencies, a person who would be content with being a rubber stamp of the government and as such indirectly a rubber stamp of the ruling party; nor was there any guarantee that the president could be a man of integrity who would defend the constitution even if it means displeasing those whose political support and sanction did earn him the position of president.

Whatever may be the fallacies of the opposition's contentions and however ill-founded their fears may have been, the electorate rejected the government's proposals for a republic with an executive president. Some of the opposition's charges that unequal treatment was bound to exist between the ruling

²¹The present writer still vividly recalls some of the fears expressed by the late N.M. Darboe then M.P. for Lower Fulladu West in one of his anti "executive president" campaigns when he told his audience that the effect of an executive president is to allow one man to rule the country the way he wished and that the opposition United Party can have no justice from the president in the event of a major conflict between the ruling P.P.P. headed by the president and the opposition United Party.

party and the opposition in the event of a change in the form of government was reported to have taken place even during the referendum campaigns. In a post-referendum statement Garba-Jahumpa, one of the leading opponents of the government's republican proposals, asserted that the Gambians want to remain a monarchy and he deprecated in no uncertain terms as undemocratic the denial of campaign facilities, such as the radio station, to the opposition.²²

The rejection of the republican proposals did not indicate a lack of confidence in the government of Prime Minister Jawara. He asked for a dissolution of Parliament and called a general election in which his party increased its majority. The proposals for a republican form of government under an executive president were again put before Parliament which, on account of the numerical strength of the government, endorsed it. The Opposition as usual, both within and without the legislature, warned the electorate that the change from monarchy to a republic under an executive president was being rushed into without knowing the full implications. The old arguments were put forward in opposition to the proposals. The government on its part, made it clear that the country will be governed under an ultra democratic constitution with all the fundamental human rights and necessary checks and balances between the executive and the judiciary and legislature. The Attorney-General Alhaji M.L. Saho explained, in a radio broadcast, that the proposed

²²African Unity Paper, 1965: The full statement is reproduced in Africa Diary 1966, p. 2694.

constitution is an "ultra-democratic one under which the executive is finally answerable to the legislature and the courts and that if the President misconducts himself or abuses the constitution he can be removed."

In April 1970, the proposals were put before the electorate, who overwhelmingly endorsed them. The Republic of The Gambia Bill was assented to by the acting Governor-General on behalf of Her Majesty on April 24, 1970. The formal assent to the Bill completed Gambia's long journey to republicanism; it also marked the end of a long period of constitutional relationship between Britain and Gambia. Like all other English speaking countries of Africa, Gambia continued to be a member of the Commonwealth but unlike most of them Gambia shyed away from actually inscribing the name of her first President in the constitution.

One cannot underestimate the proposition of the opponents of the government's proposals; but their fears may have been justified in a multi-racial society where racial conflicts can attract such great political dimensions that the temptations on the part of the President to be biased in favour of his own racial group may not easily be resisted. Gambia is a heterogeneous society which has been occasioned by the plurality of tribes but, notwithstanding this plurality, no sane politician who has the well-being of the country at heart (and for that matter his own political survival) will exploit tribal sentiments since no single tribe forms the majority to sustain any

political party in power. It may be that the opponents of the proposed constitution did not realize that a constitution, however well drafted, and however good its contents, is nothing but a means to an end; and that end is good government. The quality of government depends upon the people who exercise it, not upon the constitution.²³ It is too early to evaluate the wisdom of adopting a republican system of government in The Gambia, but if a constitution is to provide good government, Gambia appears to be endowed with the calibre of men who can make the constitution work smoothly in the interest of good government. The mature, refined, tolerant and sober attitude of the Gambian President indicates that there is a great future for good government and constitutionalism (that is a government limited in its actions by rules of law) in Gambia.

Before parting with Gambia's enpatriation of sovereign and executive power to realistically reflect her independence, it should be pointed out that in the British courts Gambia may still be regarded as part of Her Majesty's Dominions for certain purposes. The Ghana (Consequential Provisions) Act is in the same language as the Republic of The Gambia Act.²⁴ The Court of Appeal, in construing the provisions of The Ghana Act, made it clear that as far as the British courts were concerned, though Ghana has become a republic, she was still within the Commonwealth, and the laws affecting her in those courts were

²³W.I. Jennings: Democracy in Africa (Oxford University Press, 1963), p. 82.

²⁴18 and 19 Eliz. 2, C. 37.

to be treated until altered as having effect in the same way as before she became a republic, that is as if she were a dominion of Her Majesty's.²⁵ The same interpretation can be applied to section 1 of the Republic of The Gambia Act.

The attainment of republican status in 1970 marked the final stage in the country's constitutional struggle to gain political independence; in essence executive power was localised. It has been suggested that not all countries in the British Commonwealth are content to rely for the legal authority of their constitution upon its carrying the imprint of "Made in England."²⁶ These countries, Wheare explains, do not only assert the principle of autonomy but also the principle of constitutional autochthony.²⁷ The Gambian leaders during their campaigns for a constitutional change made no pretence by their pronouncements that they were not only seeking to establish complete political and constitutional autonomy but also constitutional autochthony (that is, the constitution being originally rooted in The Gambia); they were not as concerned with constitutional niceties as they were with the pragmatic results of republicanism. We nonetheless want to carry our enquiry further to see whether the principle of constitutional autochthony applies to the Gambian constitution.

The procedures adopted by India, Pakistan and the Irish

²⁵ Gohoho Vs Guinea Press Ltd. (1962) 2 W.L.R. 1471.

²⁶ K.C. Wheare: Modern Constitutions (Oxford University Press, 1960), p. 53.

²⁷ K.C. Wheare: Constitutional Structure of the Commonwealth (Oxford University Press, 1960), p. 89 et seq.

Free State to achieve constitutional autochthony have been explained by Professor Wheare²⁸ and do not need repetition here. Ghana, the first country in black Africa to change the monarchy for a president, adopted a Constituent Assembly not the legislature a creature of an Imperial Statute, for the purpose of enacting its republican constitution. This, it is said, made the constitution home grown.²⁹ But the snag, which Ghana seemed not to have overcome in effecting a clean break with the Imperial power, was that the plebescite at which the electorate endorsed the republican constitution was conducted under the authority and in accordance with a statute that was enacted according to the procedures laid down by the Imperial power. It can therefore be argued, as unconvincing as it may be, that, however remote the source of power may be, the enacting of the Ghana constitution through a plebescite was done in pursuance of a statute that was not itself home-grown. This leads one to the inevitable conclusion that the constitution lacks the autochthony which is accorded to it. Nigeria did not adopt a constituent assembly but opted for the rather unprecedented method of swearing in the Governor-General, who was deemed under section 157 (1) of the constitution to be elected President on the commencement of the new constitution, as President and soon thereafter signified his assent to the constitution.³⁰

²⁸Constitutional Structure of the Commonwealth.

²⁹For the procedures adopted in enacting Ghana's Constitution see F.R.A. Bennion: The Constitutional Law of Ghana (Butterworths, London, 1962).

³⁰Elias: The Commonwealth in Africa (1968) 31 M.L.R. 286.

This procedure was adopted after all the constitutional requirements were fulfilled. It is, however, doubtful whether this method provides the required legal break to make the constitution home-grown. It does appear, and the present writer believes this to be so, that the swearing in of the Governor-General as President had no legal effect as the office which he purported to assume had no legal existence until the law establishing it had received the royal assent. The assent was, it is submitted, not a Presidential assent but a royal assent given under a different name.

The Republic of Gambia Bill was one that was passed by the legislature--a creature of an Imperial statute--in accordance with the terms of an Imperial statute. After the normal legislative process it was widely subjected to discussion; the electorate were informed and enlightened as to the form of constitution that was proposed to govern them and it did receive their acceptance. It did not purport to have been enacted by the people themselves nor did it purport to have been enacted by the representatives of the people assembled in either a constituent assembly or in the legislature. It is unnecessary to mention that the constitution was enacted on or by the authority of the people as their endorsement of the constitution at the referendum is an ample testimony of that fact. The legislature adopted the procedures laid down by S. 48 of the independence constitution and paragraph 5 of the First Schedule to the Independence Act and followed the constitutional provision that requires the submission of all Bills to the Governor-

General for his assent before they could become law. The submission of the Bill to the acting Governor-General for his assent, on behalf of Her Majesty, does not affect the autochthony of the constitution. The fact that the Queen is one of the two estates of the Gambian Parliament legally makes her the Queen of The Gambia and, when therefore an assent was given on her behalf that assent was given not on behalf of a foreign monarch or the British monarch. Her assent to the Bill was an assent given in her right of the crown of The Gambia and in her right as Elizabeth II, Queen of The Gambia.³¹ It is submitted that the act of giving royal assent in no way detracts from the autochthony of the constitution; the Queen gave effect to the desire of the electorate by bringing an end to her role as the Queen of The Gambia and ushering in a new relationship with her erstwhile subjects, namely recognising her as head of the Commonwealth. There is, however, one principal factor that is said to determine the autochthonous nature of a constitution--the source of authority to enact a constitution. The Queen, even where she was Queen of The Gambia, did not provide that source of authority. The source of authority lies in the Gambia Independence Act, an Act of the United Kingdom Parliament, which confers authority on the Gambian Parliament to modify, amend or repeal the Act or the constitutional provisions in accordance with the stipulated procedures. It was

³¹Royal Styles and Titles Act, 1965.

pursuant to this Act that the whole process of transforming the constitution was embarked upon. By making use of that source of authority the Gambian constitution could not be said to be autochthonous.

But then must the autochthony of a constitution be based solely on its source? It has been suggested, and convincingly too, that it is the contents and not the source of the enacting authority of a constitution that is more relevant in determining its autochthony.³² It is common ground that the independence constitution of The Gambia was not imposed on her by the United Kingdom. That constitution and most of its predecessors, especially those that were granted since the early fifties were the outcome of full discussions and the recommendations of the local people themselves. It can be argued that the very authority by which the 1970 constitution was enacted formed, with the consent of the Gambians, part of the constitutional instruments granting independence. The only probable course that the Colonial Office would have adopted, (this is mere speculation) had the Gambian leaders asked for the inclusion of a provision in the Independence Act (a far-fetched possibility) that would not restrict the legislative competence of the legislature with regards to the modification of the constitution, would have been a cautious advice to them and perhaps deny the whole situation in the inner chambers of the

³²Nwabueze: Constitutionalism in the Emergent States; Presidentialism in Commonwealth Africa (C. Hurst & Co. Ltd., London, 1973).

colonial office.³³ The adoption of a republican form of government under a constitution that places the entire executive authority in a single person is not unknown to Gambia. The pre-colonial history of the country is abound with evidence that the Kings of Barra, Fulladu and Kombo, to mention a few, did not share their executive authority with any person though they did delegate power to their vassals for administrative convenience. To adopt such a system in a refined form to meet the needs of a modern government is only re-asserting in a modified form the traditions native to the Gambians. Thus this makes the constitution autochthonous.

The contents of the constitution apart, its acceptance by the people is a forceful consideration that bears on its autochthony. Once it is accepted as law of The Gambia the question why is it accepted is extraneous to law. While the constitutional law purist may want to question the source of the constitution, that consideration is not likely to attract the Gambian politicians or even the populace whose conducts are governed by it and they would certainly rely more on its acceptance than on its source. Thus Professor Wheare commented that "if the constitution obtained its life from the seed bed at Westminster, and was transplanted to Australia, it has struck roots in the Australian soil, and it owes its life

³³Swaziland actually got the United Kingdom government into acquiescing to certain proposals for independence and this acquiescing was a departure from the British conventional method of granting independence constitutions. For the details see N'wabueze's Presidentialism, pp. 76-77.

now to Australia and not to Britain."³⁴ The same can be said of the Gambian constitution.

The 1970 constitution, which is divided into eleven chapters, follows closely the provisions of the independence constitution of 1965. It provides for the mode of acquiring citizenship, protection of human rights and establishes the executive, Parliament and the judiciary; indeed its provisions are strikingly similar to those of the 1965 constitution, variations only introduced to meet the necessary changes brought about by a change in the form of government. Before proceeding to analyse the provisions of the constitution we may as well carry our enquiry a step further to examine whether there exists a separation of power between the three organs of government-- the executive, parliament and judiciary.

The doctrine of separation of powers is said to signify three things:

- (a) that the same persons should not form part of more than one of the three organs of government;
- (b) that one organ of government should not control or interfere with the exercise of its function by another organ;
- (c) one organ of government should not exercise the functions of another.³⁵

The doctrine was formulated by Montesquieu based on his

³⁴ Constitutional Structure of the Commonwealth, p. 108.

³⁵ Wade and Bradley: Constitutional Law 7th ed. (Longmans & Co. Ltd., London, 1974), p. 23.

conception of the British constitution, which makes a theoretical distinction between the three organs of government. But studies in the practice of the British constitution have shown that the validity of the doctrine is perhaps more applicable to the American than the British constitution. Gambia, though a republic with an executive president, has not abandoned the cabinet system of government; unlike the American practice the cabinet or executive members are drawn from the legislature (S. 45 (1)). The membership of the legislature by cabinet ministers makes the executive an integral part of the legislature. There may be a theoretical separation of the two or a separation in name but the absence of physical separation and separation of functions is conspicuously absent. The first criterion for determining separation of powers is lacking.

The membership of the legislature by the members of the executive sort of puts the executive under the control of the legislature. This fact is recognised by section 50 of the constitution, which makes the cabinet collectively responsible to the legislature for all acts done under the authority of the cabinet or the President. The dependence of the executive on the legislature is soundly testified by the fact that without the support of the legislature such executive measures as Bills cannot be given the force of law. Indeed the very existence of the Executive at any given moment depends upon the support of the legislature (S. 85 (3)). The executive can, and does, with parliamentary sanction, exercise the legislative functions

of the legislature by means of subsidiary legislation. Ordinarily, where a separation of power exists, the executive would be responsible only for executing and implementing laws enacted by the legislature. The absence of the doctrine in practice makes the executive to assume a dual role, both executive and legislative, and this leads one to the conclusion that as between the executive and the legislature there is no separation of powers.

When we turn to the third organ of the government--the judiciary--we do not only find that the existence of the doctrine is theoretical but also actual. Members of the executive and the legislature are excluded from membership of the judiciary and vice-versa. Judicial functions are denied to the members of the executive and the legislature and it is completely free from the control of either of them while executive and legislative functions are kept from the judiciary.

Having considered the application of the doctrine of separation of powers to the three organs of government, it remains to consider whether Parliament--in all its embracing meaning under section 56 of the constitution--the judiciary or the constitution claims supremacy over the others. Professor Dicey considered that Parliament is sovereign and this sovereignty "means neither more nor less than this, namely, that Parliament thus defined (i.e. the Queen, Lords and Commons) has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by

law of England as having a right to override or set aside the legislation of Parliament."³⁶ This principle of English constitutional law is accurate to the extent that there is no inherent jurisdiction in the courts of England to declare an Act of Parliament invalid. Once passed the courts are bound to give effect to it and will not ordinarily go behind the veils of parliamentary procedures to determine whether the appropriate procedures were adopted in passing the Act. Such inquiry into the mode of the legislative process will amount to denying Parliament the privilege of being master of its own proceedings. While the sovereignty or supremacy of Parliament entails the ability to make laws for any person no matter where he may be, it can hardly be supposed that the British Parliament in all its sovereignty can make criminal the practice of female circumcision among the Mandingos of The Gambia. In fact the sovereignty of the British Parliament has been greatly circumscribed by convention. Parliament cannot in time of peace prolong its existence beyond the five year period recognised by convention nor can it bind its successors as to the mode and content of legislation. Its sovereign powers are based on the common law recognised and acted upon by the courts of England;³⁷ the concept is a distinctively English principle which has no counterpart in Scottish constitutional law³⁸ and that it is

³⁶ Introduction to the Study of Law of the Constitution 10th ed. (Macmillan & Co. Ltd., 1965), pp. 39-40.

³⁷ O.H. Philips: The Constitutional Law of Great Britain and the Commonwealth 2nd ed. (Sweet & Maxwell London, 1957), p. 44.

³⁸ McCormick Vs Lord Advocate (1953) S.C. 39.

nothing but "a legal fiction and legal fictions can assume anything."³⁹

Under The Gambian constitution this legal fiction does not exist. Legislative actions of Parliament are subject to judicial review; the courts may, and have power to, declare what Acts are constitutional or unconstitutional. This power flows from the existence of a written constitution which prescribes the limits of the powers of Parliament, limits that the courts jealously guard against transgression. This, of course, tempts one to hold the view that as between Parliament and the judiciary, the judiciary is supreme. One cannot underestimate the authority and power^{of} of the judiciary in the exercise of its function of judicial review but one cannot also overlook the fact that whatever may be the supremacy of the judiciary, its composition, and jurisdiction are all regulated and determined by Parliament. Parliament may, when it so desires, by appropriate language divest the judiciary of its role of judicial review or even nullify a decision of the courts by appropriate legislation. The judiciary, therefore, though supreme in the sphere of judicial review, that supremacy is only relative for otherwise the judiciary may assume functions not consistent with the doctrine of the separation of powers.

In some jurisdictions the constitution expressly declares itself as the supreme or fundamental law of the land and any

³⁹Jennings: The Law and the Constitution 4th ed. (University of London Press Ltd.), p. 154.

law that is inconsistent with it is to the extent of that inconsistency inoperative. This tends to assert the supremacy of the constitution. The Gambian constitution does not declare itself supreme but the fact of its supremacy lies in its being a written one. It is the very document that gives Parliament and the judiciary their lives. It sets out what procedures Parliament may follow in enacting a law without transgressing on the sacrosanctity of the constitution. It also regulates the mode by which the courts are to review parliamentary or executive actions where these are alleged to violate the constitution. In short the constitution provides and regulates the very mechanism of government. "If the constitution claims by its terms, to limit the powers of the institutions it creates, including the legislature, its provisions must surely be regarded as of superior force to any rules or actions issuing from those institutions,"⁴⁰ so says Wheare. This assertion finds support in the words of Chief Justice Marshall when, arguing on the question of the supremacy of the constitution, he made the classic statement that "certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, subsequently, the theory that an act of the legislature, repugnant to the constitution is void."⁴¹ The learned Chief Justice continued

⁴⁰Modern Constitutions, p. 57.

⁴¹Marbury Vs Madison (1803) 1 Granch 137.

to argue that as the constitution imposes fetters on, and limits, the powers of the governors no one can contest that the constitution controls any legislative act that is repugnant to it. These arguments are indeed forceful. But the Chief Justice also realised that though the legislature cannot by ordinary means alter the constitution, he, by implication, accepted that the constitution can be altered by means other than the ordinary legislative process when he said "the constitution is either a superior, paramount law, unchangeable by ordinary means. . . ." The constitution's supremacy is not absolute; it defines the limits of legislative competence and how legislative power may be exercised within the ambit of the constitution. We do know that Parliament has ample legislative powers to alter even those very provisions of the constitution that restricts its legislative power though the procedure to do so may be extremely cumbersome and any such attempt may be met with hostile opposition.

CONCLUSION

We have attempted to sketch Gambia's transition from monarchy to a republic as well as to track the origin or source of the republican constitution and also attempted to give a brief account of the interrelationship between the various organs of the government. The constitution vests the executive authority of the state in the President who is not a member of

the legislature but who depends on the support of the legislature for his mandate to rule. The sophisticated version of the Westminster export model has been modified to reflect the republican status of The Gambia and at the same time blends traditionalism with modernism. Indeed the reversion to traditionalism (that is, vesting executive authority in one man and discarding the formal separation of power between the head of state and head of government) under a constitution that meets the needs of a modern government thoroughly explains why the Gambian constitution could claim to be "Made in The Gambia." By adopting a constitution that reflects the traditional values of the people, values that were swept under the carpet by colonial rule, is only a re-assertion of those values and not a reaction of the wider "phenomenon of liberation from the 'cultural imperialism' of colonialism" as suggested.⁴² It is a manifestation and resurrection of the African tradition.

From the brief discussion on the separation of powers it is clear that the doctrine, as literally understood and practised under the American constitution, is not a feature of the Gambian Constitution. Both the executive and the legislature are constituted by the same individuals, the executive performing some of the functions of the legislature while the legislature exercises control over the executive through the principle of the collective responsibility of the cabinet to the legislature.

⁴²Ghai and MacAuslan, p. 218.

The only organ of government to which the doctrine applies is the judiciary in its relationship with both the executive and the legislature. The judiciary alone is free from the control of the legislature and the executive; the judiciary alone performs judicial functions; it alone does not engage in legislation and it is the only organ whose members are physically distinct from the members of both the legislature and the executive. The discussion on the separation of powers inevitably led us to a consideration of the supremacy of Parliament, the judiciary or the constitution. While our discussion on this aspect tends to favour the supremacy of the constitution on account of its regulative functions over Parliament, it is safe to conclude that the constitution is supreme only to the extent that in the exercise of its powers, Parliament must conform to the provisions of the constitution and any purported derogation from its provisions will certainly be declared void. As between the judiciary and Parliament, each is supreme within its province unfettered by the supremacy of the other.

The detail analysis of the composition and functions of the organs of government established under the constitution and the other provisions of the constitution will be postponed for the next chapters.

CHAPTER SEVEN

PARLIAMENT

Gambia's change from a monarchy to a republic entailed the modification of the Westminster parliamentary system to reflect in a modified form the republican character of the state. The institution of parliament and the concept of parliamentary democracy, which are salient features of the Westminster monarchical form of government, were inherited and continued under the new constitution. The continuation of the institution of parliament found expression in the re-establishment of parliament as the principal law making organ of the state;¹ the concept of parliamentary democracy was partly restated under section 87 of the constitution, which requires the holding of elections every five years through the medium of free and fair elections and partly sanctioned by non-legislative interference with the number of political parties that may exist at any one time. Free and fair elections and the multiplicity of political parties are indeed necessary for the viability of parliamentary democracy. Parliament's function as the bulwark against executive excesses and its ultimate control over the latter has been maintained by a method of checks and balances.

The Constitution redefined the qualifications and dis-qualifications for membership of the House of Representatives.

¹s. 56.

Some of these qualifications were borrowed from the country's earlier constitutions and these were in themselves borrowed from the usage and practice of British constitution, and given statutory force. Others were inserted in the constitution as a result of changes brought about by independence. In this chapter we propose to examine the composition of Parliament; the qualifications and disqualifications for membership of the House of Representatives; the legislative and other functions of the House. The functions of the House of Representatives as the forum for the ventilation of all contentious national issues in a fearless and unimpeded manner is essential to the operation of a parliamentary system of government, and for this reason the last section of this chapter will address itself to a discussion of the powers, privileges and immunities of the House of Representatives.

A. COMPOSITION OF PARLIAMENT

Parliament, which exercises the legislative powers of the Republic for the peace, security and good government of The Gambia, is composed of the President and the House of Representatives² (hereinafter referred to as the "House"). The position of the President as one of the estates of Parliament reflects the important role he plays in the legislative process, for without his assent no measure of the House can become law.

²S. 56.

But as we will see later, the idea of empowering the President to withhold his assent to any legislation is, in the present context of Gambian political realities, otiose.

B. MEMBERSHIP OF THE HOUSE

The House consists of a Speaker and forty-three members, who are for the purposes of voting in the House, divided into voting and non-voting members. For the purpose of our study and clarity of exposition of some of the provisions of the constitution relating to qualification and disqualification of members, we shall categorise these into four classes, namely (i) elected members, (ii) chiefs' representatives members, (iii) nominated members and (iv) the Attorney-General, who may fall within the category of an elected or a nominated member.

There are thirty-five elected members³ elected from single member constituencies.⁴ In order to avoid unfair gerrymandering a Constituency Boundaries Commission is established and its members are appointed by the President after consultation with the Judicial Service Commission. Apart from operation of law a person appointed to the Commission cannot be removed without prior consultation with the Judicial Service Commission and such a removal can only be effected on grounds of the person's inability to perform the functions of his office or for misbehaviour. To insulate the Commission from political

³S. 57 (1) (a).

⁴SS. 60 and 62 (1).

influence, Members of the House, public servants or persons who are or have at any time during the two years immediately preceding their appointment as a member, been nominated as a candidate for election to the House or hold an office in any organisation that sponsors or sponsored a candidate for election to the House, are disqualified for membership of the Commission.⁵ The underlying philosophy of excluding Members of the House, and politicians in general, is to secure a minimum of political influence from being exerted on the Commission in the execution of its duties. But the shortcoming of the safeguard is the non-exclusion of political activists and persons who hold offices, for example, chiefs, by political appointments but do not fall within any of the excluded categories.

It is the task of the Commission to ensure that the number of constituencies correspond to the number of elected seats in the House and that all constituencies contain as nearly equal numbers of inhabitants as appears to be reasonably practicable. The Commission may, however, depart from the population considerations in order to take into account the need to ensure the adequate representation of sparsely populated rural areas; the means of communication; geographical features and the boundaries of existing administrative areas. The delimitation of constituency boundaries takes place at such

⁵S. 61.

time as the President may, in pursuance of a resolution of the House, determine, but in the absence of such resolution the exercise must be conducted at intervals of not less than eight and not more than ten years; or whenever a census of the population has been held or when the constitution has been amended altering the number of elected seats.⁶

The Chiefs' representative members are four in number⁷ and they are elected separately by the chiefs in assembly to represent what may be called the traditional elements. Their election takes place at the same time as the election of elected members; most of the rules governing the election of elected members apply to that of the chiefs as well. The Attorney-General may be either an elected or a nominated member of the House with voting rights. Since the abolition of the office of the Attorney-General as a public office,⁸ the only incumbent has been a nominated member. The fourth category of members are the nominated members who, until Parliament otherwise prescribes, number three; they are appointed by the President.⁹ It is not clear from the provisions of the constitution why nominated membership of the House, which was a feature of the colonial legislatures, is still retained. Its retention may be a hangover from the colonial system of according representation

⁶S. 62. The last review of the constituency boundaries in 1976/77 was carried out when Parliament amended section 57 (1) (a) of the constitution to increase the number of elected members from thirty-two to thirty-five.

⁷S. 57 (1) (b).

⁸See The Gambia Independence Order (Miscellaneous Provision) Act, 1968, Act No. 14 of 1968.

⁹SS. 57 (1) (d) and 65.

to organisations such as the Chamber of Commerce, trade unions and women's organisations whose views and interests are not likely to be adequately represented by either the elected or chiefs' representative members. In fact the practice has been to allocate one of the nominated seats to the business community and twice women have been appointed as nominated members. One other reason that may be advanced for its retention is that the President is afforded an ample opportunity to reward an industrious and loyal party member for whom no constituency could be found.¹⁰ Whatever reasons influenced the framers of the constitution in inserting section 57 (1) (d), its wisdom cannot be easily brushed aside. Under that provision the President, as appointing authority, has power to draw into the House some of the best available talents that can contribute to the efficient running of the government.¹¹ This is the only way to open the membership of the House to talented men who are unwilling to subject themselves to the rough and unpredictable game of party politics.

Membership of the House carries with it certain attributes which are defined by the constitution as "qualifications" and "disqualifications." Thus all citizens of The Gambia who have

¹⁰ Indeed, the writer thinks that it was on this ground that Mr. Jallow Sanneh was nominated as member of the 1972/77 and 1977/82 Houses, while Sir Alieu Jack who has served the country in various capacities as Speaker and acting Governor-General and served and continues to serve as a loyal supporter of the ruling party was appointed a nominated member of the 1972/77 House.

¹¹ Sir Alieu may, in addition to other considerations, have been drawn into the House for this purpose as his subsequent appointment as a Minister indicates.

attained the age of twenty-one years and able to speak English sufficiently enough to enable them to participate actively in the proceedings of the House are eligible for membership of the House as either an elected, a Chiefs' representative, or a nominated voting member. In addition to these three qualifications, in order to be eligible as an elected member, a person must be registered in some constituency as a voter in elections of elected members¹² though he need not contest elections in the constituency in which he is registered. An appointed nominated member, other than the Attorney-General if he is not an elected member, need only at the time of his appointment fulfil the age and language proficiency requirements.¹³

Under the constitution a person is not eligible for membership of the House, if (in the case of an elected member, a nominated voting member or a chiefs, representatives) he is, by virtue of his own act, under the acknowledgment of allegiance, obedience or adherence to a foreign power or state. In addition to this, a person is not qualified for election to or appointment as a nominated member of the House if at the date of his nomination for election or appointment as a nominated member of the House he holds the office of Speaker; he is adjudged or declared to be of unsound mind under any Gambian

¹²S. 58.

¹³S. 58 (a) and (b).

law; he has been declared bankrupt under any Gambian law, and remains undischarged; he is under a sentence of death or imprisonment exceeding six months or has, within five years of the date of his nomination for election or appointment as a nominated member completed serving a sentence of imprisonment exceeding six months; or subject to such exceptions and limitations as Parliament may prescribe, he has an interest in any government contract.¹⁴

Parliament is empowered to make law disqualifying persons holding or acting in an office responsible for or connected with the conduct of an election to the House.¹⁵ It may also provide that any person who has been convicted by a court in The Gambia for an offence connected with the election of members of the House is disqualified for membership. The disqualification period for a person convicted of an election offence cannot exceed five years.¹⁶ Head Chiefs that are nominated as Chiefs' representative members cannot be nominated for elected seats¹⁷ while appointed nominated members (this probably excludes an appointed nominated Attorney-General) cannot be nominated for any of the elected seats. Similarly persons who are nominated for any of the elected seats or who have stood as candidates for election but were unsuccessful cannot

¹⁴S. 59 (1).

¹⁵S. 59 (1).

¹⁶S. 59 (3).

¹⁷S. 59 (4).

be appointed as nominated members.¹⁸ Parliament may, subject to exceptions and limitations as it may prescribe, define disqualifications for members of the armed or police forces or persons holding or acting in prescribed offices or appointments.¹⁹ It may be observed that disqualifications stemming from a sentence of imprisonment exceeding six months, two or more terms of imprisonments that are required to be served consecutively are regarded as a single term of imprisonment. We may further note that imprisonment as an alternative to or in default of the payment of a fine is irrelevant for the purposes of a person's qualifications or disqualifications for membership of the House.²⁰

Before proceeding to consider the jurisdiction of the Supreme Court in disputed membership of the House, and tenure of seats of members of the House we may look at some spurious interpretations the Supreme Court was recently called upon to lay on the provisions of section 59 (1) (a), (f) and (5) in N.H. Allen Vs H.R. Monday (Sr).²¹ Section 59 (1) (a) precludes elected membership of the House to Gambians who are, by their own act, under the allegiance to a foreign power. Section 59 (6) (b) empowers Parliament to define disqualifications for membership of the House by members of the armed forces. The respondent, in that case, was alleged to have contravened

¹⁸S. 59 (5).

¹⁹S. 59 (6).

²⁰S. 59 (7).

²¹E.P. No. 2/1977 (unreported).

paragraph (a) of section 59 (1) in that as Commander of the Order of the British Empire as well as an honorary Commander of the National Order of the Republic of Senegal, he, at the time of his nomination for election to the House, owed allegiance to a foreign power. The title or honour of "Commander" did not only amount to owing allegiance to a foreign power but also amounted to being a member of the armed forces of that foreign power, the petitioner contended. Neither submission won the admiration of the Presiding Judge who dismissed them as "a piece of outrageously far-fetched and muddled thinking. . . . and a specious argument." that has no vestige of validity. But would acceptance of a foreign title of honour, other than a distinction conferred by an educational, professional, or scientific body, in contravention of section 73 of the constitution amount to owing allegiance to a foreign power or state? It seems not. Allegiance can only be owed by a subject to a sovereign; the mere decoration of, or conferment of a title of honour on, an individual by a foreign state does not entail the incidence of subjection by the decorating state. The absence of a subject and sovereign relationship in such a situation is evidenced by the fact that the decorating state cannot call upon the decorated foreign national to serve in its armed forces in case of a rebellion against the latter; other incidents of allegiance are obedience to a state by the subject and the protection of the subject by the state. None of these incidents were applicable to the respondent and the

acceptance of foreign honours without more is not sufficient to disqualify a person for membership of the House under section 59 (1) (a).

The other spurious argument based on section 59 (1) (f) stems from the fact that the respondent was, immediately before his nomination for election, the Chairman of the Management Committee of the Banjul City Council and in that capacity had interest in government contract and therefore sinned against section 59 (1) (f). The court was quick to point out that there was no evidence of the respondent's interest in a government contract and that whatever contract he may have interest in must be a contract executed in his official capacity as Chairman of the City Council. But even if the respondent had any personal interest in a government contract, it must be such interest in a government contract that Parliament prescribes as a vitiating factor for membership of the House. The wording of the provision under consideration is wide enough to exclude interests in government contracts that are not declared by Parliament as prohibited for membership of the House: the disqualification by reason of interest in a government contract is not absolute.

The objection taken under section 59 (5) by the petitioner was not so much based on his muddled thinking as it was on the complicated language of the subsection--the words "nomination" and "nominated" are used once and four times respectively--which could lead the layman into the wilderness. The fact

which led the petitioner to put spurious interpretation on that subsection are as follows: at the general elections held in March 1977 the respondent was nominated for elections to the House but lost to his opponent, who died barely a day or two after being declared elected. Subsequently, in May of the same year a by-election was ordered to be held for the vacant seat; the respondent again won his party's nomination as candidate for the vacant seat. It was this act of nomination and subsequent election of the respondent that led to the challenging of the validity of his election under section 59 (5). Subsection (5) of section 59 provides as follows: "No person shall be qualified to be nominated for election as a voting member of the House of Representatives, who, at the date of his nomination for election, is a nominated member; and no person shall be qualified to be appointed as a nominated member who, at the date of his appointment, is, or is nominated for election as, a voting member or who has, at any time since Parliament was last dissolved stood as a candidate for election as a voting member but was not elected."²² This provision, it was alleged, disqualifies a person for membership of the House if that person did not only contest elections and lost since Parliament was last dissolved, but also a person who had at any time contested elections but was unsuccessful.²³

²² Underlining mine.

²³ These points were clearly made in the petitioner's evidence when he made reference to earlier unsuccessful attempts by the respondent and two other candidates to be elected to the House.

The argument was indeed misconceived and the Supreme Court put this beyond doubts when it ruled "the purport of the section is clear and its wording also; it is to prevent an unsuccessful candidate being nominated to Parliament despite his failure at the polls, or a nominated member offering himself for election."

As a general rule a voting member once elected or nominated as such retains his seat for the life of the House; a non-voting nominated member also retains his seat for the life of the House unless his appointment is revoked by the President before dissolution. Other conditions, other than dissolution or revocation of appointment, may however arise which could lead a member to vacate his seat in the House.

A member vacates his seat if he is appointed Speaker, incurs any of the disabilities under section 59 (1); if he loses his Gambian citizenship (this does not apply to a non-voting nominated member); in the case of an elected member, if he ceases to be a registered voter; in the case of a chiefs' representative member, if he ceases to be a Head Chief; or in the case of a nominated Attorney-General, if he is removed from office.²⁴ A subsequent amendment to the constitution empowers Parliament to declare vacant the seat of a member who, without the prior permission of the Speaker, absents himself from two meetings of the House.²⁵ Parliament has

²⁴ S. 66 (1).

²⁵ Thus Mr. P.S. N'Jie, Leader of the Opposition United Party, was unseated for non-attendance of the meetings of the House without having obtained the prior permission of the Speaker.

power under the constitution to permit a member of the House declared insane, bankrupt or sentenced to death or imprisonment for a term exceeding six months, or reported guilty of an offence under section 59 (3) to retain his seat until an appeal from such declaration, sentence or conviction is heard and disposed off. The retention by a member of his seat on Parliament's permission may be subject to any conditions it may prescribe.²⁶

Disputes do occur, and there have been isolated instances of this, with respect to the validity of a person's membership of the House. The determination of disputed membership of the House is within the jurisdiction of the Supreme Court which may be prayed to decide on the validity of a person's election to, or appointment as voting, or non-voting nominated member of, the House. The court also has jurisdiction to determine questions as to whether a person elected Speaker from outside the House was qualified to be so elected and questions whether the seat of a member in the House has become vacant. Only persons qualified to vote in the elections of elected members or the Attorney-General have a locus standi to apply to the Supreme Court for a determination of the question of the validity of a member's election to, or appointment as a voting member of, the House. Every member of the House has a locus standi to challenge the validity of the election of the Speaker or the appointment of a non-voting nominated member of the

²⁶S. 66 (2).

House. An application for the determination of the issue whether the seat of any member has become vacant may be made by a voting member of the House or by a registered voter (where the dispute relates to the seat of an elected member) or by a Head Chief (where the vacancy of a Chiefs' representative seat is in question). The Attorney-General may interfere in any proceeding before the Supreme Court where he has not exercised his prerogative to make an application under the constitution.²⁷

The ruling of the Supreme Court, confirmed by The Gambia Court of Appeal, in I.A.S. Burang-John Vs The Attorney-General of The Gambia²⁸ appears to be that an application can only be properly made under section 70 (1) if an election petition is also presented. The courts indicated that "under section 46 (1) (a)²⁹ of the constitution the Supreme Court firstly, does have jurisdiction to determine whether a person has been validly elected, but under the same section 46 subsection (2) the application can only be made by a person qualified to vote in the election to which the application relates. Parliament has made provisions for the exercise of this jurisdiction and under section 32 of the Elections Act, 1963--no election and no return to the House of Representatives shall be questioned in any proceedings except by an election petition made in

²⁷ S. 70.

²⁸ Civil Appeal No. 5/1966 (unreported).

²⁹ This has been reproduced as section 70 (1) (a) of the republican constitution.

accordance with the Act. That has not been done and no election petition has been presented to this court."³⁰

There is no doubt that the usual procedure for unseating a member of Parliament--by election petitions--had greatly influenced both courts in arriving at their decisions. It can hardly be expected that Parliament intended to provide double procedures for unseating a member all of which must be adopted by an applicant, nor can section 70 or any part of it be said to have been enacted ex abundanti cautela. Even where section 32 of the Elections Act and section 70 (1) (a) (section 46 (1) (a) as it was) are overlapping provisions, the principle that where a special procedure or modus operandi is prescribed for a special case, the courts are likely (and should, as the Courts of England have done) to regard it as exclusive.³¹ The provision of special procedures is a manifest demonstration of Parliament's intention that the special procedures should apply to the special situations they are intended to govern. It is suggested, with deference to both courts, that section 70 creates a special procedure to cover situations where an applicant, who would otherwise be entitled to present an election petition, finds himself barred by the limitations imposed by section 33 (1) of the Election Act. Such a person could proceed under

³⁰The Supreme Court applied the same reasoning in P.S. N'Jie Vs The Attorney-General Civil Suit No. 5. 208/66 (unreported).

³¹Driedger: Construction of Statutes, p. 99. Parentheses mine.

section 70 to seek a declaration that an elected or appointed voting member, as the case may be, should be unseated. To make section 70 (1) (a) operative on the presentation of an election petition is to rob it off of its utility. To argue to the contrary, as the court did, will necessarily exclude the validity of the appointment of a voting member, as in the case of an appointed nominated Attorney-General, from being challenged since his membership of the House is not effected by "election or return" to the House but by appointment. The Elections Act puts it beyond doubt that election petitions may be brought under sections 32 and 33 on the grounds of "undue election or undue return." Furthermore it cannot be reasonably expected that Parliament has sanctioned different procedures for the members of the House, including the Speaker, as the court seems to suggest. Assuming the reasoning of the courts to be correct, what can be the possible grounds for "an undue election or undue return" where the validity of the Speaker's appointment from outside the House is in question?

The provisions of section 70 (5) (then 46 (5)) greatly exercised the minds of the judges. That subsection empowers Parliament to make provision with respect to the circumstances and manner in which the imposition of reasonable conditions upon which any application may be made to the Supreme Court for the determination of any question under section 70; further Parliament is empowered to regulate the powers, practice and procedure of the Supreme Court with respect to any application

under the same section. The courts observed that the enactment of section 32 of the Elections Act is an indication that Parliament has under section 70 (5) made provision for the exercise of the court's jurisdiction, that is the jurisdiction is exercisable only by way of election petition.

It is the view of the present writer that neither section 32 nor section 33 is within the contemplation of section 70 (5) or its corresponding section in the 1965 constitution. The legislative evolution of the Elections Act, and in particular the provisions of sections 32 and 33 thereof, and the constitutions that were granted to Gambia since the piecemeal introduction of franchise are all cogent evidence indicating that the court's position, on the way and manner in which the Supreme Court's jurisdiction is exercisable under section 70 (5), is untenable. The law relating to election petitions first appeared as part of the laws of The Gambia in 1947³² and has continued to be part of the laws since then. The earlier constitutions that were introduced did not contain any comparable provisions to section 70 (5) (46 (5) of the 1965 constitution) until 1962 when a new constitution providing for an enlarged legislative council was granted. In the light of this historical evidence on the legislative evolution of the Act and the constitutions, it can hardly be maintained that Parliament has under section 70 (5) made provision--the provision being section 32 of the Elections

³²Legislative Council (Electoral) Regulations 1947, Regulation No. 7 of 1947 published as Legal Notice No. 71 of 1947.

Act--empowering the Supreme Court to exercise its jurisdiction under section 70 (1) (a) only on the presentation of an election petition. To argue otherwise would not only be disregarding the historical evidence, which we have attempted to adduce, but also attributing gross incompetence and inability to the draftsman of the constitution to simply say that "The Supreme Court shall have jurisdiction to hear and determine any question whether:

(a) any person has been validly elected or appointed

as a voting member of the House of Representatives;

but no such question shall be determined by the Supreme Court unless it is brought by way of an election petition under section 32 of the Elections Act." This is how the courts read the provision; that reading would have been correct had that been the intention of Parliament, but as we have attempted to indicate earlier that is not the intention of Parliament as this provision creates a special procedure to meet the needs of special circumstances.

C. OFFICERS OF THE HOUSE

The Principal officer of the House is the Speaker; he is the representative of the House itself in its proceedings and dignity³³ and the principal characteristic of his office is that of authority and impartiality.³⁴ As the symbol of

³³ Erskin May: The Law, Privileges, Proceedings and Usage of Parliament 19th ed (Butterworths, London, 1976), p. 228.

³⁴ Ibid., p. 229.

authority and impartiality, the Speaker has to be a man of great integrity, and probity, able to subdue his political feelings in the interest of the orderly conduct of the House's business. He is elected by the members of the House at its first meeting after dissolution or at the first meeting of the House after the occurrence of a vacancy in the office of the Speaker;³⁵ and to be qualified for election as a speaker, a candidate must be a citizen of The Gambia.³⁶ Ministers or Parliamentary Secretaries cannot be elected Speaker.³⁷ He is required to preside at all the meetings of the House and in his absence the Deputy Speaker presides and in the absence of both a member of the House elected for that sitting presides.³⁸ The Speaker has neither an original nor a casting vote. In consultation with the Leader of the House he determines the time for the sittings of the House³⁹ and as president of the House he has the unenviable task of maintaining order and dignity in a House that draws its membership from bitter political opponents and sometimes unruly back benchers. His decision as to orders and procedures not covered by the Standing Orders, and his interpretation of the Standing Orders is final.⁴⁰

³⁵S.O. 2.

³⁶S. 67 (1).

³⁷S. 67 (3).

³⁸S. 76 and s.o. 4.

³⁹S.O. 7 (1).

⁴⁰S.O. 88.

His tenure of office is generally coterminous to the life of the Parliament. He, however, vacates his office when the House first meets after a dissolution; if he is removed from office by a resolution of the House supported by the votes of not less than two-thirds of all the voting members. He will, apart from these conditions, vacate his office if he incurs any disability that could have prevented him from being elected Speaker or in the case of a Speaker elected from among the members of the House, if he incurs any disability that would disqualify him for membership of the House.⁴¹ As section 67 (2) disqualifies ministers and parliamentary secretaries for the office of Speaker, one may assume that a Speaker elected among members of the House would vacate his office as Speaker if he is appointed a minister or a parliamentary secretary.

The Deputy Speaker is elected by the House from among persons who are members of the House.⁴² In the absence of the Speaker, he performs all his functions and when he presides at any sitting of the House he is supposed to divest himself of all political feelings and be as unemotional as possible on any issue, even if that issue involves his constituency. In short when he leaves his party benches in the House to take the chair of the Speaker, he must carry with him to that chair all the symbolism that characterise the office of the Speaker.

⁴¹S. 67 (3).

⁴²S. 68 (1).

Like the Speaker, the Deputy Speaker has no original vote but, unlike the Speaker, he has a casting vote which may be used for the purpose of breaking ties.⁴³ While every member of the House is eligible to be elected Deputy Speaker, ministers and parliamentary secretaries are not⁴⁴ unless they resign their offices first. Election to the office of the Deputy Speaker is held on the first sitting of the House after dissolution, on the first meeting of the House in every session and when the office becomes vacant.⁴⁵ Unlike the Speaker the tenure of office of the Deputy Speaker lasts for only one session of the House. This in effect means that at the beginning of each session the Deputy Speaker must vacate his office. However, his office becomes vacant if he ceases to be a member of the House; if he is appointed a Minister or Parliamentary Secretary or if he is removed from office by resolution of the House. The constitution does not define the required majority that can sustain a resolution for the removal of the Deputy Speaker as it does in the case of the Speaker; but one can safely assume that a resolution for the removal of the Deputy Speaker can be declared carried if it wins the support of the majority of members present and voting.

Section 69 establishes the office of the clerk of the House. He and the members of his staff are public servants under the control of the Public Service Commission and, therefore,

⁴³S. 79 (3).

⁴⁴S. 68 (2).

⁴⁵S. 68 (3).

subject to all the rules and regulations applicable to public servants. He presides at the first sitting of the House after dissolution for the purpose of electing a Speaker and, until some person has been so elected, members of the House address all their proposals to him (the proposals must of course relate to the election of a Speaker).⁴⁶ He is responsible for the routine administration of matters affecting the House. He is the custodian of the Order Book, Order Paper and all records of the House. In conjunction with the Serjeant at Arms, the clerk ensures that all orders of the Speaker are carried out.⁴⁷

The Serjeant at Arms is appointed by the Speaker; he attends upon the Speaker with the mace and is responsible for the preservation of order and proper conduct in the House.⁴⁸ It would appear that though the Serjeant at Arms may technically be a servant of the House the power to revoke his appointment does not lie in the House but in the appointing authority--the Speaker. Unlike the Serjeant at Arms in the House of Commons of England, the Gambian Serjeant at Arms has no immediate control over the police on duty at the meetings of the House.

D. PROCEEDINGS IN THE HOUSE AND THE LEGISLATIVE PROCESS

The House is the master of its own proceedings; it is vested with power to regulate its own procedure and in particular

⁴⁶S.O. 4.

⁴⁷S.O. 85.

⁴⁸S.O. 86.

it has authority to make, amend or revoke Standing Orders for the orderly conduct of its proceedings. Standing Orders were made under section 52 of the 1965 constitution and have continued to operate under the authority of section 119 of the 1970 constitution after the revocation of the earlier constitution. Some of the matters in the Standing Orders governing proceedings in the House and the legislative process have been reproduced verbatim in the constitution: where we make reference to the relevant provision of the constitution we shall also indicate its corresponding order in the Standing Orders.

As noted earlier, the Speaker is the President of the House and in that capacity presides at the sittings of the House to deliberate on the affairs of the nation. The provisions of the constitution and the Standing Orders seem to suggest that even where the office of the Deputy Speaker is not vacant the House cannot proceed to transact any business other than the election of the Speaker when his office falls vacant.⁴⁹ On the first sitting of the House after dissolution, and after the election of the Speaker at that sitting, members of the House are required to take and subscribe to an oath of allegiance or an affirmation of allegiance before taking their seats. The oath or affirmation is administered by the clerk.⁵⁰ English language is the medium of communication in the House,⁵¹ but a member may present a petition to the House in any other

⁴⁹S. 67 (4), and s.o. 2.

⁵⁰S. 75 and s.o. 3.

⁵¹S. 78.

language if it is also accompanied by a certified translation in English.⁵² The required quorum for the transaction of any business in the House is one-fourth of all its members. Where any member objects to the transaction of any matter on the grounds that the members present do not constitute the required quorum, the person presiding must ascertain that fact and if he ascertains that there is no quorum, he must adjourn the House.⁵³ As a general rule all questions proposed for decision in the House are determined by simple majority subject to the restriction imposed under section 72.⁵⁴

Perhaps the most important function of the House that readily attracts attention is its legislative function. As important as its role is in the legislative process, one cannot ignore the fact that in a system where there is no absolute separation of power between the legislature and the executive, the role of the legislature as the principal law making organ is more apparent than real. The cabinet determines and initiates legislative policy. It has the final say as to what government policy should receive formal expression by appropriate legislative enactments. It is after the discussion by the cabinet of the principles embodied in a draft bill that the bill is submitted to the House for enactment with or without amendment. In effect the House invariably comes into the legislative

⁵²S.O. 13 (4).

⁵³S. 77 and s.o. 9.

⁵⁴S. 79.

process at a late stage and even at that late stage, it acts as a rubber stamp of the executive.⁵⁵ Be that as it may, the legislative powers of Parliament are exercised by bills passed by the House and assented to by the President.⁵⁶ Every member of the House is entitled to introduce a bill for discussion and subsequent enactment by Parliament. Bills introduced by private members are classified as Private Members' Bills; the rules governing their publication and procedure for their introduction are dealt with in Standing Orders 66-69. A government bill may be introduced by a minister or parliamentary secretary only after notice of intention to introduce it is published in at least two issues of the Gazette. The text of the bill may, where practicable, be contemporaneously published with one of the notices and if possible be circulated to members of the House.⁵⁷ The actual introduction of a bill is signified by handing a copy of it to the clerk; this is followed by the

⁵⁵The writer has witnessed occasions when the House endorses bills containing not less than 30-40 clauses in a matter of forty-five minutes. In many instances members, during the Committee Stages, deal with Bills by parts instead of by clauses. Some of these Bills had spent some months journeying between the desks of the draftsman, the Attorney-General and the cabinet office. There can be no better indication of the apparent but unreal dominance of the House as the Principal legislative organ.

⁵⁶S. 71.

⁵⁷S.O. 51 and 53.

first and second readings,⁵⁸ thereafter the bill is committed to the Committee of the whole House or to a Select Committee.⁵⁹ A bill that has satisfied all the necessary legislative rituals and declared passed is submitted to the President for his assent.⁶⁰ The President may either give or withhold his assent to the bill. In the unlikely event that the President withholds his assent to the bill, he is required to send it back to the House with a message stating why he has withheld his assent.⁶¹

Section 72 (1) clearly endows the President with ample powers to assert the dominance of the executive in the legislative process. It is perhaps one of the constitutional prerogatives of the monarchy that the tides of republicanism has not swept away from the shores of our statute books. The utility of its retention in the present constitutional set up of The Gambia is hardly defensible. The President as Chairman of the cabinet which discusses all government legislations--the very process of formulating policies that are sought to be drafted into law and the discussion of draft bills before they find their way to the printer--would naturally give his blessing to the introduction and subsequent passage of any bill in the House. It is unlikely that the President will withhold his

⁵⁸S.O. 53 and 55.

⁵⁹S.O. 56.

⁶⁰S.O. 63.

⁶¹S. 72 (1).

assent to a bill which was endorsed by cabinet and subsequently passed by the House. The situation where the President may find himself compelled to withhold his assent to a bill is when a particular bill is subjected to fundamental amendments to the extent that in its amended form, it does not give effect to the aims which it was originally intended to achieve. But even in such a situation the Minister in charge will ensure that any amendment of fundamental nature will be killed by the numerical strength of the government the very moment that the amendment is proposed. The very realities of Gambian politics, where the ruling party is in every respect the embodiment of government, makes the incidence of disagreement between the President and the House on a bill very remote. The interpretation or meaning that can easily be attached to such a disagreement by outsiders is mutual lack of confidence between the President and the House; and it does appear that neither the President is, nor the members of his party in the House are, likely to create a situation that could produce a constitutional impasse which may subsequently lead to mutual political destruction.

As the framers of the constitution are not unmindful of the fact that the President could, by section 71 (2), hold the House at ransom, provision is made under section 71 (3) whereby after six months the House may again present to the President for his assent a bill to which he has withheld his assent. The House may also within six months present a bill, which has been returned to the House, for Presidential assent if the bill is supported at its last stage by the votes of not less than two-thirds

of all the voting members of the House. Where the House complies with section 71 (3) the President must, within twenty-one days, give his assent to the bill unless he has first dissolved Parliament.⁶²

Parliament may be the principal legislative organ but it is by no means the exclusive one. It may confer power on any person or authority to make statutory instruments. A statutory instrument made in pursuance of an enabling Act has to be published in the Gazette within twenty-eight days after it is made or where the enabling Act specifies the approval of some person or authority as a condition precedent for its validity, then the instrument must be published in the Gazette within twenty-eight days after such approval has been obtained.⁶³

Non-compliance with this constitutional requirement renders the statutory instrument invalid. Thus in *Chazi Mahamound Vs Inspector-General of Police* (unreported) the Supreme Court (Amendment) Rules, 1971,⁶⁴ which sought to bar Barristers and Solicitors not permanently resident in The Gambia from appearing before the Gambian courts other than The Gambia Court of Appeal was declared invalid because of non-publication in the Gazette as required by section 71 (8).⁶⁵

⁶²S. 71.(4).

⁶³S. 71 (8).

⁶⁴L.N. No. 10 of 1971.

⁶⁵The impugned Rules were made by the Rules Committee on July 16, 1970 and published on May 21, 1971 after nearly one year lapse. The Rules were however reproduced, published as required by the constitution and given retrospective force.

Though the determination of any question proposed for the decision of the House is by simple majority, proposals dealing with the alteration of the provisions of the constitution are subject to different majorities and different procedures. A bill altering the unentrenched sections of the constitution cannot be passed by the House unless, before its first reading, its text is published in at least two issues of the Gazette and supported on its second and third readings by the votes of not less than two-thirds of all the voting members of the House.⁶⁶ Any law that has as its purpose the abolition of the office of a Head Chief, Deputy Head Chief, Sub-Chief or Headman cannot be passed by the House unless the law conforms to the provisions of section 72 (2).⁶⁷ The restrictions on Parliament's power to alter the entrenched sections of the constitution are even more stringent. These sections relate to what may be called the fundamental pillars of the constitution: they are the sections that deal with the republican status and the public seal of the country, the fundamental human rights, the judiciary (other than the provisions dealing with appeals to the Judicial Committee of the Privy Council), the composition and legislative competence of Parliament and the legislative procedure of the House. To these group of entrenched subjects are added matters dealing with the summoning, prorogation and dissolution of Parliament; the time within which elections may be held after

⁶⁶S. 72 (2).

⁶⁷S. 74.

dissolution; and section 72, which deals with the alteration of the constitution. Presidential assent to a bill altering any of the entrenched sections cannot be given unless after its passage, and in the form in which it was passed in the House, it is submitted to the electorate and approved at a referendum by the votes of not less than one-half of all those entitled to vote or by two-thirds of all the votes validly cast at that referendum.⁶⁸ The constitution provides for one further condition to be met before a constitutional bill can be submitted to the President for his assent; the bill has to be accompanied by a certificate under the Speaker's hand indicating that the mandatory provisions of section 72 (2) or (3) and (4) as the case may have been complied with. The Speaker's certificate is conclusive for all purposes and cannot be questioned in any court.⁶⁹

Section 72 (6) prohibits the courts from enquiring into the validity of any constitutional bill or Act once the Speaker's certificate is issued. In such a situation all that the courts can do is to look to the Parliamentary roll; they cannot arrogate to themselves the function of an appellate authority from Parliament. Other bills that are not subject to the cumbersome procedures stipulated by section 72 must be judicially noticed as Acts when the Presidential assent is given.⁷⁰

Judicial recognition of Acts by the courts does not, however,

⁶⁸S. 72 (3) and (4).

⁶⁹S. 72 (6).

⁷⁰Interpretation Act, S. 4 Act No. 10 of 1966.

carry with it the outster of the courts' jurisdiction to enquire into the validity of Acts. If the courts can enquire into the validity of an ordinary Act of Parliament on what grounds, other than substantive grounds, can they do so? The preponderance of judicial authority denies the courts power to raise the cellophane curtain and determine whether the required parliamentary procedures have been complied with in passing an Act. It is said that non-compliance with the law of Parliament cannot be of any use in determining the validity of an Act of Parliament "because it is no part of the business of the court in construing a statute to enquire as to whether the legislature in passing it did or did not proceed according to the lex Parliamenti. It is a matter of elementary law that when a statute appears on its face to have been duly passed by a competent legislature, the courts must assume that all things have been rightly done in respect of its passage through the legislature. . . . It is a case where the maxim omnia praesumuntur rite esse acta applies with great force and vigour."⁷¹ This restatement of the law, even though in another form, is only correct where the lex Parliamenti, which defines what procedures a legislature may follow in passing an Act, is contained in Standing Orders and do not form part of the fundamental law of the country. Where the constitution, which is superior to any other law, stipulates what procedures are to be adopted

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The King Vs Irwing (1926) Ex C.R. 127 at 129 underlined words emphasised see also Pickin Vs British Railway Board (1974) 2 W.L.R. 208.

by Parliament in passing a statute, any statute passed in contravention of those procedures can be declared invalid by the courts. Parliament, however competent, has no power to ignore the conditions of law-making that are imposed by the constitution which regulates its law-making power. This proposition leads to the conclusion that where Parliament in passing a statute ignores the conditions of its law-making power, the maxim omnia praesumuntur rite esse acta will not apply when the validity of the statute is challenged on grounds of Parliament's non-compliance with the law-making conditions and the courts are competent to raise the cellophane curtain to enquire into the fact.⁷²

As we observed every member of the House is competent to introduce bills in the House. The House is, however, precluded from considering any bill, except on the recommendation of a minister--this would invariably be the Minister of Finance--that makes provision for the imposition of taxation or the alteration of taxation other than by reduction; for the imposition of any charge upon the Consolidated Revenue Fund or any other public fund of The Gambia of any moneys not charged on any of these funds or any increase in the amount of such payment, issue, or withdrawal; or for the composition or remission of any

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Quare can Parliament validly pass into law a bill sponsored by a Minister who, by virtue of his nominated membership of the House, is denied by the constitution the right to vote on any measure brought before the House for consideration. It would seem that such a law is invalid as there is a fundamental procedural defect, namely the introduction of the bill by a non-voting member.

debt due to the Government of The Gambia.⁷³ Parliament is further precluded from proceeding on any motion or amendment to a motion which, in the opinion of the person presiding, has the effect of making provisions for any of the purposes enumerated in section 81 (a).⁷⁴

Parliament's functions and dominance, however illusory these may be, are not confined only to the legislative field. It has absolute control over the finances of the country: thus there can be no taxation except by or under the authority of an Act of Parliament⁷⁵ nor can there be an Appropriation Bill without the sanction of the Committee of Supply.⁷⁶ The Appropriation Bill is usually contained in the estimates, which gives a projection of revenue and expenditures of the government for the next following financial year.⁷⁷ Withdrawals from the Consolidated Revenue Fund can only be made to meet expenditure charged on the Fund by the constitution or by an Act of Parliament; or to meet the expenditure necessary to carry on the services of the government before an Appropriation Act comes into operation.⁷⁸ A Supplementary Appropriation Bill, accompanied by a supplementary estimates, may be presented to the House by the Minister if it is found that in respect of any financial

⁷³S. 81 (a) and S.O. 12.

⁷⁴S. 81 (b) and S.O. 12.

⁷⁵S. 101.

⁷⁶S.O. 71-74.

⁷⁷S. 104.

⁷⁸S. 103.

year the amount appropriated by the Appropriation Act is insufficient or that an unforeseen situation for which no amount has been appropriated has arisen. In the like manner a Supplementary Appropriation Bill may be presented to the House if the minister is satisfied that moneys have been expended for any purpose in excess of the amount appropriated for that purpose or for a purpose for which no amount was appropriated.⁷⁹ Parliament may establish a Contingencies Fund into which the minister can dip for the purpose of meeting urgent and unforeseen expenditure for which no provision exists. Advances made from the Contingencies Fund are replaced by Supplementary Appropriation Bills.⁸⁰

Reckless and unwise spending beyond the authorised limits are incidents that occur often, but need strict control. Parliament is duty bound to ensure that government operates within the budget allotted to it for promoting the welfare of the nation. As this duty of surveillance cannot possibly be performed by Parliament as a corporate body, the constitution empowers the Auditor-General, a public officer appointed by the President, to ensure that the constitutional provisions relating to the finances of the country are complied with; and that all moneys are spent for the purposes for which they are appropriated. Apart from his duty of general surveillance to ensure compliance with the constitution's financial provisions, the Auditor-

⁷⁹S. 104 (3).

⁸⁰S. 106.

General audits and reports on the public accounts of the country, the accounts of all officers and authorities of the government, the accounts of all commissions established by the constitution, the accounts of all courts whose expenses are met by Parliament, and the accounts of the clerk of the House. The reports on the audited accounts are submitted to the Minister who must lay them before the House not later than seven days after the House first meets on the receipt of the report by the Minister. If, after receiving the reports, the Minister for any reason defaults to lay them before the House within the prescribed period, the Auditor-General must submit the same to the Speaker to be laid before the House.⁸¹

The nature of his duties puts him in a position not ordinarily enjoyed by public servants. He is not subject to the control or direction of any person, not even the authority that appoints him, in the discharge of his duties under section 109. He can only be removed from office for inability to exercise the functions of his office or for misbehaviour. Where it is proposed to remove him from office for anyone of the reasons just mentioned, the House has to, by resolution, appoint a tribunal to investigate the question of his removal. The investigating tribunal must consist of three persons one of whom must be or must have been a high judicial officer. The tribunal reports its findings to the House, which considers the report at its first convenient sitting and thereafter by

⁸¹s. 109.

resolution remove the Auditor-General from office.⁸²

Another mode of Parliament's control over the country's finances is through the Public Accounts Committee. This Committee is composed of a chairman and six other members appointed by the Committee of Selection; ministers and parliamentary secretaries cannot be appointed to the Committee. It examines the accounts showing the appropriation of the sums granted by the House to meet the public expenditure, and its meetings are attended by the Auditor-General or his representative to explain to it some of his findings. It may call, and often does call, upon heads of departments to explain why there has been over expenditure beyond the appropriated sum or non-collection of revenue.⁸³

E. COMMITTEES OF THE HOUSE

The enormity of the House's business (and the infrequency of its sittings) means that some of its businesses have to be transacted in committees. Of these committees the most important appears to be the Committee of Supply, which is appointed at the beginning of each session for the purpose of scrutinising, discussing, and approving the estimates with or without amendments. In short it is the provider of funds for the maintenance

⁸²S. 112. Although the section provides that upon the consideration of the tribunals report, the House shall by resolution remove the Auditor-General from office it is fair to assume that the House will only adopt that course if the tribunal reports adversely on the Auditor-General.

⁸³S.O. 77.

of the country's services; its membership consist of the entire members of the House.⁸⁴ Apart from the Committee of Supply there are the Select Committees which are classified as Sessional and Special Select Committees. The Sessional Select Committees consist of the Committee of Selection, the Public Accounts Committee, the Standing Orders Committee and the House Committee. We have already noted the composition and functions of the Public Accounts Committee and they need no repetition here.

The Committee of Selection is composed of the Speaker as chairman and five other members three of whom are nominated by the Leader of the Opposition. As its name implies this Committee selects and appoints the members of the other Committees and, by order of the House, the members of a Special Select Committee.⁸⁵ The Standing Order Committee is composed of five members one of whom is appointed chairman. Its main function is to consider and report to the House on the need and desirability of amending the rules of the House; it may not issue subpoena against persons or demand the production of records or papers without the approval of the House.⁸⁶ The House Committee, which is composed of four members, is responsible for considering and advising the House on matters connected with the comfort and convenience of the members of the House.⁸⁷ A Special Select

⁸⁴S.O. 74.

⁸⁵S.O. 76.

⁸⁶S.O. 78.

⁸⁷S.O. 79.

Committee is appointed by order of the House and its composition is determined by the Committee of Selection. Its functions are not specifically set out in the Standing Orders but one may reasonably suppose that it deals with matters referred to it for consideration by the House. One definite purpose of a Special Select Committee is to consider bills that may be committed to it by the Committee of the whole House. Neither adjournment nor prorogation interferes with its business; it can be discharged only after submitting its report to the House.⁸⁸

F. SUMMONING, PROROGATION AND DISSOLUTION

Parliament meets at such times and places as may be designated by the President. As a general rule Parliament must meet at least once in the year, and within twenty-eight days from the holding of a general election following a dissolution.⁸⁹ Prorogation and dissolution of Parliament are the prerogative of the President which he may exercise at any time. A Parliament, once constituted, lasts for five years unless sooner dissolved; it may, however, extend its life beyond the five year period if The Gambia is at war. Likewise a dissolved Parliament may be recalled to deal with any state of emergency that might exist and the Parliament so recalled is for all purposes the Parliament for the time being. Parliament may be dissolved on the passing of a vote of no confidence by the House on the

⁸⁸S.O. 80.

⁸⁹S. 84.

government. The President must dissolve Parliament within three days of the passing of a vote of no confidence in his government and if he does not, Parliament will stand dissolved on the fourth day.⁹⁰ This provision recognises and supports the basic constitutional practice that so long as the House is in being, the majority of its members who are prepared to act in unanimity and cohesion is entitled to determine the effective leadership of the government of the day. Be that as it may the chances of its success are remote for the simple reason that the seven days that intervene between the giving of the notice of the motion and the actual voting on it does afford the government of the day an ample opportunity to lobby support against the motion. Though the device is intended to make the government of the day dependent for its continuance in office on the House, it is unlikely to be used by the House as the successful passing of a vote of no confidence in the government does not only entail putting the government to death but also the Parliament. Members of the House, who are unsure of their standings among their constituents, will not readily conspire with others to bring about an end to their membership of the House. .

G. POWERS, PRIVILEGES AND IMMUNITIES OF THE HOUSE

The functions and duties of the members of the House require that they be vested with certain privileges, powers and immunities

⁹⁰S. 85.

to protect them from arrests and legal proceedings for any thing done in the performance of their duties within the precincts of the House. Parliament, therefore, enacted in 1960, the House of Representatives (Powers and Privileges) Act, 1960.⁹¹ This Act came into force before both the independence and republican constitutions were promulgated; it has however been continued under the transitional provisions which provide for the continuance of existing laws. The privileges and immunities conferred by the Act are "enjoyed by individual members, because the House cannot perform its functions without impeded use of the services of its members; and by the House for the protection of its members and the vindication of its own authority and dignity."⁹²

Under the Act, members of the House enjoy absolute immunity from civil or criminal proceedings for words spoken before, or written in a report to, the House or to a Committee of the House on any matter brought before the House by way of petition, bill or motion. This immunity is intended to enable members to express their views in the House without fear of breaching the law of sedition or be liable in civil suit for libel or slander. Absolute and unhindered freedom to ventilate views is essential for members of the House as this element of free speech "is the element which gives life to (a deliberative) body, as air does to natural body. And the free and fearless discussion of every plan and purpose, which is essential to wise legislation,

⁹¹Cap. 91,

⁹²Erskin May: p. 67.

would be impossible if members were subjected to restraints imposed with respect to private reputation."⁹³ The free and fearless discussion of every plan and purpose, whether emanating from government or private members, are not licenses for unwarranted and scurrilous attack on individuals or organisations that are not in the position to rebut, on the floor of the House, any unfounded allegations levelled against them. A member should, therefore, be in a position to substantiate any remarks or allegations made against other individuals. One can expect that the members will only make use of their privileges to point out the errors of government with a view to securing their corrections; the rules of debates and the general duty of the Speaker that the House conducts itself in a dignified manner are a likely deterrent against the abuse of parliamentary powers, immunities and privileges.

Members are privileged from arrest for any civil debt, the contraction of which does not constitute a crime, while proceeding to, attending at or returning from a sitting of the House or any of its Committees⁹⁴ and no civil process can be served on a member within the precincts of the House or through any officer of the House during its sittings.⁹⁵ The Act further provides that neither the Speaker nor any other officer of the House is subject to the jurisdiction of any court in respect of the exercise of any power under the Act.⁹⁶ As

⁹³ Schwartz's American Constitutional Law quoted in Nwabueze's Constitutional Law of the Nigerian Republic, p. 218.

⁹⁴S.4.

⁹⁵S.22.

⁹⁶S. 21.

members are expected to exhibit a high degree of decorum and integrity, and shining example to the rest of the nation, the Act makes it unlawful for a member to accept bribes, receive compensation or a gift as an incentive for the member to promote or oppose any matter before or to be brought before the House or any of its Committees. The infraction of this prohibition by a member is punished by a fine of two thousand and five hundred dalasis.⁹⁷

Strangers may enter and remain within the precincts of the House but may be asked by the Speaker to withdraw at any time.⁹⁸ Unqualified persons, who sit or vote in the House, are liable to a fine not exceeding one hundred dalasis or such other sum as Parliament may prescribe.⁹⁹ Non-members, who enter or attempt to enter the House in contravention of the Speaker's orders, or refuse to withdraw from the House after being asked to do so or participate in the proceedings of the House, are liable to a fine not exceeding one hundred and twenty-five dalasis or imprisonment not exceeding three months. Intimidation of members of the House, or the incitement of other persons to proceed to the House, while it is in session, in a tumultuous, riotous or disorderly manner is punishable by a fine not exceeding five hundred dalasis or imprisonment not exceeding twelve months.¹⁰⁰ Just as members are forbidden to

⁹⁷S. 13.

⁹⁸Ss. 5 and 2.

⁹⁹S. 80 (Constitution).

¹⁰⁰Ss. 8 and 9.

receive bribes, gifts or compensation for the purpose of promoting, or opposing any measure before the House so are strangers forbidden to offer the same to members of the House for the purpose of winning members' support or opposition to any measure. These and acts of assault, molestation, insult, threat, the use of violence or force against members with a view to coercing them to support or oppose any measure are punished by a fine not exceeding five hundred dalasis or imprisonment not exceeding twelve months.¹⁰¹

Under section 3 of the House of Representatives (Witnesses' and Oaths) Act,¹⁰² a Select Committee may summon witnesses or order the production of any report or document. It is an offence punishable with imprisonment not exceeding twelve months or a fine not exceeding five hundred dalasis to present an untrue, a fabricated or falsified document to the House with intent to deceive it; to refuse to be examined before a Committee of the House or to produce any document ordered to be produced; to give false testimony before any Committee or without reasonable excuse, to refuse to appear before a Committee.¹⁰³ Similar punishment is imposed for the printing or publication, in any form, of any scandalous or defamatory matter reflecting on the character or proceedings of the House; abstraction of records or documents in the custody of the clerk, their falsification

¹⁰¹S. 10 (a) - (e).

¹⁰²Cap. 92.

¹⁰³S. 10 (8) - (i).

or improper alteration.¹⁰⁴ The Act further provides that the Journals of the House of Commons of the United Kingdom are to be admitted as prima facie evidence in any enquiry touching on the privileges, immunities and powers of the House of Representatives or any of its members, and all the Journals printed by the Orders of the House are to be admitted in evidence without further proof.¹⁰⁵ Persons responsible for the publication of the proceedings of the House are immune from civil or criminal proceedings in respect of matters published under the authority of the House.¹⁰⁶ Civil or criminal prosecutions instituted against a person for printing a false copy of an Act or a Journal of the House may be dismissed if the court is satisfied that the printing or publication is done without malice.¹⁰⁷ The prosecution of an offence under the Act can be instituted only with the written consent of the Attorney-General.¹⁰⁸

The Act does not provide for the punishment of either a member or a stranger for contempt of the House. Standing Order 46 does empower the Speaker or Chairman of a Committee to order a member, whose conduct is grossly disorderly, to withdraw from the precincts of the House for the remainder of

¹⁰⁴S. 10 (k) and (m).

¹⁰⁵Ss. 15 and 16.

¹⁰⁶S. 18.

¹⁰⁷S. 19.

¹⁰⁸S. 12.

that day and a member who refuses to withdraw when ordered to do so may be suspended for three sittings of the House. Section 15 of Cap. 91, and Order 88 of the Standing Orders are drafted in such wide language that the House's power to punish any person for contempt can be exercised under them. This conclusion is fair and consistent with parliamentary practices; to suggest otherwise will make the House "entirely ineffectual to enable it to discharge its functions, if it had no power to punish offenders, to impose disciplinary regulations upon its members, or to enforce obedience to its commands."¹⁰⁹

CONCLUSION

An active, a lively and democratic House was what Gambia inherited on the eve of independence and on the eve of Republic day. Its democratic character is its most important attribute that has been maintained since the departure of the colonial government. Its position as the principal legislative organ and the degree of control it exercises over the country's finances leaves it as perhaps the only dominant instrument for promoting social and economic development. By its role it does help to provide a check against executive caprices; the greatest instrument at its disposal for controlling the government is its power to pass a vote of no confidence in a government that has proved itself irresponsible or insensitive to the needs of

¹⁰⁹Cushing: Legislative Assemblies, paras 532-3 quoted in Erskin May, p. 68.

the country.

The qualification for its membership seem to be unique. It is probably the only legislature in Commonwealth Africa in which non-citizens can be members. It is fair to point out that since Sir Philip Bridges, who sat in the House in an ex-officio capacity left the office of the Attorney-General to become Chief Justice, no non-Gambian has been appointed as nominated member of the House. Indeed political wisdom and expediency will always influence the President to disregard appointing of non-Gambians as nominated members of the House.

What is sadly lacking, however, is the frequency of the meetings of the House. It meets not more than five times in the year and, except during the budget session, mostly for two or three days. Indeed if the House's meetings are to last for a period of two or three days one can only suppose that its business are transacted in a hasty manner. It is no disrespect to observe that the quality of debates are indeed poor; this is because the majority of the members are not well educated to enable them to make their contributions on complicated national matters. Those that are reasonably educated are not making any meaningful use of their membership of the House. Sycophancy and panegyricism, all dictated by inability to draw a clear distinction between the government and the majority party in the House, have in some cases affected the tone of debates in the House while the opposition, except in isolated cases, have always come down heavily on the government for the

simple reason that they carry the label of "opposition." Indeed the average member of the House feels himself obliged to support the position of his party on any issue even against his own better judgment; this feeling of obligation is the result of party discipline which has ultimately circumscribed in a material way the freedom of speech in the House. The absence of many educated men in the House has partly been due to their inability to displace what may be called the "old guards," who have built for themselves great reputation among a rural population not interested in the niceties of political or party ideology: these people are interested in what a particular candidate's stand is on questions of peanut prices and medical facilities, to mention a few. Apart from the popularity of the "old guards," there is the unwillingness on the part of the educated men to sacrifice their well paid jobs, which guarantee them pensions during their old age, and subject themselves to the broils and unpredictable game of party politics. It may be that if Parliament does amend section 78 of the constitution to allow the House to conduct its business in English and all the three major local languages a marked change will be registered in the quality of the debates of the House. Government has recently taken steps to make parliamentarianism, and therefore politics, attractive to those who feel there is no security in being a member of the House. Parliamentarians' salaries have been increased by fifty per cent and a law has been passed to make provisions for pensions and gratuities for the members of the House.

If we look at the other side of the coin we find that the near lack of sufficient criticism of government on the floor of the House is not because of party discipline only. The writer knows as a fact that the members of the House do exert great pressure on the cabinet members at meetings of the party caucus where parliamentarians treat themselves as members of the same family and therefore feel free to point out the shortcomings of the government. A majority of the members have, by personal contacts, been able to break through the bureaucratic clap-trappings to achieve the implementation of projects for their constituencies well on time. The silent back benchers realise that demagoguery may win them the admiration of the visitors to the House, but they also realise that it is no substitute for the effective use of personal contacts which produce a lot more benefit for their needy constituents. It is also fair to mention that the parliamentarians in The Gambia have not only limited their demagoguery but they have, by their personal contacts and reputation in the community, participated effectively in the development of the country by the promotion of the concept of "tesito" or self-help.

The Gambian Parliament though young and sometimes ineffective has for the short period of its existence lived up to expectations and it does provide the only forum for the discussion of national affairs in the true spirit of democracy.

CHAPTER EIGHT

THE EXECUTIVE

By far the most significant change brought by the adoption of a republican form of constitution with an executive president is the centralisation of the executive authority and its mode of exercise. When Gambia was an autonomous monarchy the executive authority of the state was vested in the Queen exercisable on her behalf by the Governor-General who, except in certain specified cases, acted on the advice of the Prime Minister. That constitutional arrangement or practice, however, came to an end when the Crown in its rights of The Gambia was abolished. The new constitution did not only do away with the Crown but it also disregarded a presidential system of government under which the President as Head of State acted in that capacity on the advice of the Prime Minister and the cabinet. The Gambia, therefore, adopted a republican form of government, which reflects an amalgam of the American and Westminster systems of government. These systems were not borrowed in their entirety as the members of the cabinet, unlike the American system, are drawn from the House and the President as head of government is not, unlike the Westminster system, a member of the House. As Head of State and government the President wields enormous powers some of which we have already discussed. A discussion of the executive power in The Gambia logically means a discussion of the powers of the

President as the constitution makes him the linchpin of the executive authority of the Republic, which he may exercise without regard to advice tendered by any person. His powers have in some instances been adequately defined under the constitution and this is especially so in relation to his cabinet, the public service and periods of emergency. Where, however, the constitution does not provide for the specific powers of the President in relation to any subject, he may assume powers with respect to that subject under section 128 if the Crown could, at the commencement of the constitution, exercise its prerogative in relation to that subject in The Gambia.

While the theme of this chapter is the discussion of Presidential powers under the constitution, we may as well before embarking on that task throw some light on the method of his election to, and removal from, office.

A. ELECTION OF THE PRESIDENT

Presidential elections are coterminous with parliamentary elections so that whenever Parliament is dissolved an election is held to the office of President. To combine Presidential elections with parliamentary elections does not only reduce the cost of electioneering but, as we shall note, it ensures a Presidential candidate the hope to form a government if his party also enjoys the support of the majority of the elected members. When the constitution came into force in 1970

it was not necessary to hold a presidential election as provision was made¹ for the person who, immediately before 24th of April, 1970, held the office of Prime Minister under the 1965 constitution² to assume the Office of President on that day as if he had been elected in accordance with the constitutional provisions governing Presidential elections.

Under the constitution a Presidential candidate must be a citizen of The Gambia who has attained the age of thirty years, qualified to be registered as a voter for the purpose of election to the House, nominated by not less than one hundred registered voters (where the election follows a dissolution of Parliament), and an elected member of the House (where the election is held as a result of a vacancy in the office of the President in circumstances where there is no Vice-President).³ It appears from the language of section 33 that entitlement to vote, which is conferred by registration as a voter, is not an essential constitutional prerequisite for the Office of the President. All that is essential for a Presidential candidate is to be qualified to be registered as a voter though the very act of being registered as a voter would strongly confirm his qualification for the office. The assumption that one need not be entitled to vote to qualify for the Presidency, provided the other legal requirements are

¹S. 32.

²S.I. 1965/135.

³S. 33.

satisfied, finds support from the proviso to section 33 (b), which makes it abundantly clear that a Head Chief, notwithstanding his disqualification to be registered as a voter, is qualified for election as President if he satisfies the other conditions. Apart from the qualifications enumerated in section 33, one may venture to add in negative terms that a person adjudged to be of unsound mind or a bankrupt under any law in force in The Gambia, or a person sentenced to death or imprisonment exceeding six months or who within five years of the date of his nomination for election as President has served or completed serving a sentence of imprisonment exceeding six months, is not eligible for election as President.

The laws governing the election of the President are to be found in the Presidential Elections Act, 1972⁴ and chapter 4 of the constitution. The Presidential Elections Act makes the provisions of the Elections Act⁵ and subsidiary legislation made thereunder to be applicable to Presidential elections. The Returning Officer for the Presidential elections may in consultation with the Supervisor of Elections, by order published in the Gazette, declare what provisions of the Elections Act and the subsidiary legislation are applicable to Presidential elections.⁶ Chapter 4 of the constitution deals in part with the election of the President; the procedure is relatively simple.

⁴ Act No. 4 of 1972.

⁵ Cap. 58.

⁶ Act No. 4 s. 4.

Where a Presidential election is held on a dissolution of Parliament and there is only one candidate validly nominated, the Chief Justice, who is the Returning Officer in Presidential elections, declares him elected.⁷ This somewhat mandatory provision of the constitution fails to take into account the multi-party system that exists in Gambia; the provision echoes the procedure for electing a President in a one party state. In the Gambian political set up one candidate may be validly nominated as a Presidential candidate but that does not ipso facto guarantee that his party will win the majority of elected seats in the House. The present writer thinks that since a Gambian President becomes President by virtue of the support he commands in the House (and this support comes only from his party), the reasonable meaning that can be ascribed to section 34 (2) is that the Returning Officer will only declare a sole Presidential candidate elected as President if that candidate's party also wins more than half of the elected seats at the general election. This is only logical for otherwise a sole Presidential candidate may find himself pronounced elected as such while his lack of support from the House will frustrate all his efforts to form a workable government. The logicity and reasonableness of the interpretation just ascribed to section 34 (2) is borne out by paragraph (a) of the same subsection. Paragraph (a) provides that where more than one

⁷Constitution s. 34 (2).

candidate is validly nominated in a Presidential election, the candidates nominated for election to the House as elected members may declare their preference for a Presidential candidate and the Presidential candidate who obtains more than half of the total number of persons elected to the House shall be declared as President. Making the election of the President dependent upon the number of elected members on whose support he can rely in the House, in cases where there are two or more Presidential candidates, confirms our suggestion that it is not the intention of section 34 (2) to have a sole Presidential candidate declared elected as President unless he has a solid political support in the House to enable him to form a government. Paragraph (b) of section 34 (2), however, envisages a situation where none of the Presidential candidates is elected under paragraph (a), and we suggest that paragraph (b) could also apply to a situation where there is only one validly nominated Presidential candidate. But we will first discuss when paragraph (b) becomes operative when none of the Presidential candidates is elected under paragraph (a).

Failing the election of the President at the polls by reason of a tie between two or more Presidential candidates (this situation is likely to arise where there are more than two Presidential candidates so that none of them is able to win the support of more than half of the elected members or where some of the elected members are unaligned to any Presidential candidate), the voting members of the House

congregate into an electoral college to elect a President by secret ballot. As much as three ballots may be taken. A Presidential candidate who obtains, on the first or second ballot, if the first ballot fails to elect a President, more than half of the total number of votes cast at the ballot is declared elected. It may be necessary to hold a third ballot where both the first and second ballots fail to elect a President and the person who obtains the majority of votes cast at the third ballot is declared elected.⁸ One can imagine that the procedures stipulated by paragraph (b) of section 34 (2) and section 34 (3) will automatically apply in situations where a sole Presidential candidate is nominated but the numerical strength of whose party in the House is not up to more than half of the elected members. An argument to the contrary will produce the same effect we have earlier endeavoured to explain.

The procedures governing the election of the President through the medium of an electoral college apply to the election of a successor when the office of the President becomes vacant in circumstances in which there is no Vice-President. In the inter regnum period, the functions of the President are performed by a minister chosen by the cabinet until a President is elected. In such circumstances the election of the President must be held within fourteen days after the occurrence of a vacancy in the office of the President.⁹

⁸S. 34 (3).

⁹S. 39 (2).

It is pertinent to note that although under section 34 (2) (a) a Presidential candidate relies very much on the support he can muster from persons nominated for election to the House, the base for his support could be broadened under section 34 (3) (which speaks of voting members) if it becomes necessary to determine the election of the President through an electoral college. The broadening of that base by reference to voting members enables the four Chiefs representative members to do exactly what they cannot ordinarily do under the electoral laws, namely to vote at a Presidential election held on dissolution of Parliament. Indeed section 34 (3) does not only enable the chiefs representative members to do indirectly what they cannot do directly but it also appears to be discriminatory in their favour. It might be eminently fair if the other chiefs, who on account of their disqualification, cannot vote at a Presidential election, are allowed to suggest to their colleagues in the House their preference for a Presidential candidate. By this way they can participate, however indirectly, through their representatives in the election of the President. In effect Chiefs' representatives should have a fresh mandate from their colleagues whenever it is necessary for the House to resort to the procedures under section 34 (3). On this argument one may question the desirability of the popularly elected representatives' participation in the election of the President without first obtaining a mandate from their constituents as to which Presidential

candidate they would like their representatives to vote for. The simple answer to that is that Presidential candidates are usually, and have been, nominated by the political parties they lead; the non-election of a candidate who supports a particular Presidential candidate is a strong indication of the wish of the majority of the constituents that they prefer as President one whose supporting candidate is elected and not otherwise.

We have indicated that all voting members of the House are eligible to participate in the election of the President under section 34 (3). What is uncertain, however, is whether the expression "voting member" embraces a nominated Attorney-General for the purposes of electing a President under section 34 (3) after a Presidential election that ends in a deadlock. It would seem not to embrace a nominated Attorney-General for the logical reason that his nomination and appointment as such is effected by the President and one cannot imagine an incumbent President, whose fate is in the scale, to nominate an Attorney-General. This theory is sound notwithstanding section 46 (d), which requires all ministers, including the Attorney-General, to vacate their offices immediately before the assumption of office of a President. One might be tempted to argue that "immediately before the assumption of office by a President" is so vague as to enable an incumbent nominated Attorney-General to remain a voting member of the House for the purpose of section 34 (3) until a President is elected. However vague that phrase may be, it only stands to reason

that ministers must relinquish their offices as soon as the election results are declared, and the question of membership of the House in being before dissolution becomes irrelevant. The Attorney-General's position is however different when it is necessary for the voting members to elect a President in circumstances contemplated by section 39 (2).

One further matter under section 34 calls for observation. The Chiefs' representative members are entitled to participate at the election of the President through the secret ballot but they cannot give a preference (this probably means nomination) to a Presidential candidate. A Presidential candidate, to be elected as President by secret ballot, has to obtain the preference of at least one elected member¹⁰ (an elected member is one who is elected to the House on the basis of universal adult suffrage). This seems to be a contradiction in terms in that though a Chiefs' representative member is, by virtue of his status as a voting member, perfectly entitled to determine by his vote who should or should not be President, he is at the same time denied the right or privilege to sponsor a candidate for the Presidency by declaring his preference. If the philosophy is to prevent a Chiefs' representative member from openly asserting his political alignment, the provision should go further to limit voting rights in such situations to elected members who have made no secret of their political alignments.

¹⁰S. 34 (2) (b); underlining mine.

It is submitted that Chiefs' representative members should be excluded from electing the President through the procedure contemplated by section 34 (3) because the very fact of voting for a particular Presidential candidate, however secret the voting may be, is an ultimate indication of political alignment with that particular candidate.

Just as in ordinary constituency elections, disputes may arise as to validity of the President's election by reason of non-compliance with the procedure regulating the election of the President. There is however a fundamental difference in determining disputes in constituency elections and disputes in Presidential elections. In the latter any question as to whether the constitutional provisions governing the election of a President or any law in that behalf has been complied with, or whether any person has been validly elected President is determined by the Returning Officer and his determination on any such issue is not subject to an enquiry by any court.¹¹

The President is not a member of the House; any person who is elected President and also a member of the House at the same general election must vacate his seat in the House as soon as he assumes office.¹² Similarly where the Vice-President succeeds the President or where there is no Vice-President and one of the elected members is selected by the

¹¹S. 35 (2).

¹²S. 36 (2).

House as President, then he must vacate his seat in the House as soon as he assumes the office of President.¹³ There is much sense in this system as it ensures that the dignity attaching to the office of the President is maintained. Membership of the House by the President will certainly either involve him in unedifying disputes with his political opponents in the House, or muzzle those who have any sense of respect for the Head of State as they might not easily distinguish his position as Head of State and that as head of government. But the political antagonism and animosity that have been generated during the electioneering period is likely to tempt even the most sensible political opponents of the President to drag him into disputations, which, to say the least, is not compatible with his office. It is for the avoidance of disrespect and humiliation to the office of the President and its holder that the constitution requires the President not to be a member of the House.¹⁴

B. THE PRESIDENT'S TENURE OF OFFICE

The President assumes office on the day following his

¹³S. 39 (2).

¹⁴The writer believes that Hon. Joe Clark would not have felt himself free during a House of Commons (Canada) question period to tell the Prime Minister that this is not the time (an apparent reference to the results of the October 1977 mini-elections) for the Prime Minister to adopt his usual disputatious ways if the Prime Minister was also Head of State. Such a statement, if addressed to the Head of State, will certainly win the disapproval of a great number of people.

election and continues to hold office, until the person elected President at the next following general elections assumes office.¹⁵ This means the President can hold office for five years and there is no constitutional prohibition on him to seek re-election for as many terms as he desires provided he has the support of the electorate.

His office, however, becomes vacant if he dies, if he resigns or if he is removed from office in which case the Vice-President assumes office or where there is no Vice-President the functions of the President devolves on a minister selected by the cabinet until a new President is elected.¹⁶ The automatic assumption of the office of President by the Vice-President has its shortcomings. A Vice-President who so assumes the Presidency in this manner is not the popular choice of the electorate and may in some cases lack a solid political base both inside and outside the House. Such a situation could induce rebellion among the government M.P.s and that rebellion could lead to a break down of constitutional government. The selection of a Vice-President by the President is only a tacit indication on the part of the President that the man appointed Vice-President is capable of handling the affairs of the state in case the President is no longer in office, but no more. Since the country became a republic there have been three persons appointed

¹⁵S. 36 (1).

¹⁶S. 39 (1) and (2) (a).

as Vice-President¹⁷ one of whom could definitely be said to lack a solid political base not only throughout the country but also in his constituency; the assumption of office as President by a Vice-President without a large following will make his acceptability extremely difficult. The practice in Kenya,¹⁸ whereby when the office of the President falls vacant the Vice-President or some other minister performs the function of the President for a period of not more than three months after which a fresh Presidential election is held, is to be preferred to the Gambian practice.

Section 40 stipulates that the salary and allowances payable to the President are to be determined by a resolution of the House and that the salary and allowances so determined shall be a charge on the Consolidated Revenue Fund. It is further provided that while the President is in office his salary and allowances cannot be altered to his disadvantage. He is also exempt from personal taxation; his exemption from personal taxation relates only to the salary and allowances that are provided by the House. His income from other sources, such as rent, cannot be exempted from taxation as these are not incomes derived or earned by him in his capacity as President.

C. REMOVAL OF THE PRESIDENT FROM OFFICE

Mental and physical fitness are essential attributes

¹⁷At the moment of writing Hon. Assan Musa Camara was appointed a Vice-President a second time.

¹⁸See Ghai and MacAuslan, p. 230.

to be possessed by a President in order to discharge the onerous functions of his office. It is equally essential for a President to exhibit some modicum of discreteness in his conduct and to ensure that he does not in any way violate the provisions of a constitution, which by his oath of office, he undertakes to preserve and defend. As there is no full proof insurance against the physical or mental incapacity of a President or against his indiscreet behaviour the constitution provided the only panacea in such situations--namely power to remove the President from office.

(i) REMOVAL ON GROUNDS OF MENTAL OR PHYSICAL INCAPACITY

The process for the removal of the President on grounds of his mental or physical incapacity to discharge the functions of his office is initiated by a cabinet resolution, supported by the votes of a majority of all its members, stating that the mental or physical capacity of the President should be investigated. The Chief Justice is then informed of the cabinet's desire to have the investigation conducted. A tribunal consisting of not less than three persons qualified to practice medicine under the laws of The Gambia must be appointed by the Chief Justice to conduct the investigation. The report of the tribunal is submitted to the Chief Justice who, on the basis of the medical report, must issue a certificate indicating whether or not the President is physically or mentally fit to

execute the functions of his office. The Chief Justice's certificate on any such issue is conclusive and cannot be questioned in any court.¹⁹

As soon as the cabinet resolves that the question of the mental or physical capacity of the President should be investigated, he stands suspended from office and his functions are performed by the Vice-President or in case there is no Vice-President by such minister as the cabinet may appoint. The suspension of the President ceases if the medical tribunal finds him capable of performing the functions of his office.²⁰ An acting President has no power to revoke the appointment of the Vice-President or to dissolve Parliament.²¹

There is yet another situation where the President may be temporarily removed from office because of illness. This temporary abdication of Presidential powers to some other cabinet minister may be done by the President himself where he considers that, by reason of his illness, it is desirable to authorise the Vice-President to discharge certain specified functions of the President. The Vice-President will discharge those functions until his authority to do so is revoked. Where the President is, by reason of his physical or mental illness, unable to give authorisation to the Vice-President or to another person to perform the functions of the President,

¹⁹S. 37 (1) and (2),

²⁰S. 37 (3).

²¹S. 37 (4).

those functions will fall to be performed by the Vice-President or in his absence by some other minister appointed for that purpose. A certificate of the Chief Justice that the President is incapable, by reason of physical or mental infirmity, to perform the functions of his office is conclusive and remains in force until the President signifies his intention to resume the functions of his office. A person acting as President during the temporary absence of the President cannot revoke the appointment of the Vice-President or dissolve Parliament. The temporary assumption of the office of the President by reason of his mental or physical infirmity does not disqualify the temporary holder from membership of the House.²² Bennion commenting on a similar provision in the Ghana constitution remarks that "illness here means temporary illness and does not include illness of such gravity as to have resulted in the President's having been adjudged incapable of acting by the Chief Justice. . ."²³

(ii) REMOVAL ON GROUNDS OF GROSS MISCONDUCT ETC.

Violation of the constitution or gross misconduct by the President are further grounds on which he could be removed from office. His removal from office on any of these ground is initiated by a notice in writing signed by not less than one-half of all the members of the House alleging that the President

²²S. 39 (3) - (7).

²³The Constitutional Law of Ghana, pp. 143-144.

has violated the constitution or as the case may be has grossly misconducted himself (the notice must specify particulars of the allegations and also must contain a proposal that a tribunal be appointed to investigate those allegations). The notice is served on the Speaker who must within seven days put it before the House for its consideration, if the House is sitting; or where Parliament is prorogued the Speaker must summon the House within twenty-one days to consider the motion. The substance or merits of the motion are not subject to debate; the Speaker causes a vote to be taken on the proposal and if it wins the support of not less than two-thirds of all the voting members, it is declared passed. The Chief Justice then appoints a tribunal consisting of a chairman and not less than two other persons one of whom must be or must have been a high judicial official to investigate the allegations and report to the House on its findings. The President is entitled to appear and be defended before the tribunal. If the investigating tribunal reports to the House that any allegation against the President has not been substantiated, the matter is closed. If, however, the investigating tribunal reports that the particulars of any allegation have been substantiated, the House may, on a motion supported by a two-thirds majority, resolve that the President is guilty of violation of the constitution or gross misconduct and upon such resolution the President ceases to hold office on the third day unless he sooner dissolves Parliament.²⁴ It has been

²⁴S. 38.

suggested, and the present writer agrees, that this procedure has a self-stultifying effect.²⁵ It is unimaginable why such an elaborate and cumbersome procedure should be provided for if at the end of the whole exercise the President could call into aid his power to dissolve Parliament in order to escape a humiliating departure from that high office. What is also stultifying is the fact that during the investigation the President is not required to relinquish the functions of his office to his Vice-President or some other minister as he is required to do when the question of his mental or physical incapacity is being inquired into. A President who faces an investigating tribunal for gross misconduct or violation of the constitution could, by his official position, intimidate or influence the members of the investigating tribunal and this will certainly tantamount to adding insult to injury. There can hardly be any gross misconduct or violation of the constitution by a President than tampering with a tribunal set up to investigate charges against him.

D. PRESIDENTIAL IMMUNITIES

During his tenure of office no criminal or civil proceedings can be instituted against the President for anything done or omitted to be done by him in his official or private

²⁵Nwabueze: Presidentialism in Commonwealth Africa, p. 134.

capacity.²⁶ Immunity from civil or criminal proceedings for matters done or omitted to be done by the President in his official capacity is absolutely necessary to ensure the fearless and unimpeded performance of his functions as President. It cannot be over-emphasised that the best process against a President for his erring official acts is the electoral machinery through which the electorate, by their votes, can indict and pass verdict on his official performance. Immunity for acts done or omitted to be done by him in his personal capacity is hardly defensible. It is an open authorisation to an unscrupulous President to interfere--interference that could amount to a tortious act--in his private capacity in the affairs of others. An aggrieved individual has no remedy for wrongs committed against him by the President in his private capacity. A marked distinction ought to have been drawn between the official and private acts of the President since the President's personal liability to an aggrieved individual "is not likely to assume political dimensions, and the rule of Parliamentary accountability (or indictment by the electorate) is a poor remedy for an aggrieved individual."²⁷ Granted that it is necessary to clothe the President with immunity for his private acts during his tenure of office in order to preserve the dignity of his office such immunity should only last while he is in office. An aggrieved person ought to be at liberty to seek remedy

²⁶S. 41.

²⁷Ghai and MacAuslan, p. 233. Parenthesis mine.

against the President when he is no longer President and the statutory limitation period should only commence to run from the day that the President vacates office.

The concept of Presidential immunity means that the courts cannot issue any process against the President. As unsatisfactory as that concept is under the Gambian constitution it has begun to be extended to the Vice-President. The extension of immunity to the Vice-President from the courts' process has no constitutional or other statutory backing; it is an immunity enjoyed by the Vice-President through judicial "magnanimity." The Supreme Court in *Allen Vs Monday (sr.)* decreed Vice-Presidential immunity in favour of A.B. N'Jie in these words, "Mr. N'Jie is the Vice-President--if he will come voluntarily he may do so; but no subpoena will be issued." and later in the same case the court opined that "there is no process against the Vice-President before me. I have however, directed that subpoenas should not be issued against the Vice-President or President and there is an end to the matter, so far as this court is concerned." The ruling is indeed unsupportable; Presidential immunity, which includes immunity from the courts' process, and not Vice-Presidential immunity is what the constitution provides for. The position adopted by the Supreme Court is tantamount to an amendment of the rule of evidence that, unless the contrary is provided for by statute, all persons are both competent and compellable witnesses.²⁸ To hold that

²⁸See generally Phipson on Evidence 11th Edition, paras 1471-1478.

the Vice-President is, in the absence of a statutory provision to the contrary, not a compellable witness is not only contrary to the accepted rules of evidence but it also undermines the efficacy of section 20 (8) of the Constitution, which entitles a person to fair hearing (fair hearing includes ordering a Vice-President to give evidence on behalf of any litigant). If the efficacy of section 20 (8) is to be asserted then a litigant, the substantiation of whose case depends upon the appearance of the Vice-President in the witness box should be able to have subpoena issued against him unfettered by the novel concept of Vice-Presidential immunity from the courts' process. It is conceivable to attach immunity to a Vice-President while he is acting as President but not otherwise. There are two problems that have not been put to rest by the court's ruling and these are: if the court will not issue subpoena against the Vice-President at the behest of a litigant can it issue one against another person at the behest of the Vice-President; and does the ruling apply to only questions of subpoenas or the processes of the court generally?

E. PRESIDENTIAL POWERS

The powers of the President under the constitution are various and not easy to classify as formal or substantive. The difficulty of classifying Presidential powers arises from the fact that those powers which were formally vested in the

Governor-General as the representative of the Queen and those vested in the Prime Minister as head of government have all been lumped together and vested in the President. For the purposes of our discussion we will not draw any distinction between the formal and substantive powers of the President but rather we will treat all those powers under the generic name of Presidential Powers.

In the last chapter we observed among other things the powers of the President to appoint nominated members of the House, members of the Constituency Boundaries Commission as well as the power to dissolve Parliament. These powers and the others we are about to discuss are vested in him by virtue of his position as the repository of the executive authority of the Republic. As Head of State he is also Commander-in-Chief of the armed forces.²⁹ In that capacity he has authority to declare war and make peace. There is no provision in the constitution which makes the declaration of war or conclusion of peace the province of Parliament. It is however not clear whether as Commander-in-Chief he could take personal command of the armed forces and give instructions as to its operation.

As President the executive power of the Republic is vested in him and, subject to the provisions of the constitution, he may exercise that power either directly or through officers subordinate to him. He may act in his own deliberate judgment

²⁹S. 31.

and is not obliged to follow the advice tendered by any person or authority in the exercise of his executive powers. Parliament may, where it thinks necessary, confer on other persons or authority Presidential functions.³⁰ The constitution provides for a Vice-President and a cabinet of ministers, which functions as the "principal instrument of policy" and as an advisory organ to the President on matters of policy. Before discussing the appointment of ministers their tenure of office and relationship with the President we may take a brief look at the Vice-President whose office is recognised by the constitution.

(i) OFFICE OF THE VICE-PRESIDENT

The Vice-President's office is established by the constitution and the holder of that office is the principal assistant to the President in the discharge of the executive functions of the State.³¹ He is appointed from among elected members of the House³² and holds office until his appointment is revoked or Parliament is dissolved whichever is earlier. He is de facto the Prime Minister and though section 43 (1) of the constitution has been amended³³ to empower the President to appoint any member of the House as leader of Government

³⁰S. 42.

³¹S. 43 (1).

³²S. 45 (1).

³³See Sections 2 and 3 of the Constitution of the Republic of The Gambia (Amendment) Act, 1973; Act No. 1 of 1973.

business, the practice has been for the Vice-President to perform that function. He assumes the functions of the President whenever the physical or mental incapacity of the President is being investigated; he executes Presidential functions when the President is absent from The Gambia or authorises him to do so by reason of his (the President's) illness, and in the absence of the President presides at all cabinet meetings. When the Vice-President temporarily assumes the office of the President he is nothing but a glorified caretaker of the affairs of the state as he has no power to dissolve Parliament. The scope of his authority as acting President may be heavily circumscribed as the President can, under section 39 (3), define what specific Presidential functions the Vice-President is to perform in the absence of the President.

(ii) THE CABINET

The establishment of ministries, the appointment of ministers and parliamentary secretaries are the prerogatives of the President. Ministers and parliamentary secretaries are appointed from the members of the House but they need not be elected members. What specific functions ministers perform in relation to the departments of state assigned to them is not, except in the case of the Attorney-General, precisely clear; all that the constitution provides for is that ministers are to be responsible for such departments of state or other business of the Government as the President may assign to

them.³⁴ The Vice-President, ministers and parliamentary secretaries hold their offices during the pleasure of the President. Apart from the tenure of their offices being dependent on the good will of the President, a minister including the Vice-President, or parliamentary secretary vacates his office immediately before the assumption of office by the President; if he ceases to be a member of the House otherwise than by dissolution of Parliament; if he resigns his office; or in the case of the Vice-President, if he assumes the office of President on the death or resignation of the latter.³⁵

The ministers of government and the Vice-President constitute the cabinet. The meetings of the cabinet are presided over by the President and in his absence the Vice-President. The functions of the cabinet are vaguely expressed "as the principal instrument of policy" and "responsible for advising the President with respect to the policy of the Government."³⁶ The function of the cabinet as the principal instrument of policy and advisor to the President with respect to the policy of the Government is qualified by making those functions subject to the powers of the President. This qualification reduces the cabinet to the position of a sort of super civil service with a role to formulate policy and advice the President on that policy, which the President is not bound to follow.

³⁴ S. 43 (5).

³⁵ S. 46.

³⁶ S. 49.

This theory is even made clearer by section 42, which empowers the President not to follow the advice of any person in the exercise of his executive powers. The exercise of executive power must necessarily include determination of matters of policy. The net effect of sections 42 and 49 (2) is to limit the cabinet's function to formulation of policy and advising the President thereon. But even in that role the cabinet's function is subject to the overriding powers of the President so that while cabinet may devise policy its ultimate execution is subject to the good will of the President. Notwithstanding these far-reaching powers vested in the President in relation to his cabinet, it is unlikely that the President will rely on the language of the constitution to disregard the advice of his ministers on any particular policy nor is it likely that the President will assume responsibility for policy decisions on matters that are within the portfolios of his ministers. Indeed any move on the part of the President to relegate the cabinet to the role of super civil servants will lead to the breakdown of cabinet government.

(iii) COLLECTIVE RESPONSIBILITY OF THE CABINET

The British convention of cabinet government whereby the cabinet is collectively responsible to Parliament has been given statutory force under the constitution. Thus the cabinet is collectively responsible to Parliament for all things

done by or under the authority of the President, the Vice-President or any minister in the execution of his office.³⁷ The concept of the cabinet's collective responsibility is to ensure unanimity among ministers in support of government policies on all public occasions, and to prevent a cabinet divided on policy matters to carry their disharmony to the public. Once the cabinet adopts a policy it becomes the duty of every single minister to submit it to and defend it before the House, and to resign if defeated on an issue of confidence.³⁸ The duty to submit and defend government policy before the House on all public occasion cannot be shirked by a minister on the grounds that the policy was not formulated by his department, or that during the discussion stage of the policy in the cabinet his role was that of a passive audience or that he did not agree with the policy. A cabinet member therefore cannot, in the public, dissociate himself from any government policy or anything authorised to be done by another cabinet member. The proper and honourable course open to a member who feels himself unable to defend an act authorised by any of his cabinet colleagues is to resign or keep his silence when the matter is being debated by the House. Proposals made by any member of the cabinet are proposals of the government even where the proposals have not received cabinet approval.³⁹

³⁷ S. 50.

³⁸ Marshall and Moodi: Some Problems of the Constitution 4th ed. (Hutchinson & Co. Ltd., London, 1968), p. 62.

³⁹ Jennings: Cabinet Government 3rd ed. (Columbia University Press, 1959), p. 494.

The collective responsibility of Gambian ministers does not extend to the appointment and removal from office of ministers of the Government and parliamentary secretaries, the assignment of portfolios or the authorisation of any person to perform the duties of the President or Vice-President. Also excluded from the cabinet's collective responsibility are acts done or ordered to be done by the President in the exercise of his Prerogative of Mercy and decisions taken by the Attorney-General in the exercise of his functions relating to criminal proceedings.⁴⁰

The position of the Attorney-General deserves particular attention. He is a cabinet minister who shares responsibility for the actions of his colleagues and it would seem that his colleagues share responsibility for matters done under his authority other than matters relating to criminal proceedings. What may not be easily discernible in the Attorney-General's decision relating to criminal proceedings is whether the decision reflects state policy, in which case his colleagues will not be collectively responsible for that decision, or whether the decision is based on the government's policy on criminal proceedings, in which case the cabinet would be collectively responsible. One may assume with reasonable certainty that decisions on criminal prosecutions are influenced by general state policy and not by the policy of the government of the

⁴⁰S. 50 (a) - (d).

day. This state policy consideration puts the responsibility on the Attorney-General to decide when to institute and undertake criminal prosecutions, to take over and continue any criminal proceedings instituted by any person, and to discontinue at any stage, before delivery of judgment, any criminal proceeding instituted by him or by another person.⁴¹ To put criminal prosecutions beyond the control of the cabinet has the virtue of ensuring healthy and unbiased administration of criminal law. This is indeed desirable as the "responsibility for decisions in matters of criminal prosecution is quasi-judicial in nature; it necessarily involves the exercise of discretion, and if the rule of law is to be maintained, it must be as well protected from extraneous influence, political or otherwise. Any person to whom control of criminal prosecution is entrusted should, therefore, be endowed therein with a status of independence, recognised as a matter of constitutional law."⁴² This is what the Gambian constitution seeks to do by section 50 (c).

The Gambian Attorney-General is ipso facto a politician and, apart from his learning and experience in the practice of law, he holds office principally because of his political alliance. As it is absolutely necessary and desirable to insulate criminal prosecutions from political influence, the

⁴¹S. 48 (2).

⁴²K. Roberts-Wray (Sir): Commonwealth and Colonial Laws, p. 350.

present Attorney-General Mr. Saho has, on his own initiative, abdicated his powers under section 48 of the constitution to the Director of Public Prosecutions and he has been concentrating mainly on giving legal advice to his cabinet colleagues. This magnificent course is only what we may call as "the Saho policy" and subsequent Attorneys-General may depart from it.⁴³ As expedient as it is to shed himself of his powers under the constitution in favour of the D.P.P., that act is nothing more than a delegation of those powers. One cannot rule out the possibility of situations arising which are political in nature, that may force the Attorney-General re-assert his position by withdrawing from the D.P.P. his delegated powers. The best protection of criminal prosecutions from extraneous influence is the establishment of an independent office of the D.P.P. protected by the constitution. Finally, it is pertinent to note that the D.P.P. in performing the functions of the Attorney-General relating to criminal prosecutions does so under and in accordance with the general or special instructions of the Attorney-General.⁴⁴ What the D.P.P. may not do is to enter a

⁴³The writer is not aware of any occasion on which the Attorney-General has given any specific direction to the D.P.P. about any criminal case. He of course always wants to be informed as to the state of any criminal trial and this is done for the sole reason of equipping himself with adequate information should he be questioned in the House by M.P.s on any case.

⁴⁴S. 48 (3).

nolle prosequi and take over criminal proceedings instituted by some other person; the D.P.P. may perform other duties of the Attorney-General such as signing notices of appeal.⁴⁵

(iv) PERSONAL RESPONSIBILITY OF MINISTERS

Ministers do have a certain amount of discretion and it would seem that where the exercise of that discretion leads to ill-considered and irrational decisions, the defeat of the minister cannot be a defeat for the entire government as the decision is wholly attributable to his faulty judgment. He therefore becomes personally responsible for his decision. Also ministers are individually responsible to Parliament for answering parliamentary questions on specific matters within their portfolios. Though the question of individual responsibility of ministers, is not expressly dealt with in the constitution, one can imagine that the British Convention of cabinet government, whereby a minister assumes personal responsibility for certain matters, is applicable to Gambia. Thus a minister may be individually responsible for policy that is largely his own idea or he may be individually responsible for a policy which though formulated by the entire cabinet is passed on to him for implementation.⁴⁶ In both cases, however, the cabinet may extend to the particular minister the benefits of the

⁴⁵Attorney-General Vs Dennis R.S. N'Jie (unreported).

⁴⁶For a discussion on personal responsibility of ministers see J.P. MacKintosh - The British Cabinet 3rd ed. (London, 1977), pp. 529-531.

concept of the cabinet's collective responsibility.

(v) EMERGENCY POWERS

Of the powers conferred on the President by statute, the most extraordinary seems to be the emergency powers. He is empowered under the constitution to declare by proclamation that a state of emergency exists or that a situation exists which if allowed to continue may lead to a state of public emergency.⁴⁷ A state of public emergency is defined as a period during which The Gambia is at war or a period during which there is in force a declaration under section 29 (1).⁴⁸ A declaration that a state of emergency exists must be published in the Gazette. It continues in force for a period of seven days from the date of its publication if the House is sitting, and twenty-one days in any other case unless it is approved by a resolution of the House supported by the votes of two-thirds of all its voting members. A resolution of the House approving the declaration remains in force for twelve months or such shorter period as may be specified therein unless the declaration is earlier revoked by the President under section 29 (3).

As the existence of a state of emergency necessarily involves authorisation of some person to take speedy legislative measures to deal with the situation, the Governor-General, up

⁴⁷S. 29 (1).

⁴⁸S. 30 (2) (b).

to 23rd April 1970 and thereafter the President, is vested with power to make such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of The Gambia, the maintenance of public Order and the suppression of mutiny, rebellion and for maintaining supplies and services essential to the life of the community.⁴⁹

In addition to these subjects, the President may by emergency regulations, provide, inter alia, for the detention of persons or restriction of their movements; provide for amending any law or suspending the operation of any law except the constitution and the Emergency Powers Act; provide for the apprehension, trial and punishment of persons who violate the emergency regulations; authorise acquisition of property by the Government or authorise the entering and searching of premises. Though the President may by regulation provide for the apprehension, trial and punishment of violators of the emergency regulations, the trial of those violators are to be conducted by the ordinary courts of the land.⁵⁰ Regulations made in pursuance of the emergency powers may not be declared void by reason of repugnancy or inconsistency with any other law except the constitution or the enabling Act itself.⁵¹ The significance of this provision, as far as it relates to the constitution,

⁴⁹ S. 3 (1) Emergency Powers Act, cap 60 Laws of The Gambia 1966 ed.

⁵⁰ Ibid., s. 3 (2).

⁵¹ Ibid., s. 4.

will be adverted to in our discussion of the human rights provisions. The emergency regulations, as the declaration of a state of public emergency, are effective only if affirmed by a resolution of the House and only for such period that the emergency proclamation is in force.⁵²

The combined effect of section 29 of the constitution and the provisions of the Emergency Powers Act is to confer on the President ample discretion to determine when a state of emergency exists and to make what regulations he deems fit to deal with the situation. Section 30 (2) of the constitution could be relied on to challenge the President's judgment as to whether there indeed exists a state of emergency by reason of the fact that The Gambia is at war; but the President need not, by issuing a proclamation, base his judgment on the fact that The Gambia is at war. Section 30 (2) (b) may always be relied on; and under that paragraph the determination as to whether a state of emergency exists or that a situation exists which if allowed to continue may lead to a state of emergency is wholly within the discretion of the President. The courts are not likely to question his judgment on that, though they may question the validity of any regulations made in pursuance of the emergency powers vested in him by reason of their inconsistency with the constitution or the terms of the enabling Act. Once a declaration of a state of emergency is in force.

⁵² Ibid., s. 5.

the President assumes wide legislative powers. His powers in this regard are not confined to the specific matters defined under section 3 (1) and (2) of the Emergency Powers Act but extend to the authorisation of officers subordinate to him to make rules and orders for any purpose for which the regulations are authorised.⁵³

As mentioned earlier, the emergency powers of the President are perhaps the most extraordinary powers conferred on him by the Statute. These powers, which are expressed in terms of legislative competence, are indeed necessary to deal speedily with situations which if allowed to continue would result in the social and economic dislocation of the state. If the normal parliamentary process were to be adopted in enacting legislations to deal with a state of public emergency the results could be extremely averse to the state as the delays inherent in that process would impede speedy action. The untrammelled emergency powers of the President, prima facie, projects him as a sole autocrat who could, by emergency regulations, decree what he wills during a period of public emergency inhibited only by his conscience. But the safety valve against unwanton use of emergency powers during the period of public emergency is provided for by Gambia's constitutional system of government. Both section 29 of the constitution and section 5 of the Emergency Powers Act strictly circumscribe what may be called

⁵³Ibid., s. 3 (3).

the President's autocracy in a period of public emergency. Presidential declarations of a state of emergency are effective only if approved by a resolution of the House and so are the emergency regulations. This stipulation ensures that the President does not go unchecked in the exercise of the powers conferred on him by the constitution and the Act, and they ultimately re-assert the fact that Parliament has not abdicated its legislative functions to the President.

(vi) THE PUBLIC SERVICE

The general administration of the government of The Gambia is carried out by the public service which is departmentalised into various departments two or more of which may be merged to constitute a ministry under the general supervision of a permanent secretary. The public service generally executes and implements government policies and is protected from political influence. Its relationship with the President, except in few defined cases, is not exactly clear; however, the powers that the President has with regards to the Public Service Commission--the appointing authority to the established posts in the public service--is beyond doubt.

The Public Service Commission (called "the Commission" for short) consists of a Chairman, a Vice-Chairman and not less than two and not more than four members appointed by the President.⁵⁴ Membership of the Commission is open to fit and

⁵⁴S. 110 (1) (Constitution).

proper persons. But members of the House, public servants and persons who are, or have at anytime during the two years preceding their appointments been, holders of an office in any organization that sponsors or otherwise supported a candidate for election to the House; and persons who are, or have at anytime during the two years immediately preceding their appointments been, nominated as candidate for election to the House⁵⁵ are disqualified for membership of the Commission.

A member of the Commission is not, except with the consent of the President, eligible to hold office in the public service within two years from the date on which his membership of the Commission terminates.

A member of the Commission holds office for two years from the date of his appointment. He must, however, vacate his office if he incurs any of the disabilities that would have disqualified him to be appointed as a member.⁵⁶ The President may, before the expiration of his tenure, revoke a person's appointment, as a member of the Commission on grounds of that person's inability to exercise the functions of his office, whether such inability is by reason of infirmity of mind or body; or for misbehaviour. Though the President has power to revoke the appointment of a member of the Commission, no such revocation can be done unless an investigating tribunal is set up by the President to enquire into the allegation that a member has misbehaved himself or

⁵⁵S. 110 (2) (Constitution).

⁵⁶S. 110 (4).

he is by reason of mental or physical infirmity unable to discharge the functions of his office. The members of the tribunal, a chairman and not less than two persons one of whom must be or must have been a high judicial officer, are selected by the Chief Justice. During the enquiry, the member, the desirability of whose removal is being enquired into, may be suspended by the President and ultimately removed if the tribunal finds him guilty of the charges.⁵⁷

By section 111 (1) of the constitution the power to appoint persons to hold or act in offices in the public service including the power to confirm appointments, the power to exercise disciplinary control over persons holding or acting in public offices and the power to remove them is vested in the Commission. Under section 53 the President is, subject to the provisions of the constitution and any Act of Parliament, empowered to constitute offices for the Republic, make appointments to such offices and terminate any such appointment. These two provisions leave one wondering as to whether the control of the public service is vested in the Commission or in the President. It may be that both exercise concurrent powers over the public service or as suggested the effects of both provisions is to leave the Commission largely in control of existing established posts while the President is provided with power to create new ministries and provide new staff for the newly created

⁵⁷S. 110 (5) - (8).

ministry.⁵⁸

The powers of the Commission in relation to the public service have no application to the judges of the superior courts of record, the Auditor-General, Permanent Secretaries, the Establishment Secretary, Principal Representatives of The Gambia abroad, the Inspector-General of Police, the Secretary-General or the Deputy Secretary-General. Except for the Auditor-General and judges of the superior courts of record, the tenure of office of holders of the established posts in the public service are not protected by the constitution and they may be removed by the President or the Commission without going through hair-splitting procedures. The appointment of Permanent Secretaries, the Secretary-General, the Deputy Secretary-General, the Auditor-General or Inspector-General of Police is done by the President after consultation with the Commission.⁵⁹ Except with the consent of the President, the Commission cannot appoint any person to or to act in any office on the personal staff of the President;⁶⁰ and similarly the Commission may not exercise any of its powers in relation to the clerk of the House or a member of his staff without prior consultation with the Speaker.⁶¹

Neither the constitution nor the Public Service Commission

⁵⁸Ghai and MacAuslan, pp. 246-250.

⁵⁹Ss. 112 (1), 114 (1) and 115 (1).

⁶⁰S. 111 (4).

⁶¹S. 111 (5).

Regulations nor the General Orders of the Government has made it expressly clear that a public servant holds his office at the pleasure of the President. It has, however, been held in *Abdoulie Waggeh Vs The Attorney-General* (unreported) that the terms of section 128 of the constitution, which provides that "where under any law in The Gambia immediately before the commencement of this constitution any prerogative or privileges are vested in Her Majesty, those prerogatives or privileges shall, from the commencement of this Constitution, vest in the President," are wide enough to embrace the British constitutional convention that all public servants hold their offices at the pleasure of the President. It was the opinion of the Supreme Court, confirmed by the Court of Appeal, that a public servant cannot assert a right to be retained in the public service after the Commission, acting as agent of the President, terminates the services of that public servant.

While the Commission is not subject to the direction of any person or authority in the execution of its duties, the President may nonetheless request it to consider whether there are local candidates suitably qualified for appointment or promotion to positions held by expatriate public servants. This is to enable the President to give effect to the Gambianization of the public service. Depending on the availability of suitable local candidates the President may request the Commission to retire a specific number of expatriate appointees. The President's direction is only limited to a request to the

Commission; the appointment of particular persons to the vacant positions cannot be determined by the President. The Commission does that.⁶²

(vii) PREROGATIVE OF MERCY AND NATIONAL HONOURS

To complete the study of Presidential powers it is necessary to advert to the President's powers in the exercise of his Prerogative of Mercy and his power to award National Honors. Both of these powers are exercised by the President in virtue of his position as Head of State. In his capacity as Head of State the President is the Fountain of Mercy and may grant to any person convicted of an offence a pardon either free or subject to lawful conditions; grant a respite either indefinite or for a specific period of the execution of any punishment imposed on a person for an offence; or substitute a less severe punishment imposed on any person for any offence, penalty or forfeiture due to the Republic.⁶³ An Advisory Committee on the Prerogative of Mercy is established to advise the President on the exercise of his prerogative under section 54. The Members of the Advisory Committee on the Prerogative of Mercy, who must number not less than two and not more than four, are appointed by the President to hold office during his pleasure.⁶⁴

⁶²S. 124.

⁶³S. 54.

⁶⁴S. 56.

As Head of State the President is also the Fountain of Honour. The Constitution empowers Parliament to make laws with respect to titles of honours and to empower the President to award national honours and decorations. Gambian citizens and members of the public service or the armed forces cannot accept foreign titles of honour, decorations or dignity (other than a distinction conferred by an educational, professional or scientific body) without the prior consent of the President.⁶⁵ In pursuance of section 73 of the constitution, the Gambian Parliament enacted the National Honours Act, 1972⁶⁶ under which the President may, by Warrant, make provision for the award of honours. The provisions of a Warrant of honour may among other things provide for the precedence to be accorded to different honours and different ranks of honour; prescribe the insignia by which an honour or rank of an honour is to be distinguished.⁶⁷ Section 2 (3) of the Act provides that the award of honours in pursuance of a Warrant under the Act is to be exercised by the President in accordance with section 73 of the constitution. Unfortunately that section is silent on the mode of the exercise of Presidential powers in this respect. All that is provided for by that section is for the President to confer titles of honours, decoration or other dignity and a general prohibition against Gambian citizens, civil servants,

⁶⁵S. 73.

⁶⁶Act No. 5 of 1972.

⁶⁷Ibid., s. 2 (2).

and members of the armed forces to accept foreign honours without the prior consent of the President. One may however imagine that the President is not restricted in the exercise of his power to confer honours on any deserving individual. The exercise of the power is discretionary on his part.

Finally the President, like the British sovereign, may attend and address the House at any time or send messages to the House to be read by the Vice-President or a minister designated in that behalf by the President at the first convenient sitting of the House.⁶⁸ Under section 128 of the constitution, all the prerogatives or privileges vested in the Queen in the right of her crown in The Gambia became vested in the President. These prerogatives or privileges must be ones that are capable of being exercised by the Queen in an independent Gambia.

GENERAL OBSERVATIONS

Our analysis of the executive authority of the Republic has proved to be an analysis of the powers of the President in his capacity both as Head of State and head of government and the exercise of those powers with respect to certain spheres of government operations. That course has been inevitable since the entire executive power of the republic revolves around the President in his dual capacity. It has not of course been possible to draw a clear demarcation line between his

⁶⁸S. 82 (Constitution).

powers as Head of State and those as head of government. One aspect of the exercise of his powers, which is blurred by his dual position, is in relation to the cabinet. It is not clear whether in selecting and appointing members of the cabinet he does so as Head of State and government or does the selection as head of government (which would be the practice if the office of the Head of State is separate from that of head of government) and appointment as Head of State. These difficulties are irrelevant for the purpose of the exercise of his powers, whether substantive or formal, and are not likely to produce any constitutional controversy. What is perhaps worth noting is that the powers conferred on him under the constitution are very much reminiscent of the powers of an autocratic Colonial Governor. Like the Colonial Governor he exercises his executive powers to the exclusion of any other person; the fundamental difference being that the President is elected and may be removed from office if he incurs the displeasure of the House, or, as the case may be, the electorate while the Colonial Governor was answerable to the Secretary of State. The President is in fact the power base of the state vested with plenary executive and discretionary powers the exercise of which may only be restricted by his own good sense.

The President's good sense as a restraining factor in the exercise of his constitutional powers cannot be over-emphasised; his good sense will perhaps prove more efficacious than restrictive constitutional stipulations, which the constitutional

history of some countries in Africa under an executive president have proved to be worthless. The virtue or vice and excesses of an executive presidential system depends very much on the executive president himself. The Gambian experience so far has been one of non-regret, and this is largely due to the good sense of the present President who cherishes constitutional government as much as his erstwhile colonial masters. The existence of vocal opposition parties (some of them have of course died because of carpet crossing), the accountability of the executive to Parliament and even in an indirect way to the electorate, and the international reputation that the present President has earned for himself for his adherence to constitutionalism have all provided fetters against unwarranted use of presidential powers for his own personal political glorification.

The exercise of his powers, which are unfettered by the constitution, has by and large been done on the advice of some person or authority and one may imagine or rather wish that that practice will mature into a recognised convention. As the Republic is very young and enormous powers are vested in a person who is a politician with political bias, it will be preposterous to prognosticate how these unfettered Presidential powers will be used or exercised in the future. The mode of their use and exercise in the future will invariably be determined by the prevailing political situation, the personality of the President and of course his concept of a democratic and constitutional government.

CHAPTER NINE

THE JUDICIARY

The judiciary was one of the institutions established by the colonial regime to serve as a vehicle for inculcating a sense of "civilisation" in the colonised subjects of The Gambia. As part of the entire colonial administrative machinery, the judiciary was part of the colonial civil service though a specialised branch of it; the judiciary was considered as the colonial judicial service. The judges were appointed by the Governor on the advice of the Secretary of State for colonies and they held their offices at the pleasure of the Crown. Appointment to judgeship was usually by promotion via the magistracy and in some cases Attorneys-General and Solicitors-General have been appointed as judges. Appointment to the high bench by promotion was deprecated on the grounds that it "is bound to induce in the mind of the person expecting that promotion some kind of fear and respect for the authority which he considers will appoint him."¹ Notwithstanding the unsatisfactory system of appointment to the high bench by promotion--which could make the appointee dependent on the appointing authority--and the decision of Lord Goddard C.J. in *Terrell Vs Secretary of State for the colonies*² that judges hold their

¹Nwabueze: *Judicialism in Commonwealth Africa* (St. Martins Press, New York, 1977), p. 265.

²(1953) 2 Q.B. 482.

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offices at the pleasure of the Crown, the judiciary remained independent throughout the colonial era. The independence of the judiciary during the colonial era was not sustained by any entrenched legal provisions but rather by practice which was evolved since 1870. This practice of maintaining the independence of the judiciary--whereby colonial judges may not be removed without reference to the Judicial Committee--was confirmed by the Colonial Regulations.³

The anticipated departure of the colonial regime made it necessary to translate into statutory provisions--entrenched by section 72 of the constitution--mechanisms that would guarantee the ancient tradition of the judiciary's independence. This was both necessary and desirable as the judiciary can, if not insulated from extraneous influences, be a viable instrument for the suppression of political opponents and the perversion of the Rule of Law. To maintain and further cement the independence and impartiality of the judiciary, the 1965 constitution stipulated provisions for the appointment and removal of judges of the superior courts and also provided security for their tenure of offices. The personnel of the lower bench and the registry were made the responsibility of the Judicial Service Commission. These provisions were not abrogated when The Gambia became a republic in 1970. Both the 1965 and 1970 constitutions did not only provide for the independence of the judiciary but also re-established the Supreme Court

³Nwabueze: Judicialism, p. 266.

and The Gambia Court of Appeal leaving it to Parliament to establish courts subordinate to the Supreme Court. Before proceeding to analyse the composition of the courts re-established by the constitution, their jurisdiction and independence, we should note that the Supreme Court of The Gambia is a court that is only supreme in name and not in law. Its decisions are subject to appeal to The Gambia Court of Appeal from wherein further appeals lie to the Judicial Committee of the Privy Council.

A. COMPOSITION OF THE GAMBIA COURT OF
APPEAL AND THE SUPREME COURT

The Gambia Court of Appeal is the highest court of the land that sits locally but it is by no means the final court of appeal for The Gambia. It is composed of the President of the court and such other number of justices of appeal as may be prescribed by Parliament. The Chief Justice of the Supreme Court and the puisne judges thereof sit on the Court of Appeal in an ex officio capacity.⁴ Like all other courts of appeal, The Gambia Court of Appeal is a superior court of record with all the powers of such court.⁵ When the appeal court is determining any matter, other than an interlocutory one, it

⁴At the time of writing, there are apart from the ex officio Justices of Appeal, three Justices of Appeal including the President.

⁵S. 88 (3)

is composed of an uneven number of judges not being less than three.⁶

By section 89, the Supreme Court is established with unlimited original jurisdiction to hear and determine any civil or criminal proceedings and it may exercise jurisdiction and powers conferred on it by the constitution or any other law. Under the Courts Act the Supreme Court is empowered to exercise the jurisdiction, powers and authorities vested in Her Majesty's High Court of Justice in England; the powers, jurisdiction and authorities thus vested in the Supreme Court must be such as are capable of being exercised by Her Majesty's High Court of Justice immediately before February 18, 1965.⁷ The Supreme Court is constituted by the Chief Justice and such number of puisne judges as may be prescribed by Parliament.⁸

B. JURISDICTION OF THE COURTS

(1) THE SUPREME COURT

The Supreme Court exercises both original and appellate jurisdictions. Its original jurisdiction in civil and criminal matters is unlimited, and may exercise such further jurisdiction and powers as may be conferred on it by the constitution or

⁶S. 88 (4).

⁷S. 3 (1) Courts Act cap. 36.

⁸S. 89 (2).

any other law.⁹ By virtue of this section and section 3 (1) of the Courts Act cap. 36, the Supreme Court is empowered to exercise the jurisdiction, power, and authorities vested in or capable of being exercised by Her Majesty's High Court of Justice in England immediately before February 18, 1965. Except in the most serious felonies triable by jury and conviction for which entail either imprisonment for life or a sentence of death, the Supreme Court does not usually exercise its original jurisdiction in criminal matters.

The court also has original jurisdiction to hear and determine any application by any person who alleges that any of the human rights provisions of the constitution has been, is being or is likely to be contravened in relation to him; and to hear and determine questions involving the interpretation of the constitution in any proceeding in a lower court.¹⁰ Questions involving the interpretation of the constitution are referred to the Supreme Court for its determination if the person presiding in the lower court is of the opinion that the question involves a substantial question of law and one of the parties to the proceedings requests the matter to be referred to the Supreme Court.¹¹ Such a reference was made to the Supreme Court in Dennis R.S. N'Jie Vs Attorney-General¹² to determine

⁹S. 89 (1)

¹⁰S. 28 (1) - (3).

¹¹S. 93 (1).

¹²(unreported).

whether a statute that confers jurisdiction on the Gambian courts to try employees of the government of Gambia for offences committed abroad against the laws of The Gambia has the effect of translating an act that was not an offence into an offence. The court held that the statute--The Criminal Law (Amendment) Act, 1974-- was not one creating an offence but one conferring jurisdiction on the courts to try offenders for offences committed abroad while in the employment of The Gambia government. The Supreme Court did not lay down any general or specific guiding principles for the lower courts in matters of constitutional references. But the Nigerian Courts in a similar situation have attempted to shed light on what should be the determining criteria for referring constitutional questions for the determination of the Supreme Court. The Nigerian Supreme Court advised that "the first requirement for a reference under section 108 (2) (this section was the same as section 93 (1) of the Gambian constitution) is that a question should be raised as to the interpretation of the constitution. Secondly the court must be satisfied that the question involves a substantial question of law. It is not enough that any party to the proceedings has requested the court to refer the question: the court must be satisfied that in its opinion the question does involve a substantial question of law."¹³ For a matter to involve a substantial question of law there

¹³Olawoyin Vs Commissioner of Police (No. 2) (1961)
1 All N.L.R. 622. Parenthesis mine.

has to be some doubt or differences of opinion as to what the law is.¹⁴

Apart from being a court of first instance, the Supreme Court is also a court of appeal. Appeals may be brought to it as of right or by leave of the court whose decision is being appealed. An appeal lies as of right to the Supreme Court from final decisions of a subordinate court or a court-martial in any civil or criminal proceedings involving the interpretation of the constitution (not being questions that have been referred to the Supreme Court under section 28 (3) or section 93 (1) of the constitution).¹⁵ Similarly an appeal lies as of right to the Supreme Court from final decisions of any subordinate court in any civil proceedings where the matter in dispute in the appeal exceeds the value of two hundred and fifty dalasis or where the appeal involves directly or indirectly a property or the right to a property the value of which exceeds two hundred and fifty dalasis; or from final decisions in proceedings for dissolution or nullity of marriage; or final decisions in such other cases as may be defined by Parliament.¹⁶ Although a prospective appellant may appeal as of right from the final decision of a subordinate court in any of the matters just mentioned, that right is curtailed by paragraph (a) of the proviso to section 97 (3). Appeals from the final decisions of

¹⁴T.O. Elias: Nigeria, etc., p. 238.

¹⁵S. 97 (1).

¹⁶Ss. 96 (1) and 97 (3).

a subordinate court cannot be taken direct to the Supreme Court if under any law an appeal lies as of right from the final decision of such subordinate court to the Gambia Court of Appeal or an appeal lies from such final decision to the Court of Appeal with leave of the subordinate court and that leave has not been refused.¹⁷ It is not only under section 97 (3) (a) that appeals may not be brought direct to the Supreme Court from final decisions of a subordinate court. An appeal from a subordinate court may not be brought direct to the Supreme Court if under any law an appeal lies of right from that decision to another subordinate court or an appeal lies from that decision to another subordinate court with the leave of the court that gave the decision or some other court and that leave has not been withheld.¹⁸

(ii) THE GAMBIA COURT OF APPEAL AND THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The Gambia Court of Appeal has no original jurisdiction; it is an appellate court. Usually appeals do not lie from courts subordinate to the Supreme Court direct to the Court of Appeal nor do appeals lie as of right to the Court of Appeal from courts subordinate to the Supreme Court unless there is a law in that behalf.¹⁹

An appeal lies as of right to the Court of Appeal from

¹⁷S. 97 (3) (a).

¹⁸S. 97 (2) and (3) (b).

¹⁹S. 97 (3) (a).

final decisions of the Supreme Court:

- (a) in any civil or criminal proceedings on questions as to the interpretation of the constitution;
- (b) in exercise of the jurisdiction conferred under section 28 of the constitution (which relates to the enforcement of fundamental rights and freedoms);
- (c) in any civil proceeding where the matter in dispute in the appeal exceeds two hundred and fifty dalasis; or where the appeal involves property or the right to property and the value of which exceeds two hundred and fifty dalasis;
- (d) in proceedings for dissolution or nullity of marriage; or
- (e) in such other cases as may be prescribed by Parliament.²⁰

The finality of the Court of Appeal's decision depends on the purse of the litigant in any particular case. The constitution provides for further appeals to be taken to the Judicial Committee of the Privy Council. An appeal lies as of right to the Judicial Committee from final decisions of the Court of Appeal in matters involving the interpretation of the constitution.²¹ Similarly an appeal lies as of right to the Judicial Committee from final decisions of the Court of

²⁰S. 95 (1) and 96 (1).

²¹S. 95 (1).

Appeal in any civil proceeding where the matter in dispute on the appeal is of the value of two thousand and five hundred dalasis or more or where the appeal involves property or right to property the value of which is two thousand and five hundred dalasis or more; or from final decisions in proceedings for the dissolution or nullity of marriage; or final decisions in such other cases as Parliament may prescribe.

The Court of Appeal may entertain appeals from the Supreme Court with leave of that court and likewise the Judicial Committee may hear appeals from the Court of Appeal with leave of that court. The principle on which such leave is given in civil proceedings is that the court, which grants leave to appeal to the Court of Appeal or as the case may be to the Judicial Committee, must be satisfied that the question involved in the appeal is one that, by its great general or public importance, ought to be submitted to the Court of Appeal or as the case may be to the Judicial Committee.²² By section 96 (4) of the constitution the Judicial Committee may by special leave hear an appeal from any decision of the Court of Appeal in any civil or criminal matter. The granting of the Judicial Committee's special leave in criminal matters will be in exceptional cases because "it is obviously proper that Dominions (and countries which still maintain appeals to Her Majesty in Council) should more and more dispose of their own cases, and

²²S. 96 (3).

in criminal cases it has been laid down so strictly that it is only in most exceptional cases that the sovereign is advised to intervene."²³

C. APPOINTMENT AND REMOVAL OF JUDGES

In the colonial era appointment of judges was done by the Governor acting on the advice of the Secretary of State for colonies. The Judges in the Colonial Judicial Service held their offices at the pleasure of the Crown; this principle was confirmed by Lord Goddard in the case of *Terrell Vs Secretary of State for colonies*. On the attainment of independence and subsequently republican status, Gambian Judges continued to be appointed by the executive though under a different procedure. The termination of the appointment of judges ceased to be regulated by convention; this, like the procedure of their appointment, is governed by entrenched constitutional provisions which tend to sanctify the office of the judges. The procedure for removing judges from office--a procedure that only operates in Gambia among the Commonwealth African nations--is so cumbersome that it literally makes them irremovable.

The President of the Court of Appeal and the Chief Justice are appointed by the President in his sole discretion while

²³Per Viscount Haldane in *Hull Vs McKenna* (1926) Ir. R. 402 at 406. Parentheses mine.

the Justices of Appeal and the puisne judges of the Supreme Court are appointed by the President but acting in accordance with the advice of the Judicial Service Commission (hereinafter called "the Judicial Commission").²⁴ It would seem ideal to place the appointment of judges of every category in the hands of the Judicial Commission so as to insulate the judiciary from any form of executive influence. As ideal as such a situation may be, it has been argued that it "would be wrong for the government of the day to be denied any effective voice in judicial appointments"²⁵ and, though it is possible to place the appointments of other judges in the hands of the Judicial Commission, it would be preposterous to make that Commission the appointing authority of the Chief Justice since the Chief Justice is usually, and in the case of Gambia he is, the Chairman of the Judicial Commission. To deny the Judicial Commission power to appoint the Chief Justice "is inevitable, since a body which makes recommendations for appointment of persons to any public office cannot properly include persons who may be candidates."²⁶ It would also appear that the selection of the other Justices of Appeal and judges of the Supreme Court for appointment is solely the prerogative of the Judicial Commission. It would seem that the language of section 90 (2)

²⁴S. 90 (1) and (2).

²⁵Sir K. Roberts-Wray on the Independence of the Judiciary in Commonwealth Countries in Changing Law in Developing Countries by Anderson (ed.), p. 65.

²⁶Ibid., p. 66.

which requires the President to "act in accordance with the advice of the Judicial" leaves no room for the President to refuse to appoint a candidate recommended by the Judicial Commission. But granted that the language of section 90 (2) does not impose any duty on the President to act as recommended by the Judicial Commission, the system cannot lend itself to abuse provided "there is mutual confidence between the President and the Chief Justice (or the Judicial Commission) as ought normally to exist the mechanism of consultation (or acting on the advice of the Judicial Commission) could be as effective (and politically unbiased) as appointment by the Judicial Service Commission."²⁷ It is to be assumed that on principle the President will only appoint persons as Justices of Appeal or Supreme Court judges only on the advice of the Judicial Commission. It is unlikely, and indeed it would be out of harmony with constitutional practice, that a candidate recommended for appointment by the Judicial Commission will be passed over by the President. Such a situation is more unlikely when one bears in mind that the Judicial Commission is headed by the Chief Justice, who on account of the trust and confidence reposed in him by the President has earned him (the Chief Justice) the high position of Chief Priest in the temple of Justice. Apart from the Chief Justice the other two members

²⁷ Selected speeches of Chief Justice Telford Georges reproduced in Law and its Administration in a One Party State edited by R.W. James and F.M. Kassam (1973), p. 21. Parentheses mine.

of the Judicial Commission, namely the Chairman of the Public Service Commission and the appointed member, all sit on the Judicial Commission by virtue of their appointment by the President in the former as Chairman of the Public Service Commission and the latter in consultation with the Chief Justice. The membership of the Judicial Commission by the Chairman of the Public Service Commission and the appointed member, like that of the Chief Justice, rests on the trust and confidence the President has in them; and it is unlikely that the President will disregard that trust and confidence by not acting in accordance with the advice of the Judicial Commission in matters relating to the appointment of Justices of Appeal and judges of the Supreme Court.

A candidate for appointment as a Justice of Appeal or a judge of the Supreme Court must be a professional lawyer versed in the law and with many years of experience to his credit. Section 90 (3) provides that a person is not qualified to be appointed a Justice of Appeal or a judge of the Supreme Court unless he is or has been a judge of a court with unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in a country outside the Commonwealth that may be prescribed by Parliament, or a court that has jurisdiction in appeals from such courts. One may assume that if Parliament were to prescribe some other country outside the Commonwealth it would be a country that has the common law as the basis of its laws. The section further provides in the

alternative that in order to be qualified for appointment as a Justice of Appeal or a judge of the Supreme Court a candidate must hold one of the specified qualifications and has held one or other of those qualifications for a total period of not less than seven years. These specified qualifications are defined in Order IX of the First Schedule to the Rules of the Supreme Court,²⁸ and they are conditions required for admission as a barrister or solicitor of the Gambian Bar. The conditions necessary to be fulfilled before admission to the Gambian Bar are briefly entitlement to practise as a barrister in England, Northern Ireland, the Republic of Ireland or as an advocate in Scotland or admission as a Solicitor in England, Northern Ireland, or the Republic of Ireland or as a Writer to the Signet or law agent in Scotland. Recently this list has been expanded to include Nigeria and further expansion of the list may be made as more and more Gambians pursue their legal training in some other commonwealth countries not at the moment included in the list of countries.

The wording of the alternative qualification under section 90 (3) (a) (ii) and (b) is not entirely free from doubt. Does it mean that one has to hold or must have held one of the qualifications which entitles one for admission to the Gambia Bar for at least a period of seven years or does it mean that one has to be admitted as a barrister and solicitor of the Gambia Bar for seven years before being qualified to be appointed

²⁸ Cap. 36.

as a Justice of Appeal or a judge of the Supreme Court? The Gambia Court of Appeal's view on the provision in *N.H. Allen Vs Haddy Bah and six others*²⁹ did not throw any light on the meaning of that section. The Court of Appeal after summarising the contention of the appellant (the appellant had contended that the appointment of the Solicitor-General as an acting judge of the Supreme Court was unconstitutional in that the Solicitor-General is not and was not, prior to his appointment as an acting judge of the Supreme Court of The Gambia, a judge of a superior court with unlimited jurisdiction and therefore did not possess the "specified qualification"), observed that "it is not necessary to determine the soundness or otherwise of this submission. No evidence was adduced³⁰ before the court below or before this court that the Learned Judge did not possess both of the qualifications specified in section 90 (3) (a) (i) and section 90 (3) (ii). The undisputed fact is that the Learned Judge acted as a judge of the Supreme Court and discharged the duties of that court in the proceedings the subject matter of this appeal. In those circumstances, we must presume, on the strength of the presumption of law which is expressed in the maxim *omnia praesumuntur esse rite et solemniter acta donec probetur in contrarium*, that he was regularly appointed. In *Reg Vs Roberts* (1978) L.T. 690 which related to the appointment of a deputy judge of the County

²⁹ Civil Appeal No. G.C.A. 11/1977 (unreported).

³⁰ Underlining mine.

Court, Lord Coleridge C.J. who sat with four other judges (all of them concurred with him) in the Court of Crown Cases Reserved said *inter alia* at p. 691 -- 'one of the best recognised principles of law *omnia praesumuntur esse rite solemniter acta donec probetur in contrarium* is applicable to public officers acting in discharge of public duties. The mere acting in a public capacity is sufficient *prima facie* proof of the proper appointment.' It is beyond question that the principle is part of the law of The Gambia. . . . that principle is applicable to the facts of this case." It is submitted, with respect, that the Court of Appeal did not determine the question put to it. The view of the court that no evidence was adduced to indicate that the Learned Judge did not possess both qualifications did not only fail to clarify the meaning of section 90 (3) but it would appear to have even been further confounded. What the Court did was to leave the doors wide open to any prospective objector to adduce evidence to invalidate the appointment of a judge on the grounds that he does not possess both qualifications under section 90 (3). The correct approach, we submit, was for the court to indicate that the qualifications specified in section 90 (3) are alternative and not cumulative.

The difficulty that arises from the wordings of section 90 (3) (a) (ii) and section 90 (3) (b) is that on a literal reading of those provisions one is forced to the conclusion that, in order to be eligible for admission to the Gambian Bar, one has to hold or must have held one of the qualification specified.

in Order IX of the Rules of Supreme Court. Sections 90 (3) (a) (ii) and (b) as drafted does not, in our view, when literally construed mean admission to the Gambian Bar for a period of seven years. One may of course be bold to concede that the intention or object of the statute in question is to stipulate a seven year period as a post call qualification period (that is the number of years one has to his credit after being called to the Bar) for any barrister or solicitor of the Gambian Bar to be appointed a judge of the Supreme Court or a Justice of Appeal. But the method adopted for expressing that intention, namely legislation by reference beclouds the intention of the law makers. It was possible for the court to have upheld the constitutionality of the Solicitor-General's appointment on the grounds that the qualifications under section 90 (3) are not cumulative and to further indicate that though a literal construction of section 90 (3) (a) (ii) and section 90 (3) (b) would disqualify the Solicitor-General for appointment as a judge, the object of the statute is to allow barristers of the Gambian Bar with at least seven years experience to be appointed as judges or Justices of Appeal. Such an approach would defeat any absurdity that would arise from the literal construction of the statute and it would indeed bring about an effective result. Pegging its decision on the lack of evidence, the court has unconsciously and unintentionally left room for a plethora of objections to be raised on the validity of a judge's or Justice of Appeal's appointment as such: such

objections may not only prove embarrassing to the judge concerned but perhaps to the Justices of Appeal, if the objection is the subject of an appeal as there may be enough evidence to substantiate that the judge concerned does not possess "both qualifications." In such a situation the reasoning of Lord Coleridge, which the Court of Appeal adopted and applied in the Allen case, would be of no avail as Lord Coleridge was quick to qualify his reasoning by saying that "but it is only a prima facie presumption and it is capable of being rebutted."³¹ It must, in fairness to the Court of Appeal, be pointed that it implicitly stated the possibility of the presumption being rebutted when it said "No evidence was adduced before this court or the court below. . . ."

But the problem inherent in the Court of Appeal's reasoning and even the approach we suggest to avoid the absurdity, which a literal interpretation of section 90 (3) (a) (ii) would produce, would still endure. As we have ventured to suggest the principle underlying that provision is to enable barristers of the Gambian Bar with at least seven years experience to be appointed to the high benches. One question that may be asked in this connection, however, is what would be the position of a person loaned to The Gambia to be appointed to the high bench but who does not qualify for such appointment under section 90 (3) (a) (i) but has been admitted as a barrister to,

³¹(1878) L.T. 690 at 691.

say, the Ontario or Alberta Bar for a period of not less than ten or more years? It would appear that on the reasoning of the Court of Appeal the appointment of such a person to the high bench in The Gambia would be held unconstitutional if an objector adduces evidence to substantiate that the person so appointed does not qualify under either section 90 (3) (a) (i) or section 90 (3) (a) (ii) by reason of the fact that he is or was not a judge of a superior court with unlimited jurisdiction in civil and criminal matters or that though he has been a member of the Ontario or Alberta Bar for a period of more than seven years, his admission to the Gambian Bar is less than the seven year statutory period.³²

A possible method to avoid the inconvenience which we have endeavoured to outline above is to enact a Judges Act, which among other things will contain the philosophy of section 90 (3) of the constitution. A Judges Act is advisedly suggested as it will certainly be unwise and expensive to amend any constitutional provision relating to the Judicature (other than

³²The majority of the Judges of both the Supreme Court and The Gambia Court of Appeal are, at the moment of writing non-Gambians loaned to the Government of The Gambia on basis of technical assistance. All the Justices of Appeal are or have been superior court judges in their countries of origin. (Mr. Justice Sam Forster is a Gambian but now resident in Sierra Leone.) The Chief Justice and the Puisne Judge are non-Gambians; in fact the latter was loaned to Gambia by the government of Nigeria since 1973; there is all indication that he has not been a barrister of the Gambia Bar for seven years nor has he been a superior court judge as contemplated by s. 90 (3) (a) (i) before his appointment as a puisne judge of the Supreme Court. He is of course a barrister of long standing in the Nigerian Bar.

appeals to the Judicial Committee) because such a constitutional amendment will certainly lead to the holding of a referendum. The Judges Act should recast section 90 (3) of the constitution to read thus:

"A person is not qualified to be appointed as a Justice of Appeal or a Judge of the Supreme Court unless

(a) he holds or has held office as a judge of a court having unlimited jurisdiction, in civil and criminal matters in some part of the Commonwealth or in any country outside the Commonwealth that may be prescribed by Parliament or a court having jurisdiction in appeals from such a court; or

(b) he is admitted as a Barrister or solicitor of the Supreme Court of The Gambia and has been so admitted for a period of not less than seven years."

Paragraph (b) of section 90 (3) should also be deleted and be substituted by a new subsection, which I suggest, should read thus:

"Parliament may exempt any person, who has been admitted to the bar in some part of the Commonwealth or in any country outside the Commonwealth as Parliament may prescribe for a total period of not less than seven years, from the provisions of paragraph (b) of section"

In this form the intention of the statute is clear and unambiguous; there is no doubt that the minimum qualification required to be possessed by a candidate for appointment as a Judge of the

Court of Appeal or of the Supreme Court is among other qualifications seven years experience after being called to the bar and Parliament has power to exempt non-members of the Gambian Bar from the provisions of paragraph (b) in order to appoint legal personnel loaned to Gambia on technical assistance to the high bench. In this form it will not be necessary for any court to proceed on a prima facie presumption of the regularity of the appointment of a judge under our suggested paragraph (b): all that the presiding judge or the Court of Appeal should do, where the constitutionality of a judge's appointment under paragraph (b) is in dispute, is to refer to the roll of barristers and solicitors in the Supreme Court. The perusal of that roll would provide enough evidence as to whether the judge, the constitutionality of whose appointment is being impugned, has or has not been admitted as a barrister or solicitor of the Supreme Court for at least seven years; and the court is bound to take judicial notice of the matters entered on that roll.

(ii) TENURE OF OFFICE

Unlike the United Kingdom appointment to Judicial office in The Gambia does not endure for the life of the appointee. The constitution, however, prohibits the abolition of the office of a Justice of Appeal or a judge of the Supreme Court while there is a substantive holder thereof.³³ Further there

³³ Ss. 88 (2) (b) and 89 (2).

is a prescribed compulsory retiring age for judges of both the Court of Appeal and the Supreme Court and that prescribed age is, in the case of Justices of Appeal, sixty-five and; in the case of judges of the Supreme Court, sixty-two.³⁴ An Act of Parliament altering the prescribed retiring age of either a Justice of Appeal or a judge of the Supreme Court cannot affect a person performing the functions of either of those offices unless he consents that the altered age is applicable to him.

(iii) REMOVAL OF JUDGES

The power to appoint judges of either the Court of Appeal or the Supreme Court is vested in the executive but once appointed the executive is divested of the power to remove them; the House is vested with the power to remove judges from office. The procedure to remove a judge of either court is initiated by a written notice of motion, signed by at least one-third of all the voting members of the House alleging that the judge be removed from office by reason of inability to perform the functions of his office (whether arising from infirmity of body or mind) or because of misbehaviour. The written notice of motion, which must be deposited with the Speaker, must contain a proposal that a tribunal be established to investigate the allegation against the judge. The motion is

³⁴S. 91 (5).

not subject to debate; the only action that the House takes on the motion is a vote. If the motion is supported by a two-thirds majority of all voting members, then the House must by resolution appoint a tribunal consisting of a chairman and not less than two other members one of whom must be or must have been a judge of a superior court. The judge whose conduct is being investigated may, if he so desires, appear and be represented before the tribunal. The House is empowered to suspend the judge from performing the functions of his office during the course of the investigation. After the investigation and the tribunal reports unfavourably on the judge to the House, the latter may after considering the report resolve, by a two-third majority of all the voting member, that the judge be removed from office and upon such resolution the judge will stand removed.³⁵ A judge whose appointment is revoked by the procedure contemplated under section 91 (4) may nonetheless continue to act as a judge in order to enable him to deliver judgment or do any other thing in relation to proceedings that were commenced before him.³⁶

D. JUDICIAL SERVICE COMMISSION

A Judicial Commission is established by the constitution to advise the President on the appointment of high judicial officers other than the Chief Justice of the Supreme Court and

³⁵S. 91 (4).

³⁶S. 90 (8).

the President of the Court of Appeal. The Judicial Commission is also responsible for appointing, and exercising disciplinary power over the Registrar and the Assistant Registrar of the Supreme Court as well as Magistrates.³⁷ District Tribunal Judges and administrative officer, who by virtue of their office act as, or perform the functions of, Magistrates, are not subject to the control and power of the Judicial Commission.

The Commission itself is composed of the Chief Justice as Chairman, the Chairman of the Public Service Commission and one other person appointed by the President acting in consultation with the Chief Justice. The disqualifications for membership of the Judicial Commission are the same as those for members of the Public Service Commission. The tenure of office of the appointed member is two years but he may be removed from office before the expiration of his term of office for inability to perform the functions of his office (whether by reason of infirmity of mind or body) or for misbehaviour. The procedure for the removal of the appointed member is the same as that for removing a member of the Public Service Commission with the difference that a proposal to remove the appointed member is initiated by the Chief Justice.

The Judicial Commission, like the other Commissions established by the constitution, is independent of and not subject to the direction of any person or authority in the

³⁷S. 100 (1) and (3).

performance of its functions under the constitution.³⁸

E. INDEPENDENCE OF THE JUDICIARY

An independent judiciary is a sine qua non in any place if the Rule of law is to survive and subjects protected against executive and administrative caprices. The constitution provides for the necessary safeguards which provide the roots for the independence of the judiciary. Like their counterpart in many Commonwealth and common law countries, the Gambian judges enjoy security of tenure of office and once appointed the office of a judge cannot be abolished while there is a substantive holder performing the functions of that office. Although Parliament may reduce or increase the compulsory retiring age of judges of either the Court of Appeal or the Supreme Court, such legislative alteration cannot affect a judge who is already in the judicial service without his consent.³⁹ These constitutional prescriptions provide the protective shield against executive intrusion in the temple of justice and also provide the roots that sustain the independence of the judiciary.

The salaries and allowances of the judges are provided by Parliament, and are a charge on the Consolidated Revenue Fund. Judge's salaries and their other terms of services can-

³⁸S. 99 (10).

³⁹Ss. 88 (1) (b), 89 (2) and 91 (5).

not be altered to their disadvantage.⁴⁰ By insisting that Parliament fixes the salaries of judges section 107 of the constitution protects "the judiciary from executive power to impair judicial independence by reduction or raises in salaries."⁴¹ In addition to securing the salaries of judges being a charge on the Consolidated Revenue Fund, two other safeguards have been instituted to secure the independence of the judiciary. These safeguards relate to the appointment and removal of the judges. As we have seen, apart from the Chief Justice and the President of the Court of Appeal, the appointment of superior court judges is the concurrent responsibility of the President and the Judicial Commission. This system of entrusting to both the President and the Judicial Commission responsibility for appointing the other superior court judges provides a fetter against the executive to fill the judiciary with political appointees. The system does provide the Judicial Commission the opportunity to do what could concretise and enhance the independence of the judiciary, namely the selection of men of probity and integrity for appointment by the President. The constitutional safeguards for the independence of the judiciary is not limited to the superior court judges only. The Magistrates, whose lack of independence of the executive could lead to a violation of the Rule of Law especially in

⁴⁰S. 107.

⁴¹P.W. Hogg: Constitutional Law of Canada (The Carswell Co. Ltd., Toronto, 1977), p. 118.

criminal trials where the state has the greatest interest, have been expressly insulated from the executive by entrusting their appointments and removal to the Judicial Commission. This indeed guarantees the independence of the Judiciary even at the lowest level.

The pre-republican procedure for the removal of judges has continued as part of the 1970 constitution though a reference to the Judicial Committee has been abolished. The power to remove judges from office is vested in the elected representative of the people and not the executive. The executive is not only divested of the power to remove a judge from office but even the power to suspend him while the enquiry into his conduct is being conducted. The combination of the parliamentary and judicial processes for removing a judge from office greatly enhances the independence of the Gambian judiciary and that procedure--operating nowhere in Commonwealth Africa except The Gambia--would seem to be the best.⁴²

Finally the independence of the judiciary is guaranteed by the entrenchment of the judicature provisions of the constitution (except provisions relating to appeals to the Judicial Committee) which virtually puts them beyond the reach of Parliament. The judges are as a matter of common law, not liable for slander or for damages for any thing done or said in the exercise of

⁴²Nwabueze: Judicialism, p. 273.

their judicial functions. Equally no person can criticise the conduct of a judge not even Parliament (in the case of Parliament such criticism has to be on a substantive motion) and no comment may be made on any case that is sub judice.

GENERAL OBSERVATIONS

The exit of the colonial power and the handing of political power to the local politicians did not bring in their wake the attrition of judicial independence. The independence of the judiciary is reaffirmed under the 1970 constitution and this reaffirmation is expressed by entrenching the constitutional provisions relating to the judiciary. It is not possible for Parliament to abrogate the independence of the judiciary by tampering with these entrenched provisions without also holding a referendum. It is not likely that any government will attempt to derogate from the independence of the judiciary by subjecting itself to a referendum: referenda campaigns in Gambia are not always limited to the proposals which are put to the electorates for their approval but they also provide the opponents of the proposals every opportunity to discredit any other policy of the government. A government that is not ready to mount a full scale campaign will certainly not initiate any legislative proposals that would lead to the attrition of judicial independence.

Since the attainment of nationhood, there has been no

discernible effort on the part of the executive to tamper with the independence of the judiciary nor has there been confrontations--confrontations that normally undermine the independence of the judiciary--between the executive and the judiciary. Despite the lack of confrontation between the executive and the judiciary, the executive has not hidden its dismay at what it considers token fines in certain offences. It may be argued that the expression of the executive dismay (probably addressed to the Magistrates) is to bring to the attention of the judiciary that the judiciary has a role to convince the public that it administers justice evenly for "when a Magistrate convicts a man of this kind of crime (as has happened in some cases) involving misappropriation of scores of thousands of Dalasis of public funds and the Bench then proceed to impose a token fine of a few hundred Dalasis or even less; and the prosecuting counsel does not even bother to complain. . . . one cannot blame the public if they draw the obvious conclusion."⁴³ To the constitutional purist these utterances have the effect of derogating from the independence of the judiciary in that they constitute a tacit direction by the executive to the judiciary for the latter to impose fine or other punishment that the executive finds satisfactory. That however is not the purport of the executive's intention; that statement is an attempt on the part of the executive to bring home to the judiciary that

⁴³Presidential Speech on the occasion of the State opening of Parliament 16th August 1978: Sessional Paper No. 3 of 1978 pp. 19-20.

while the independence of the judiciary must not be compromised, it cannot be insensitive and indifferent to the role it has to play "in maintaining the economic, social and moral health of the Nation."⁴⁴ For the judiciary to accomplish this goal, it perhaps needs some orientation, an orientation that would drag it from the centre of too much legalism; an orientation which would also make the judiciary "without sacrifice of principle, to appear independent though not isolated, impartial but not indifferent, positive but not inflexible."⁴⁵

The whole concept of guaranteeing the independence of the judiciary is to protect it from executive interference and to ensure litigants a maximum judicial impartiality. Judicial impartiality is perhaps more essential than anything else as the bulk of litigation in Gambian courts are usually between private citizens, and the government normally does not have an interest in these litigations. Although the constitutional prescriptions have a bias towards an independent judiciary which in turn has a bias towards an impartial judiciary, those prescriptions do not provide a panacea for the frailties of human nature. Judges, like all other persons, are humans and as humans they cannot easily ignore certain ideas and notions which are prevalent in the circles in which they move. These ideas and notions are part and parcel of the judge so that "when you have

⁴⁴ Ibid., p. 19.

⁴⁵ James and Kassam (eds.) Law and its Administration in a One Party State, p. 62.

to deal with other ideas, you do not give as sound and accurate judgement as you would wish."⁴⁶ The independence of the judiciary cannot eliminate the personal prejudices of individuals and every one, be he a litigant or otherwise, has to tolerate this fact knowing that no human being can divest himself of all his prejudices. A judge's personal prejudice is only intolerable when it leads to constant and unbridled perversion of justice.

In this and in an earlier chapter it was observed that the Judicial Committee of the Privy Council still performs the role of a final Court of Appeal for The Gambia. One would have expected that the severance of constitutional links between The Gambia and the British monarch would have led the Judicial Committee to be an effete institution as far as The Gambia is concerned. To efface the Judicial Committee from the hierarchy of appellate courts can be justified by the history of that Committee. An appeal to the Judicial Committee is in practice and in substance an appeal to the sovereign in council as the fountain of justice to dispense justice to any of his subjects who is aggrieved by the decision of the Sovereign's Courts beyond the seas. The residual prerogative of the Sovereign is exercised by the Judicial Committee whose advice to the Sovereign is translated into an Order in Council of the Sovereign.⁴⁷

⁴⁶ Lord Scrutton: Commercial Courts, 1 Cam.L.J. p. 6 at 8.

⁴⁷ Sir George Rankin: The Judicial Committee of the Privy Council, 7 Cam.L.J. p. 2; Viscount Haldane of Cloan: The Work for the Empire of the Judicial Committee of the Privy Council, 1 Cam.L.J. p. 143.

In the light of the historical development of the appellate jurisdiction of the Judicial Committee, the only reason why a republican state, such as The Gambia, may still maintain appeals to the Judicial Committee may only be pegged on the experience and learning of the judges of that Committee. By their wealth of experience and learning the judges of the Judicial Committee have helped to elucidate and settle once and for all difficult points of law in many former colonies of Britain. This factor is likely to be an invaluable asset to both Gambian judges and practitioners. Added to this fact is the other reason that the Judicial Committee is completely divorced from the local scene. This ensures in every way that the Judicial Committee is not the tool of the executive and is insulated from the influence of "big men" litigants. The fact that the Judicial Committee does operate outside would repose confidence in the average Gambian who thinks that the judiciary is nothing but an appendage of the executive.

As cogent and impressive as these arguments may be, one cannot ignore the fact that the Judicial Committee is essentially a prerogative Court that exercises the residual prerogative powers of the British sovereign to avert injustice being meted to its subjects. It cannot be over-emphasised that Gambians are no longer subjects of the British sovereign. It is a ridiculous and an anomalous situation for the sovereign of a foreign country to indicate by an Order in Council how a dissatisfied Gambian subject should be treated in the law courts.

It is not consistent with Gambia's sovereignty that appeals should be finally determined "by an external court constituted under laws of another country, composed almost entirely of judges appointed by an outside government and functioning entirely from outside."⁴⁸ It is hardly defensible that the Queen in her capacity as the fountain of justice for her subjects should perform that same role for Gambians when her role in that capacity was put to rest when Gambians, in 1970, saw it fit to bring an end to the role of the monarchy in The Gambia. The present writer believes that the exhortation of Lord Haldane in *Hull Vs McKenna* that "Dominions", and we venture to add, all republican states that still maintain appeals to the Judicial Committee, "should more and more dispose of their own cases," should not only be strictly observed by Gambian courts but the Gambian Parliament should go a step further to efface the Judicial Committee from the hierarchy of Gambian appellate courts. The abolition of appeals to the Judicial Committee ought not to generate any fear in the people as to what could be the fate of the judiciary, the last hope of the poor man, in the hands of the executive. If the average Gambian has absolute confidence in the local politicians by vesting in them enormous executive and legislative powers--legislative powers that can be used to annul the decisions of the Judicial Committee in so far as they affect The Gambia--one cannot imagine any reason

⁴⁸Nwabueze: Machinery of Justice, etc., p. 204.

why Gambians cannot repose the same degree of confidence in a final court of appeal that operates within the country and presided over by local judges. However, if the Gambian Parliament does not think it fit to abolish appeals to the Judicial Committee one may suggest that appeals can still go to the Judicial Committee not under the Judicial Committee Act, 1833⁴⁹ as amended but under a Treaty of Judicial Cooperation between the United Kingdom and The Gambia whereby the Judicial Committee will, in appeals from The Gambia, advise the President instead of the Queen.⁵⁰

⁴⁹3 and 4 Will. 4, C. 41.

⁵⁰Section e of the Federation of Malaya Independence Act, 5 and 6 Eliz. 2, C. 60 provides for such an arrangement to be made between the government of the United Kingdom and the government of Malaya.

CHAPTER TEN

THE INDIVIDUAL AND THE STATE

Perhaps the most prominent negative role of law in establishing Britain's colonial presence in Gambia was in the sphere of citizenship law. Not only were the colonised subjects deprived of whatever citizenship they could lay claim to before colonisation, but the colonial power through its system of administration differentiated between the colonial subjects as citizens of the United Kingdom and colonies and British protected persons. This differentiation in the national or citizenship status of the colonised subjects did not have any pragmatic effect as all the colonised subjects, whether citizens of the United Kingdom and colonies or British protected persons, were for all purposes regarded as British subjects. The notion or idea of a Gambian nationality or citizenship during the colonial era was more apparent than real. The adjective "Gambian" was only used for the convenience of describing the individual's place of origin rather than his nationality or citizenship, since international law does not recognise nationality or citizenship of a non-sovereign state because "the fundamental basis of a man's nationality is his membership of an independent political community."¹ It is the absence of an independent and sovereign political community in The Gambia during the

¹J.G. Starke: Introduction to International Law 6th ed. (Butterworths, London, 1967), p. 91.

colonial era that made the idea or notion of a Gambian nationality or citizenship more apparent than real. The differentiation or dichotomy that existed in the status of the Gambian inhabitants, namely citizens of the United Kingdom and colonies and British protected persons, persisted until February 18, 1965, when a common citizenship emerged with the birth of the new nation.

Allied with the absence of a common Gambian citizenship or more correctly a common British nationality among all the inhabitants of Gambia was the absence, until in 1963, of a codified Bill of Rights guaranteeing fundamental freedoms and liberties. An argument in extenuation for the absence of a Bill of Rights might be based on the grounds that the English Bill of Rights 1689, the Habeas corpus Act 1816, all being statutes of general application in Gambia, and all that body of fundamental freedoms and liberties recognised by the common law were all applicable in Gambia. Local legislations, such as the Criminal Procedure Code, provided some of the liberties and freedoms that any democratic government would include in its constitution. In addition to these, the 1948 United Nations Universal Declaration of Human Rights, to which the United Kingdom Government was a party, could be enjoyed by the colonised subjects of Gambia, since one would assume that the Government of the United Kingdom committed herself to observing and respecting the principles of human rights contained in the Universal Declaration, not only within the geographical limits of the United Kingdom, but also within her colonies.

But one cannot ignore the fact that the statutes of general application and the common law are applicable in a colony subject to local circumstances. These bodies of laws and the local legislations are amendable to amendment or variation by the local legislature in exercise of its legislative power. This does not mean that the colonial government, though autocratic, acted in a tyrannical fashion to deny the local inhabitants their fundamental rights as recognised by the statutes of general application, the common law and local legislations. The point is only observed to indicate the dangers inherent in the absence of a constitutionally entrenched Bill of Rights. Challenges to government violation of the common law freedoms and freedoms enjoyed by virtue of the statutes of general application are not likely to succeed, for reliance on any of these faced the dangers of being brushed aside on the grounds that local circumstances made them inapplicable. Violations of human rights might be challenged by persons who were subjects of the United Kingdom and colonies with some degree of hope for success; challenges of violations of human rights by persons who were British protected persons stood little chances of success in the courts because the colonial legal advisors were well armed with the defence of "act of state." A plea of an act of state against a British protected person always had the effect of driving a dagger through the heart of his case.

The extenuating argument based on the United Kingdom

Government's commitment to observe and respect within her colonies the rights declared in the Universal Declaration of Human Rights cannot be sustained when one realises that that Declaration contains no machinery for the enforcement of the catalogue of the generally acceptable rights of the individual. The Declaration "did not purport to be more than a manifesto, a statement of ideals, 'a path finding' instrument."² But even if the Declaration was more than a manifesto and contained machinery for the enforcement of the catalogue of rights contained therein, it was still a poor substitute for a constitutionally entrenched Bill of Rights. The Declaration is in its nature and purport an international treaty imposing obligation on the signatories thereto; as an international treaty imposing obligation on the state parties, enforcement of its provisions could properly be done by a state signatory thereto. An aggrieved person, be he colonial subject or a subject of an independent sovereign state, may not bring action against his government for non-observance or compliance with its treaty obligations unless he has exhausted all the local remedies available to him under the municipal law.³ But one would be assuming too much to expect that an aggrieved colonial subject, who has exhausted all the local remedies available to him, would exercise his right of recourse to other venues or to expect that any

²Starke, p. 314.

³This is a crude generalisation as other state parties, may and can initiate investigations into allegations of violations of human rights.

of the colonial powers or independent non-third world countries would take up the case of an aggrieved colonial subject for investigation in any tribunal by whatever name called.

On the attainment of independence a common Gambian citizenship was inaugurated. A few years before this a Bill of Rights guaranteeing fundamental rights and freedoms with a machinery for their enforcement found a place in the constitution. In part one of this chapter it is proposed to discuss the citizenship and nationality laws of The Gambia and in part two it is proposed to deal with the fundamental rights and freedoms as guaranteed by the Bill of Rights.

PART I

CITIZENSHIP

Gambian citizenship is regulated by chapter two of the constitution and supplemented by The Gambia Nationality and Citizenship Act, 1965⁴ (hereinafter referred to as the "Act"). The constitution distinguishes between citizens by birth, by descent, by registration and by naturalization and the Act provides for the mode of acquisition of citizenship by naturalization or registration and the mode by which a person may renounce, or be deprived of, his citizenship.

⁴Act No. 1 of 1965.

(i) CITIZENSHIP BY OPERATION OF LAW

By section 3 (1) of the constitution every person who was born in The Gambia and was on the 17th day of February 1965 a British subject or a British protected person automatically became a Gambian citizen on the 18th of February 1965. This has no application to a person neither of whose parents nor grandparents were born in The Gambia or to a person neither of whose parents was naturalized in The Gambia as a British subject under the British Nationality Act. Similarly, any person who on the 17th of February 1965 acquired citizenship of the United Kingdom and colonies under the British Nationality Act by virtue of his having been naturalized in The Gambia as a British subject automatically became a citizen of The Gambia on the 18th of February, 1965.⁵ Any person who was a British subject on the 17th of February, 1965 but born outside The Gambia became a Gambian citizen on February 18, 1965 if his father became or would but for his death have become a citizen by virtue of either section 3 (1) or section 3 (2) of the constitution.⁶

(ii) CITIZENSHIP BY BIRTH AND DESCENT

A person born in The Gambia after the 17th of February, 1965 becomes a Gambian citizen at birth unless neither of his

⁵Constitution s. 3 (2).

⁶S. 3 (3).

parents is a citizen of The Gambia and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to The Gambia; or his father is a citizen of a country with which The Gambia is at war and the birth occurs in a place then under enemy occupation by that country.⁷ For the purpose of determining a person's place of birth, the constitution provides that a person born aboard a registered ship or aircraft of the Government of any country shall be deemed to have been born in the place in which the ship or aircraft was registered or, as the case may be, in that country.⁸

Citizenship by descent may be acquired by those born outside The Gambia after the 17th of February, 1965. A person born outside The Gambia after that date became a citizen of The Gambia at the date of his birth if at that date his father was a citizen of The Gambia by birth, by naturalization or by registration. This means that a person born outside The Gambia and who by descent has himself acquired citizenship through his father cannot transmit Gambian citizenship to a child born to him outside The Gambia.⁹

By section 9 of the constitution, Parliament is empowered to enact legislation for the acquisition of Gambian citizenship by persons who are not entitled to become such citizens or who

⁷S. 5.

⁸S. 12 (2).

⁹S. 6.

have ceased to be entitled to become such citizens under the constitution. Those eligible to be registered as citizens of The Gambia are defined in the constitution and in the Act.

(iii) CITIZENSHIP BY REGISTRATION

A person who was born in The Gambia and was a citizen of the United Kingdom and Colonies or a British protected person, but neither of whose parents or grandparents was born in The Gambia may, before the 18th of February 1967, be registered as a citizen of The Gambia. An application for registration as a citizen may be made on behalf of a minor, other than a woman who is or has been married, by his parent or guardian.¹⁰ Similarly a woman who on the 17th of February, 1965 has been married to a person who becomes a Gambian citizen by virtue of section 3 of the constitution; or a person who died before the 18th of February, 1965 and would but for his death have become a citizen by virtue of section 3 of the constitution, may upon application to the appropriate minister be registered as a citizen of The Gambia.¹¹ The constitution further provides that any woman who, on the 17th of February, 1965, has been married to a person who becomes, or would but for his death have become entitled to be registered as a citizen of The Gambia but whose marriage was, before the 18th of February 1965, terminated by death or dissolution is entitled to be

¹⁰S. 4 (1).

¹¹S. 4 (2).

registered as a citizen of The Gambia. The termination of the marriage on or after the 18th of February 1965 does not affect the woman's right or entitlement to be registered as a citizen provided application for registration is made before the 18th of February, 1967.¹² A woman who is married to a citizen of The Gambia or who has been married to a man who was, during the subsistence of the marriage, a citizen of The Gambia is entitled to be registered as a citizen of The Gambia.¹³ The Act provides that the Minister responsible for matters relating to nationality and citizenship of The Gambia may cause a person born outside The Gambia, and whose father was at the time of that person's birth a citizen of The Gambia, to be registered as a citizen of The Gambia.¹⁴

A Commonwealth citizen, a citizen of the Republic of Ireland or a British protected person of full age and capacity may, on application, be registered as a citizen of The Gambia. A person in this class can acquire Gambian citizenship by registration if he satisfies the Minister that he (the applicant) is a person of good character; he would be a suitable citizen of The Gambia; he has sufficient knowledge of a language in current use in The Gambia; and he is ordinarily resident in The Gambia and has been so resident for a continuous period of five years, or such shorter period as the Minister may in the special circumstances of any particular case accept, immediately

¹²S. 4 (3).

¹³S. 7.

¹⁴The Act s. 3 (2).

preceding his application.¹⁵

(iv) CITIZENSHIP BY NATURALIZATION

An alien of full age and capacity may, on satisfying the Minister that he possesses the requisite qualifications for naturalization as a citizen of The Gambia, be granted a certificate of naturalization after taking the prescribed oath of allegiance.¹⁶ The requisite qualifications are set out in the Second Schedule to the Act which provides that an applicant for a certificate of naturalization must satisfy the Minister that

- (a) he has resided in The Gambia for a continuous period of twelve months immediately preceding the date of his application;
- (b) during the seven years immediately preceding that period of twelve months he has resided in The Gambia for a total period of at least five years;
- (c) he has adequate knowledge of a language in current use in The Gambia;
- (d) he is of good character;
- (e) he would be a suitable citizen of The Gambia; and
- (f) he intends, if naturalized, to continue to reside permanently in The Gambia.¹⁷

In special circumstances the Minister may, with the approval

¹⁵Ibid., s. 3 (1).

¹⁶S. 6.

¹⁷Para. 1 Sched. 11 to the Act.

of the President, vary the requirements under subparagraphs (a) and (b) of paragraph 1.¹⁸

(v) RENUNCIATION OF CITIZENSHIP

A Gambian citizen of full age and capacity may by declaration renounce his citizenship of The Gambia. The Minister has a discretion to cause a declaration of such renunciation to be registered if he is satisfied that the person making such declaration will become a citizen of a country within the Commonwealth or a national of a foreign country. Registration of the declaration may be withheld if the Minister is satisfied that the declarant is ordinarily resident in The Gambia and that in his opinion registration of the declaration would be contrary to public policy.¹⁹

(vi) DEPRIVATION OF CITIZENSHIP

A Gambian citizen, other than a citizen by birth, may be deprived of his citizenship if the Minister is satisfied that such a citizen has, at any time while a citizen of The Gambia and of full age and capacity, acquired the nationality or citizenship of a foreign country by any voluntary or formal act other than by marriage; or voluntarily claimed and exercised rights that are exclusively accorded to the citizens.

¹⁸Para. 2 Sched. 11 to the Act.

¹⁹Ibid., s. 7.

or nationals of that foreign country. Deprivation of Gambian citizenship on any of those grounds may be done only if the Minister is satisfied that the continued Gambian citizenship of such person is not conducive to the public good.²⁰ A person who acquires Gambian citizenship by registration or naturalization may be deprived of such citizenship if the Minister is satisfied that that person has acquired his citizenship by false representation, fraud or concealment of any material fact. A naturalized citizen may lose his citizenship if he has shown himself by act or speech to be disloyal or disaffected towards the Government of The Gambia; or has, during any war in which The Gambia was engaged, unlawfully traded or communicated with any enemy or been engaged in or associated with any business that was to his knowledge carried on in such manner as to assist an enemy in that war; or has within seven years of his becoming a naturalized citizen been sentenced in any country to imprisonment for a term of not less than twelve months. A naturalized citizen may be deprived of his citizenship if the Minister is satisfied that that citizen has been ordinarily resident in a foreign country or foreign countries for a continuous period of seven years and has not during that period registered annually at a Gambian consulate or has not by notice in writing to the Minister signified his intention to retain his Gambian citizenship.²¹ If a citizen of The

²⁰ Constitution s. 10 and the Act s. 8.

²¹ S. 9 of the Act.

Gambia who was also a citizen of any country within the Commonwealth or a citizen of the Republic of Ireland is deprived of his latter citizenship on grounds which, in the opinion of the Minister, are substantially the same as those under section 9 (1), (2) and (3) of the Act; then the Minister may by order deprive him of his Gambian citizenship.²²

In all cases of deprivation of citizenship, the Minister must be satisfied that it is not conducive to the public good that the person should continue to be a citizen of The Gambia. Renunciation by a person of his Gambian citizenship or deprivation of any person of his Gambian citizenship does not affect his liability for any offence committed by him before the renunciation or deprivation of his citizenship.²³

The Minister's power to deprive a person of his Gambian citizenship is not automatically exercisable even where he is satisfied that the conditions on which deprivation of citizenship can be made exist. The constitution requires the Minister, before making a deprivation order, to give notice to the citizen of the grounds on which it is proposed to deprive him of his citizenship. The notice must indicate the citizen's right to have his case referred to a committee of enquiry; the Minister must refer the case to a committee of enquiry if the citizen so requests. The mode of the committee's operation in any such reference will be such as determined by the Minister. In deter-

²²S. 10 of the Act.

²³S. 11 (2) of the Act.

mining whether to make an order depriving a person of his citizenship the Minister must take into account the committee's report, but he is not obliged to be bound by any recommendation contained therein.²⁴

Finally, it may be observed that in 1977 the Act was amended to empower the President to confer on deserving individuals honorary citizenship of The Gambia.²⁵ The same amendment forbids any Gambian to hold the nationality or citizenship of another country, and requires that persons who seek to be registered or naturalized as Gambian citizens must not only satisfy the requirements under section 3 or, as the case may be, section 6, but must also renounce any other citizenship they hold.

PART II

THE BILL OF RIGHTS

As indicated above the constitutions granted to The Gambia did not, until in 1963, contain any Bill of Rights guaranteeing human rights and freedoms. What rights and freedoms existed were protected and safeguarded by the ordinary laws of the land. The 1963 constitution contained a Bill of Rights that was fairly

²⁴ Constitution s. 11.

²⁵ This is the first provision of its kind that the present writer has encountered in the nationality and citizenship laws of any country. Perhaps the principal purport of the amendment is to honour people who for many years have sincerely and faithfully served The Gambia or to honour people who have through research established their connection with, or roots in, The Gambia.

similar to the one in the Sierra Leone constitution and it protected and guaranteed the fundamental rights and freedoms and at the same time provided machinery for their enforcement. The effect of its inclusion in the constitution was to "establish the right of the individual to go into the courts of this country, thereby assuring the preservation of his freedoms. These great traditional rights are merely pious ejaculations unless the individual has the right to assert them in the courts of law."²⁶ On the eve of independence the government of Prime Minister Jawara (as he then was) proposed by Sessional Paper No. 12 of 1964 to include in the independence constitution the same "safeguards" and liberties of the individual as were enshrined in the 1963 constitution; the Sessional Paper contained a further proposal for the entrenchment of the "safeguards" and liberties and the mode of their enforcement. Entrenching the Bill of Rights and the mechanism for its enforcement in the constitution is a sure way of providing it durable protection as the act of entrenchment puts it beyond the capricious reach of the ordinary legislative process.²⁷

The 1965 constitution and, subsequently, the 1970 republican constitution made provision for a detailed and elaborate Bill of Rights. Both in its content and draftsmanship the Gambian Bill of Rights does not reveal any thing novel; its provisions

²⁶J.G. Diefenbaker quoted by W. Glen How in "The case for a Canadian Bill of Rights" (1948) 26 Can. Bar. Rev. 759.

²⁷Bora Laskin: An Inquiry into the Diefenbaker Bill of Rights (1959) 37 Can. Bar. Rev. 77.

are virtually the same as those contained in the independence constitution of Sierra Leone.²⁸ The first section of the Bill of Rights opens with a statement or declaration of principles indicating what fundamental rights and freedoms are guaranteed and protected by the constitution. The statement or declaration of principle is said to be the entitlement of every person in The Gambia "to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for public interest to each and all of the following, namely--(a) life, liberty, security of the person and protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation."²⁹ This declaration or statement of principle "brings out the general purport of the guarantees, lifting them above the austerity of tabulated legalism, and may help to spread awareness of their implications. . . . among the community at large."³⁰ The declaration of the principle ends with a caveat that the rights and freedoms thus guaranteed and protected are to be exercised and enjoyed only in so far as

²⁸ Indeed during a House of Representatives debates on the proposals for Gambia's independence Prime Minister Jawara invited Members of the House to peruse the Sierra Leone Bill of Rights as the government would like to have a similar Bill of Rights entrenched in the Gambian Constitution.

²⁹ Constitution s. 13.

³⁰ S.A. de Smith: The New Commonwealth and its Constitutions (Stevens and Sons, London, 1964), p. 194.

their exercise does not interfere with the rights and freedoms of others or is not prejudicial to the public interest. In effect the rights and freedoms can only be exercised or enjoyed within the limits allowed by law.

We will not turn to a consideration of the provision of the Bill of Rights to see how far the fundamental rights of the people of a democracy in the sense in which it is known are protected by the constitution.

(i) RIGHT TO LIFE

The first, perhaps the most important, right of the individual protected by the constitution, is the right to life. By prohibiting an intentional deprivation of a man of his life, the constitution entrenches the existing law of murder and allied offences. The right to life is, however, qualified by the constitution to the extent that a person may intentionally be deprived of his life in the execution of a sentence of a court in respect of a criminal offence for which he has been convicted under the law of The Gambia. An intentional killing may not amount to a contravention of the constitution if such a killing is done in defence of one's property against trespassers. It is also recognised by the constitution that an intentional killing is proper if such killing is done in order to effect the arrest or prevent the escape of a person from lawful custody. The other instances in which a person may be justifiably deprived of his life are killings for the suppression of a riot, insurrection,

or mutiny; or for the purpose of preventing the commission of an offence by the person killed. In all cases of justifiable killing, other than killing in the execution of a court sentence, the constitution demands that the force used must be reasonably justifiable in the circumstances of the case.³¹

(ii) RIGHT TO PERSONAL LIBERTY

Protection of the personal liberty of the individual in a poly ethnic and multi-party society is of paramount importance so that opponents will not be subjected to unwarranted and undue incarceration. The ordinary laws of the land do contain provisions guaranteeing the right of the individual to his personal liberty but some of these provisions were transplanted into the constitution, which also provides them additional buttress. Every person in The Gambia has a right to his personal liberty and may not be deprived of it: the constitution so declares. But as it may be necessary in the public interest to curtail the personal liberty of the individual, the constitution goes further to declare in what circumstances deprivation or curtailment of personal liberty is permitted. Thus, it is not in contravention of the constitution if a person is deprived of his personal liberty in execution of the sentence or order of a court for a criminal offence for which he has been convicted; through detention by order of any superior court for contempt of that court or any other court or tribunal; detention to secure a person's fulfilment of

³¹S. 14.

any obligation imposed on him under any law; or apprehension of a person for the purpose of bringing him before a court in execution of a court order. Also excepted are the lawful apprehension of a person reasonably suspected of having committed, or being about to commit, a criminal offence; the lawful detention of a minor for his education or welfare; the lawful detention of a person for the purpose of preventing the spread of an infectious or contagious disease; the lawful detention of a lunatic, drug addict, vagrant or alcoholic for the purpose of his care or treatment or for the purpose of protecting the community. It is permissible to deprive a person of his personal liberty for the purpose of preventing his unlawful entry into The Gambia or to effect his expulsion or extradition from The Gambia.³²

Procedural matters designed for the fair administration of the Criminal Procedure Code, in so far as it affects the liberty of the individual, have also been given constitutional recognition. To this end the constitution stipulates that a person arrested or detained must be informed as soon as reasonably practicable, in a language he understands, of the reasons for his detention or arrest.³³ It would appear that the detaining or arresting authority need not, though it is desirable, inform the detained or arrested person of the reasons for his detention or arrest when he is found actually committing a crime. But to be found on the scene of a crime or to be reasonably suspected of having committed a crime does not absolve the arresting or

³²S. 15 (1).

³³S. 15 (2).

detaining authority of his duty to explain the reason for his action. A person arrested or detained for the purpose of bringing him before a court in pursuance of a court order, or upon reasonable suspicion of his having committed or about to commit an offence, cannot be subjected to undue confinement. He must be brought, without undue delay, before a court or released on bail unless his continuous detention is ordered by a court.³⁴ Compensation is payable to any person who is unlawfully arrested or detained.³⁵

(iii) PROTECTION FROM SLAVERY: FORCED LABOUR AND INHUMAN TREATMENT

Slavery and forced labour were outlawed in The Gambia well before independence. But it was found necessary to provide constitutional prescriptions to reaffirm their abolition for the simple reason that the customs of some tribes, mainly the Mandingos, do respect ownership of human beings. It must, however, be observed that the concept of slave ownership in this context is not the same as that concept used to be in the days of the slave trade. A master and slave relationship as recognised by the custom of the Mandingos--the courts in West Africa have held such custom to be repugnant to natural justice equity and good conscience--only arises where one person, because of his weakness or poverty, puts himself under another person for the former's

³⁴S. 15 (3) - (5).

³⁵S. 15 (6).

protection or support. The person who thus puts himself under such protection or support is not liable to give his services to his protector or supporter if he does not wish to do so. This type of relationship is abominable by reason of the fact that the person providing the protection or support regards the other person as a "slave." But in truth and in reality the person receiving the protection or support is nothing more than a co-opted member of the protecting or supporting family. Proscription of forced labour is absolutely necessary to prevent powerful Chiefs or Alkalolu from abusing their authority by ordering inhabitants of their districts or villages to work, against their wishes, on the farms of the Chiefs or Alkalolu.

The constitution therefore provides ~~that no person shall~~ be held in slavery and no person shall be required to perform forced labour.³⁶ The first of the prohibitions is not subject to any exceptions but the second is. The constitution excludes from the definition of forced labour any labour required in consequence of the sentence or order of a court, labour demanded during any period of public emergency or labour required as part of reasonable or normal communal or other civic obligations. In a period of public emergency the labour that a person may be required to perform must be such as is reasonably justifiable in the circumstances of the situation.³⁷

³⁶S. 16 (1) and (2).

³⁷S. 16 (3).

The dignity of the person is protected from torture or inhuman or degrading punishment or treatment.³⁸ This provision prohibits police officers and all persons in authority to use means, amounting to the degradation of the human person, for the purpose of obtaining confessions from persons charged with the commission of a crime or arrested on suspicion of having committed a crime. However, the protection is not absolute since the constitution saves any law that authorises the infliction of any description of punishment that was lawful in The Gambia on the 23rd of April, 1970.³⁹ On this basis corporal punishment, which would ordinarily amount to torture or inhuman or degrading punishment, is excluded; this form of punishment is inflicted on young persons found "guilty" of an offence.

(iv) RIGHT TO PROPERTY

Any property of whatever description and any right or interest in any such property cannot be compulsorily acquired from any person in any part of The Gambia unless such acquisition is done by or under the authority of a law. Any law that provides for the compulsory acquisition of property or rights or interests therein must provide for the payment of adequate compensation and must provide the person claiming such compensation a right of access to the Supreme Court for the determination

³⁸S. 17 (1).

³⁹S. 17 (2).

of his interest and the adequacy of the compensation.⁴⁰ Property or interest therein may be compulsorily acquired in satisfaction of a court order or judgment; or by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence. In addition to these exceptions; any property that poses danger to human or animal health may be compulsorily acquired by the state, and so may enemy property. Any law that authorises the acquisition of a deceased person's property, property of a lunatic or of a bankrupt company for the purpose of vesting it in an administrator or a liquidator for the purpose of its administration for the persons entitled to the beneficial interest therein is saved from the operation of section 18 (1) of the constitution. These constitutional guarantees of freedom from deprivation of property apply to property taken possession of or acquired by or for the state as they do in relation to other persons.⁴¹

(v) FREEDOM FROM ARBITRARY SEARCH OR ENTRY

The next freedom guaranteed by the constitution is the freedom from or right against arbitrary search or entry. Except with his own consent no person may be subjected to the search of his person or his property or entry on his premises by others.⁴²

⁴⁰S. 18 (1).

⁴¹S. 18 (2) - (4).

⁴²S. 19 (1).

Freedom from arbitrary search or entry is not absolute since a person may, in the absence of legislation, compromise his freedom by consenting to be searched or by consenting to the entry on his property by others. It may, however, be necessary to search a person or his property or to enter on his premises without his consent. Derogation from a person's right not be searched or not to enter on his premises without his consent may be done under the authority of any law that is reasonably required in the interest of defence, public safety, public order, public morality, town and country planning, the development and exploitation of mineral or the utilization of property for communal benefit. Denial of the freedom from search or entry is not limited to the circumstances just enumerated. The constitution permits derogation from freedom of arbitrary search or entry if such derogation is done in pursuance of a law that is reasonably required for the purpose of protecting the rights or freedoms of other persons; or for the purpose of authorising government, or local government officers or officers of any body corporate to enter the premises of any person in order to inspect those premises or anything found therein for the purpose of any tax, or rate; to execute any public work on the property; or to enforce the judgment or order of a court in any civil proceeding. Anything done under the authority of any such law is invalid if it is shown that the measures taken are not reasonably justifiable in a democratic society.⁴³

⁴³S. 19 (2).

(vi) RIGHT TO THE PROTECTION OF LAW .

The principle of English law requiring speedy trial of an accused person, on the grounds that justice delayed is justice denied, is entrenched in the constitution. To avoid delays in the trial of persons charged with a criminal offence, the constitution stipulates that any person charged with a criminal offence must, unless the charge is withdrawn, be afforded a fair trial within a reasonable time by an independent and impartial court established by law.⁴⁴ A person charged with a criminal offence must be presumed innocent until he is proved, or has pleaded, guilty; he must be informed in a language he understands of the detailed nature of the charge against him; he must be given adequate time and facilities for the preparation of his defence. Similarly a person charged with a criminal offence must be allowed to defend himself in person or, at his own expense, by a legal representative of his choice; he has to be afforded facilities to cross-examine witnesses for the prosecution, and unless he otherwise consents his trial cannot be conducted in absentia unless he so conducts himself as to render the continuance of the trial in his presence impracticable.⁴⁵ In short, all the rights basic to a fair trial are guaranteed by the constitution. Representation by counsel of one's choice is very cardinal to any fair trial and the necessity of such a represent-

⁴⁴ S. 20 (1).

⁴⁵ S. 20 (2).

ation has been eloquently supported by Lord Denning when he remarked that "I know of nothing which is so essential to a right decision as to have the benefit of arguments which put forward all that can be said on each side."⁴⁶

The right of an accused to be afforded adequate time and facilities for the preparation of his case and the right to be represented by counsel of his own choice came up for determination in *Baba Musa Tarawally Vs Inspector General of Police* (unreported). The accused, who was a licensed journalist and publisher of a pamphlet, published and disseminated material alleging that the President was engaged in rice cultivation in his native village of Barajally and that the inhabitants of that village worked in the rice fields of the President against their will--in essence the villagers were performing forced labour. The accused was arrested and charged with the offence of criminal libel and his case was set down for hearing on the very day of his arrest. Accused instructed counsel to conduct his defence. Counsel applied for adjournment so that he could interview his client and prepare his case adequately; the application for adjournment was denied, whereupon he decided to withdraw from the trial. The accused's trial continued without his being represented by counsel, and throughout the trial he pleaded to be given the opportunity to be represented by counsel of his choice. He was subsequently

⁴⁶Sir A.T. Denning: *Freedom Under the Law* (Stevens and Sons Ltd., London, 1947), p. 91.

convicted by the trial Magistrate and his grounds of appeal to the Supreme Court contained, inter alia, an allegation that his right to be defended by counsel of his own choice was violated. The Supreme Court (Sir Philip Bridges C.J.) conceded that the accused's right to be defended by a counsel of his choice was violated--this, it is submitted, was sufficient to vitiate the entire trial--but went further to hold that the conviction could not be set aside because there was sufficient evidence to justify the conclusions reached at by the trial Magistrate. The Supreme Court, like the trial court, failed to take into account both the principle and letter of the constitution. It was not the sufficiency or insufficiency of evidence adduced but rather it was the principle of fair trial as guaranteed by the constitution that was the cardinal point in issue. The decision of the Supreme Court, it is submitted, ought not to have been based on the sufficiency of evidence; it ought to have been based on the right of the accused to be defended by counsel of his choice. That right should have prevailed because "where there is a conflict between the freedoms of the individual and any other rights or interests (including the right to be protected against criminal libel) then no matter how great or powerful those other interests may be, the freedom of the humblest citizen shall prevail."⁴⁷

The right to be defended by counsel of one's choice was recently invoked in the case of Ghazi Mahamoud Vs Inspector-

⁴⁷Denning, p.4. Parenthesis mine.

General of Police (unreported). In that case the accused, who was charged for foregery and defrauding insurance companies in the course of his buiness, instructed one Bathern Macauley, a Queen's counsel then resident in Jamaica to conduct his defence. Prosecuting counsel objected to Mr. Macauley's appearance on the grounds that he was not a barrister or solicitor permanently resident in The Gambia as required by the Supreme Court (Amendment) Rules, 1971.⁴⁸ The accused challenged the validity of the amended Supreme Court Rules on the grounds that the amendment violated the constitution inasmuch as it purported to deny the accused his right to counsel no matter where such counsel . may be permanently resident.. The Supreme Court (J. Omo Agege J.) following the decision in Awolowo and Ors Vs Minister of Internal Affairs ruled that counsel's right of audience in any Gambian court other than The Gambia Court of Appeal is dependent on the length of his residence in The Gambia--which must be not less than six months--and that the Rules Committee was entitled to determine and set what conditions a barrister or solicitor must satisfy before exercising his right of audience in Gambian courts.

The constitution also requires that a person cannot be compelled to give evidence at his own trial nor can a person be tried a second time for an offence for which he has been convicted or acquitted or for an offence for which he could have

⁴⁸These rules were declared invalid but subsequently validated. See Chapter Seven above.

been convicted at an earlier trial.⁴⁹ The last of these provisions reaffirms the rules of *autrefois convict* and *autrefois acquit*, thereby constitutionally protecting the individual from double jeopardy. Similarly, a person cannot be tried for a criminal offence if he shows that he has been pardoned for that offence.⁵⁰ Also prohibited by the constitution is the conviction of a person for an act or omission that did not at the time it took place constitute an offence; nor may a penalty be imposed for an offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time of its commission.⁵¹ A statute that retroactively confers jurisdiction on the courts to try offences committed by the employees of The Gambia Government abroad is not a statute making criminal an act or omission that did not at the time it took place constitute an offence.⁵² It is pertinent to note that the Gambian Bill of Rights, unlike most other Bills of Rights in the Constitution of Commonwealth African states, does not require that a person should be tried for only offences that are defined in a written law and the punishment for which is prescribed in a written law. This omission means that an act or omission that constitutes an offence under customary law may be prosecuted if that act or omission constituted an offence under customary law at the time it took place.

⁴⁹S. 20 (7) and (5).

⁵⁰S. 20 (6).

⁵¹S. 20 (4).

⁵²Dennis R.S. N'Jie Vs Attorney-General (unreported).

As regards civil proceedings, the provisions guaranteeing protection of the law are brief. It is provided that any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation must be established by law and must be independent and impartial; any case brought before such court or adjudicating authority must be given fair hearing within a reasonable time. The court or adjudicating authority is, as a general rule, required to hold its proceedings in public; but it may in certain circumstances hold proceedings in camera in the interest of public morality, the welfare of minors, privacy of the litigants concerned, public safety or public order.⁵³

The right to protection of the law, like the other guaranteed rights, suffers from the cautious approach of its promoters and the draftsman; it too has a catalogue of exceptions attached to it. The presumption of an accused person's innocence until proved guilty is made subject to anything contained in or done under the authority of any law to the extent that such law imposes on an accused person the burden of proving particular facts in any criminal trial.⁵⁴ Strictly speaking this exception does not qualify the presumption of innocence in favour of a person charged with a criminal offence; all that this exception does is to entrench a rule of evidence which requires that any person who relies on any fact peculiarly within his knowledge

⁵³S. 20 (8) and (10).

⁵⁴S. 20 (11) (a).

has to prove the existence of that fact.⁵⁵ Imposing the burden of proof on an accused in special circumstances does not amount to a presumption of his guilt as section 20 (11) (a) seem to suggest. Also excluded from the right of protection of the law is any law that prohibits legal representation in proceedings before a customary court or before another court in appeal from a customary court.⁵⁶ While the constitution prohibits double jeopardy, it also provides that nothing contained in or permitted to be done under the authority of any law shall be held to be in violation of the rights guaranteed under section 20 (5) of the constitution to the extent that that law authorises a court to try a member of a disciplined force for a criminal offence notwithstanding that such member has been tried and convicted or acquitted under the disciplinary law of the force to which he belongs. But in any such second trial the court must take into account any punishment available to him under the disciplinary law.⁵⁷

(vii) FREEDOM OF CONSCIENCE

Subject to the exceptions defined in the constitution and subject to his consent, no one can be hindered in the enjoyment of his freedom of conscience, including freedom of thought and religion and freedom to change religion or belief. Every person

⁵⁵ See Phipson on Evidence 11th edition, paragraphs 108-110.

⁵⁶ S. 20 (11) (b).

⁵⁷ S. 20 (11) (d).

is entitled either alone or in community with others, and both in private and in public, to manifest and propagate his religion or belief.⁵⁸ Guaranteeing freedom of religion in a community where eighty-five per cent or more of the inhabitants profess and practice the religion of Islam is of fundamental necessity; without such guarantee fanatic and over-enthusiastic adherents of the dominant religion may, through persecution, seek to impose their religious views and practices on adherents of other religions. The penetrating statement of Justice Murphy in *Prince Vs Massachusetts* that "No Chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to present day, the ingenuity of man has known no limits to forge weapons of oppression against those who dare to express an unorthodox religious belief. . . . Religious freedom is too sacred a right to be restricted or prohibited in any degree without proof that a legitimate interest of the state is in great danger,"⁵⁹ is an ample testimony on the desirability of religious freedom in any community; that freedom helps to contain persecution by religious bigots. Religious Communities may establish educational institutions for the purposes of providing religious instructions to adherents of their religion, but no person attending such an educational institution can be compelled

⁵⁸S. 21 (1).

⁵⁹Quoted in "The case for a Canadian Bill of Rights," 26 Can. Bar. Rev. 759.

to take the religious instruction provided by the institution (in the case of a minor the consent of his guardian must be obtained). Similarly, no one can be forced to take any oath that is contrary to his religious beliefs or take an oath in a manner not consistent with his religious beliefs.⁶⁰

As usual, the right to freedom of religion may be restricted under a law that is reasonably required in the interest of defence, public safety, public order or public morality; or for the protection of the rights and freedoms of others, including the right to observe and practice any religion without the unsolicited intervention of adherents of any other religion. But any law restricting the exercise of freedom of conscience or religion or anything permitted to be done under such law will be unlawful if those challenging the validity of the measures taken under such law are able to show that the measures are not reasonably justifiable in a democratic society.⁶¹

(viii) FREEDOM OF EXPRESSION

Freedom of expression, including freedom to receive and impart ideas and information⁶² is very cardinal in a community that practices parliamentary democracy. It is only through free and frank discussions and imparting of ideas that the errors of

⁶⁰S. 21 (2) - (4).

⁶¹S. 21 (5).

⁶²S. 22 (1).

the Government can be pointed out; through free and unhindered freedom of expression, matters of interest to the public at large can be freely discussed. Institutions of government and their operation "derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals."⁶³

The freedom of expression is, however, freedom within the law. In guaranteeing freedom of expression the constitution strikes a balance between the freedom of the individual on the one hand and the interest of the state on the other hand; it also protects the reputation and private lives of others from being injured through the exercise of freedom of expression. On this principle of balancing of interest the constitution provides that measures may be taken under a law restricting freedom of expression in the interest of defence, public safety, public morality or public order or public health; restriction may be imposed on public officers not to divulge confidential matters that come into their possession in the course of their official duties. Exercise of the freedom of expression may be curtailed in order to protect the freedom of others; for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or for regulating the technical operation of telephone, telegraph, posts, wireless,

⁶³Reference re Alberta Statutes (1938) S.C.R. 100 at 133.

broadcasting or television.⁶⁴ These exceptions are not novel; the laws of sedition and defamation, the Official Secrets Act and the Telephone and Telegraph Act already circumscribe the freedom of expression. Their inclusion in the constitution only serves as a reminder to any one exercising his freedom of expression that he must do so within the limits allowed by the law.

(ix) FREEDOM OF ASSEMBLY AND ASSOCIATION

This head of freedom has been long recognised in The Gambia, as evidenced by the formation of friendly societies, political parties and trade unions. Guaranteeing freedom of assembly and association in the constitution is of particular importance, for without it "electors and elected representatives cannot band themselves into parties for the formulation of common policies and the attainment of common ends."⁶⁵ It is, however, interesting to note that though freedom of assembly and association is essential for the formation of parties in order to achieve a common end, the constitution does not specifically confer the right to form political parties. This leaves room for the government to enact legislation proscribing all political parties or certain political parties except the party in power unless it can be shown that such proscription is not reasonably just-

⁶⁴S. 22 (2).

⁶⁵Jennings: Cabinet Government quoted in Nwabueze's Constitutional Law of the Nigerian Republic, p. 376.

fiable in a democratic society. What the constitution guarantees under this head is the right to assemble and associate freely with others and in particular the right to form and belong to trade unions or other associations for the purpose of protecting one's interest.⁶⁶ The right to form trade unions is subject to the provisions of the Labour Act, which requires a number of conditions to be satisfied before a trade union could be registered; the Act also empowers the Registrar of trade unions to de-register any union which fails to comply with the Labour Act.⁶⁷ Public officers may be denied the right to belong to trade unions; and the general right to freedom of assembly and association may be curtailed in the interest of public order or public safety or to protect the rights or freedoms of other persons.⁶⁸ It is axiomatic that the freedom of assembly and association can only be exercised for lawful purposes.

(x) FREEDOM OF MOVEMENT

The constitution guarantees to every person his freedom of movement through out The Gambia, including the right to reside in any part of The Gambia; in addition to the freedom of movement all persons are immune from expulsion.⁶⁹ It is pertinent to

⁶⁶S. 23 (1).

⁶⁷About six trade unions were de registered in 1977 for failure to file statements of accounts with the Registrar.

⁶⁸S. 23 (2).

⁶⁹S. 24 (1).

observe that the freedom guaranteed under this head is not guaranteed only to citizens of The Gambia but to any person within the territorial limits of The Gambia. But the constitution goes further to stipulate a number of exceptions to the guaranteed freedom. It is provided that restrictions on a person's freedom of movement that is involved in his lawful detention is consistent with the constitution.⁷⁰ Restriction can be imposed on the movement or residence within The Gambia of any person or any person's right to leave The Gambia in the interest of defence, public safety or public order. Where a person's freedom of movement is restricted in the interest of defence, etc., he has a right to have his case reviewed at intervals of three months by an independent and impartial tribunal presided over by a legal practitioner appointed by the Chief Justice.⁷¹ The tribunal may make recommendations concerning the necessity or expediency of the continuation of that restriction to the authority by whom it is ordered; the authority is, however, not obliged to act in accordance with the recommendations unless he is required by law to do so.⁷² Also excluded from the protection of the freedom of movement is any law that imposes restrictions on the movement or residence of persons generally or on a class of persons within The Gambia or their right to leave The Gambia in

⁷⁰S. 24 (2).

⁷¹S. 24 (3) (a) and (4).

⁷²S. 20 (5).

the interest of defence etc., except so far as that law or anything done under it is shown not to be reasonably justifiable in a democratic society. The right of ingress and egress by non-citizens is also subject to the Immigration Act; and even though the constitution grants immunity from expulsion, undesirable immigrants may, under the Immigration Act, be deported. Deportation does not apply to citizens but they can, by court order or under the authority of law, be confined to particular designated areas in the country. A person's right of residence in any part of the country does not carry with it the right to acquire property or land.⁷³ This restriction buttresses the provisions of the Lands (Provinces) Act, which prohibits acquisition of land or interest in land situated in the Provinces by persons who are not indigenous to the Provinces.

(xi) FREEDOM FROM DISCRIMINATION

The constitution prohibits, subject to specific limitations, the enactment of any law that is discriminatory in itself or in its effects; or to treat any person in a discriminatory manner by a public officer or authority in the execution of his duties under any written law. Discrimination as contemplated by the constitution means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political

⁷³S. 24 (3).

opinion, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another description.⁷⁴ It has been held that section 26 (1) and (3) and Schedules 3 and 6 of the Elections Act, 1963 are not contrary to section 23 (3) (this section is the same as section 25 (3) of the 1970 constitution) of the 1965 constitution by reason that these provisions required the inhabitants of the Provinces not to possess voters' cards for the purposes of election and that the law is not discriminatory in favour of the provincial voters by reason of their place of origin.⁷⁵

The constitution, however, stipulates a number of matters for which discriminatory legislation may be made, and sanctions discriminatory actions by persons acting under a written law or in the functions of any public officer or authority in specified cases. Discriminatory legislation may be enacted for the appropriation of public revenue or other public funds; or with respect to non-citizens of The Gambia. Legislation is not invalid, even where it may be discriminatory in itself or in its effect, by reason that such legislation makes provision for the application of the law with respect to divorce, burial or devolution of property or the application of customary law with respect to any matter to a particular tribe or to inhabitants

⁷⁴S. 25 (1) - (3).

⁷⁵P.S. N'Jie Vs The Attorney-General Civil Suit No.S. 208/66 (unreported).

of a particular place.⁷⁶ This exception preserves the existing personal laws of individuals relating to devolution of property, marriage, divorce, etc. and perpetuates sex discrimination under the Islamic law of succession and inheritance whereby a female beneficiary does not stand pari passu with her male co-beneficiaries in the distribution of the estate of their deceased relative. Also excepted is any law which makes provisions with respect to standards or qualifications not specifically based on race, place of origin, political opinions, colour or creed, to be required of any person who is appointed to or to act in any office in the public service, any office in a disciplined force, any office in the services of a local government authority or any office in a body corporate established by law for public purposes.⁷⁷ Finally, the constitution provides that nothing contained in or done under the authority of any law shall be held inconsistent with the constitution to the extent that such a law makes provision whereby a person is discriminated against in the exercise of his freedom against arbitrary search, freedom of religion, freedom of expression, freedom of movement and freedom of assembly on grounds of his race, tribe, place of origin, political opinions or creed. But the discriminatory legislation or discriminatory act in any such case must be within the limits of the exceptions attached to these heads of freedoms.⁷⁸

⁷⁶S. 25 (4).

⁷⁷S. 25 (5).

⁷⁸S. 25 (7).

(xii) THE BILL OF RIGHTS AND EMERGENCY POWERS

The fundamental rights and freedoms guaranteed by the constitutional Bill of Rights are subject to so many limitations and exceptions that the legislature or executive may derogate from them. Section 26 of the constitution specifically permits derogation from freedom of personal liberty and freedom against discrimination during a period of public emergency. Apart from these two specific derogations permitted by the constitution, the executive may, during a period of public emergency, take such measures to secure the maintenance of democratic and essential institutions of the state. Any such measure may violate the rights and freedoms of the individual. In spite of this, the freedoms and rights guaranteed by the constitution are not nugatory even in a period of public emergency since any emergency regulation or measure or both may be declared invalid if found to contravene the constitution in circumstances not reasonably justifiable in a democratic society. The constitution also affords basic constitutional rights to a person deprived of his personal liberty under an emergency law. He must be informed in writing of the reasons for his detention as soon as reasonably practicable, but not later than seven days after the commencement of his detention. Within fourteen days after the commencement of his detention, a notice must be published in the Gazette stating the particulars of the provisions of the law under which his detention is authorised. The constitution also requires that a detained person must have his case reviewed within one month

from the date of his detention and thereafter at intervals of not more than six months by an independent and impartial tribunal presided over by a person appointed by the Chief Justice from among persons entitled to practise as a barrister or solicitor in the Supreme Court. He must be afforded facilities to consult counsel of his own choice and must be permitted to appear before the tribunal in person or be represented by a legal representative of his choice. The authority making the detention is not obliged to act on the recommendation of the tribunal unless it is specifically required by law to do so.⁷⁹

(xiii) ENFORCEMENT OF RIGHTS

The mere declaration or theoretical recognition of fundamental rights and freedoms in a Bill of Rights is utterly useless unless there is also provided machinery for their enforcement. The machinery provided for by the constitution for the enforcement of the guaranteed rights is a logical reaffirmation of the long recognised principle of law that where there is a right there is a remedy: it is the availability of remedy for legislative, executive or administrative intrusion into areas of human rights that gives the provisions of the Bill of Rights their efficacy. The courts, which are traditionally the guardians of human rights and freedoms against arbitrary government acts, are entrusted with the onerous task for adjudicating on complaints of human

⁷⁹S. 27.

rights' violations. Thus any person who alleges that his right or freedom has been, is being or is likely to be, contravened in relation to him (or in the case of a person who is detained, another person alleges such contravention in relation to the detained person) he may apply to the Supreme Court for redress. The powers of the Supreme Court in granting redress are wide as it may make such orders, issue such writs and issue such directions as it may consider appropriate for the purpose of enforcing the guaranteed rights. The Supreme Court, however, has discretion to decline to exercise its powers under the constitution if it is satisfied that other means of redress are available to the applicant.⁸⁰ Additional powers for the enforcement of the guaranteed rights may be conferred on the Supreme Court by Parliament. No specific procedure has yet been formulated for the enforcement of the guaranteed rights though the Chief Justice has power to make rules with respect to the practice and procedure for the exercise by the Supreme Court of its jurisdiction in constitutional matters. In the absence of a specific procedure, an applicant may adopt any procedure that is speedy and easy. The experience of other countries, with similarly worded provisions as section 28 (1) of the Gambian Bill of Rights, has shown that for a person to have a locus standi to invoke the Supreme Court's jurisdiction under section 28 (1) of the

⁸⁰S. 28 (1) and (2).

constitution, he must be able to show that he is in imminent danger of suffering under a legislative enactment or that his normal business or other activities have been directly interfered with by or under such enactment.⁸¹

GENERAL OBSERVATIONS

The constitution and other relevant laws have sought to clarify the status of the individual in his relationship with the state and in his relationship with other individuals. The citizenship and nationality laws have, at least in terms of status, effaced the dichotomy that had hitherto existed between the inhabitants of the former colony and protectorate. Perhaps the only unsatisfactory provisions governing acquisition and deprivation of citizenship are sections 6 and 11 of the constitution. The former section declares a person born outside The Gambia after the 17th of February, 1965 becomes a Gambian citizen if at the date of his birth his father is a citizen. . . otherwise . . . than by virtue of section 3 (3) of the constitution. The net effect of this provision is to prohibit transmission of citizenship by descent; it also has the effect of leaving a child born outside The Gambia of a father who acquired his citizenship by descent in limbo; and unless the laws of his country of birth

⁸¹Elias: Nigeria, The Development of Its Laws, etc., p. 161.

recognise citizenship by birth he would automatically become stateless. But the inconvenience or absurdity of that situation may be averted by the Minister exercising his discretion to cause any minor to be registered as a citizen of The Gambia if his parent or guardian makes application in the prescribed manner. Section 11 of the constitution does entitle a person to have his case referred to a committee of enquiry where it is proposed to deprive him of his citizenship. Reference to a Committee of enquiry only has the effect of providing the citizen an opportunity to plead reasons why he should not be deprived of his citizenship. Following the procedure for deprivation of citizenship has no meaning at all since the Minister is not obliged to act on the recommendation of the Committee even where it recommends that the person whose case was reviewed should not be deprived of his citizenship. The only purpose of review by the Committee is to delay the Minister in issuing a deprivation order.

The inclusion in the constitution of an entrenched Bill of Rights reflects a desire on the part of the government to reconcile the democratic principles of the freedoms of the individual with the desirability of maintaining the integrity and security of the state. The rights and freedoms guaranteed in the Bill of Rights are meant to be enjoyed by persons in their individual capacities and not in a group; thus the freedoms and rights guaranteed are individual and not group rights. The Gambian Bill of Rights appears to be an improvement on other Bills of Rights in the constitutions of Commonwealth African nations granted

before 1965. The Gambian Bill of Rights does not restrict the freedom of movement and freedom against discrimination to citizens only; these freedoms and rights together with the others covered by the Bill of Rights are granted to "every person," though freedom of movement in its wider definition does not provide non-citizens immunity from expulsion.

The discussions on the various provisions of the Bill of Rights reveal that even the sacred right to life is subject to exceptions and limitations; these exceptions and limitations have the near effect of reducing the provisions to nothing more than a mere decoration on the statute book. But the exceptions do not matter in so far as they are intended to preserve the interest of the state and the freedoms of others. Notwithstanding the numerous exceptions attached to them, the very fact that the rights are provided for in the constitution serve as a constant signal to the legislature, the executive and administrators that certain high ideals have been declared to be maintained in order to preserve the dignity and integrity of the human being even though "a government determined to abandon democratic courses will find ways of violating them. But they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a government on individual rights."⁸² They also provide a standard to which appeal may be made by those who feel their rights are being infringed by a capricious

⁸²Report of the Nigerian Minorities Commission 1958 quoted in de Smith's *New Commonwealth and its Constitutions*, p. 197.

executive, legislature or administrator.

The constitution classifies the rights and freedoms into those that cannot be derogated from in the interest of defence, public order, public safety and public morality and those that may be derogated from in the interest of defence, etc. unless it is shown that such a derogation is not reasonably justifiable in a democratic society. The first class of the guaranteed rights are insulated from legislative interference while those in the second class may, by legislative action, be curtailed. It must, however, be observed that the rights in the first class are not absolutely free from derogation since they may be derogated from within the limits of the exceptions attached to them. The second category of rights may be derogated from under a law that is reasonably required and not shown to be unjustifiable in a democratic society. It is not known exactly what this provision means: there is certainly an obligation on the party impugning the validity of the law or the act done thereunder to show that the act done is not reasonably justifiable in a democratic society; but whether the executive has an obligation to show that the law is reasonably required is not quite clear. Presumably the courts will relieve the executive of that burden and proceed on a presumption of the constitutionality of legislative acts. But the exceptions to these freedoms and rights tend to involve a contradiction for "it is very hard to see how a law can itself be both reasonably required and not reasonably

justifiable."⁸³ These provisions do not only reveal a contradiction but they also cast a heavy burden on the courts to delimit the frontiers of what is or is not "reasonably justifiable in a democratic society." What is or is not reasonably justifiable in a democratic society may differ from time to time and may depend very much on the ideas and notions of a particular judge. Without the constitution specifying what amounts to "reasonably justifiable in a democratic society," the courts might, which it is submitted would be a disservice to the nation, take shelter behind the rules of evidence, namely, the inability of the person alleging the unjustifiability of the law or the act done thereunder to show that the law is indeed not reasonably justifiable in a democratic society.

But even with these feelings of scepticism one may reasonably hope that the provisions guaranteeing human rights and freedoms will prove efficacious and resilient to the needs and aspirations of the young republic; their entrenchment and mode of enforcement, one may hope, will always provide a restraining force on the government.

CHAPTER ELEVEN

GENERAL CONCLUSIONS

THEN AND NOW

The preceding chapters of this study have been directed at an analysis of the establishment of colonial rule in The Gambia, the development of the institutions necessary to sustain that rule, the ultimate attainment of political emancipation and how the inherited colonial institutions of government operate under the national government. In every respect law has been the most important instrument in establishing these institutions, including the establishment of colonial rule, defining their modus operandi and transforming them whenever the political master desired so. The initial utilisation of law in bringing part of what is now known as The Gambia in contact with the British administration was not for the purpose of establishing British political influence in the area; it was for the purpose of tapping the economic potentials of the area, namely to promote the slave trade. The trader-customer relationship ultimately gave birth to the governor-subject relationship with its logical corollary of the subordination of the governed and their institutions. To accomplish the subordination of the colonial people and their institutions the law was again called in aid; the Foreign Jurisdictions Act gave the Crown ample power and authority in the areas within the Protectorate while the Law of

England (Application) Ordinance expressly made the application of customary law subject to the repugnancy test. The colonial government might have thought the native institutions inferior to the British institutions but it was careful not to dismantle the native institutions such as the courts and native administration system; it adapted these to meet its needs.

Throughout the colonial period the native courts operated under the name of District Tribunals dispensing justice to persons of African descent within the territorial limits of their jurisdictions. These Tribunals, in dispensing justice to people within their jurisdictions, applied native law and custom, but subject to natural justice, equity and good conscience and subject to the principles of common law and local statutes. The criteria for applying customary law made, and still makes, it subordinate to English law which governs the relationship of the minority. Before we attempt to give any reason for that subordination we may as well look at the enactment that subordinates customary law to English law. The Law of England (Application) Act, which provides for the reception of English law in The Gambia, stipulates by section 5 that "Nothing in this Act shall deprive the courts of the right to observe and enforce the observance, or deprive any person of the benefit of any customary law, existing in The Gambia, such law not being repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any law for the time being in force." (A similar provision is contained in

the Protectorate [now Provinces Act] Ordinance). The wording of this provision is wide enough to embrace not only Imperial Statutes and enactments of the local legislature but also the common law rules that were in force in England on the reception date. But why did the Law of England (Application) Act preserve customary law and at the same time make its application subject to, among other things, its compatibility with any law for the time being in force? The answer, it is submitted, is an attempt on the part of the colonisers to impress on the colonial subjects that customary law could not serve as an instrument to inculcate any sense of civilisation in the natives. English law had therefore to be given a position of superiority in order to serve as a vehicle of civilisation; the colonial masters felt, rightly or wrongly, that the barbaric rules and institutions of the natives were not suitable for this purpose and therefore had to be subordinated to the English law and English institutions. But history does provide ample evidence that English law was given a position of superiority not because of its civilising influence, but because those responsible for its administration were in the position to impose their will on the simple-minded natives: indeed, history does provide ample evidence that English law was used to legalise what by every standard can be labelled as contrary to natural justice, equity and good conscience, namely, slave trade and slavery. The point that is sought to be made here is that the subordination of customary law and customary institutions was not on account of their inferiority to English law but because English law could be, and was, used

by the colonial government to keep tight control over the colonial subjects.

The tenor of the language of the Protectorate Ordinance under which the Tribunals were first established did not only subordinate customary law to English law but it also created a dual system in the administration of justice, which in turn resulted in discrimination between the people of The Gambia. It was evident that all the people in The Gambia, from the Governor to the village farmer, were subjects of the crown, but they were subjected to different courts and different rules of law in certain matters: differential treatment in the administration of justice was, until the enactment of the Protectorate Courts Ordinance, 1944, evident in the administration of criminal law and procedure to which all persons irrespective of their descent were subject. Until the enactment of the Protectorate Courts Ordinance, trial by jury was confined to the colony and even when that Ordinance was passed the Protectorate was only privileged to have the system of trial with the aid of assessors. It may, however, have been that the policy of the colonial government to allow different systems of law to apply to Africans and Europeans was well intentioned. The practice and procedure in the District Tribunals are simple, inexpensive and free from technicalities which are the hallmarks of English law. The operation of the dual system may also have been a desire on the part of the colonial government to preserve existing traditional institutions and norms. It is, however, doubtful whether any extenuating

arguments can be advanced for the subordination of customary law to English law.

The colonial government or rather the colonial civil servants could not administer customary law because they had little knowledge of the customs of the people. The traditional chiefs, who were gradually being drawn near to the nerve centers of decision making within the set up of the colonial administration, provided valuable collaborators for this purpose. They were not only made or rather reaffirmed as the presidents of the District Tribunals but were also a vital link between the administration and the local authorities. In the exercise of their customary judicial power the traditional chiefs were also required to enforce such government regulations as they were given jurisdiction over. It should be observed that though the chiefs could enforce government regulations, which were in themselves part and parcel of English law, they never had jurisdiction over non-Africans who could possibly contravene those regulations within a chiefs' territorial jurisdiction.

The subordination of customary law to English law and the creation of a dual system of administration have been singled out for brief comment in order to indicate that during the growth and metamorphosis of the constitution and government of The Gambia the colonial government again called in aid the law to gradually put the local legislature and the executive on equal footing with the Parliament and cabinet of the United Kingdom but no such move was made to inject any measure of parallelism

between customary and English law.

It has been fourteen years since The Gambia attained nationhood. Independence did not bring in its trail any measure of equality between customary law and English law nor the dismantling of the dual system of the administration of justice. Both matters can be solved by bold legislative action by declaring customary law to be *pari passu* with English law and making all persons subject to the jurisdiction of District Tribunals in so far as breaches of statutes for which they have authority to enforce are concerned. The solution will not necessarily involve a complete integration of the court system nor would it free customary law from the repugnancy test but it will certainly make every person subject to the jurisdiction of the District Tribunals in their power to enforce certain statutes. The solution will also relieve a person relying on a rule of customary law from proving the existence of that particular rule. At the moment customary law must be proved in the English type courts as any other foreign law.¹

The national government has so far made no attempts to eradicate what discrimination there is in the exercise of the jurisdiction of the District Tribunals; what it has done is to steadfastly maintain what the colonial government thought fit

¹Angus Vs Attah P.C. '74 - '28, 43 established the rule that customary law like any other foreign law must be proved by the person alleging the existence of that custom unless it has been notoriously acted upon in the courts when the courts will take judicial notice of it.

for a colony. Whether such an omission on that part of the government is intentional or not raises questions as to its fidelity in the District Tribunals as institutions fit for all the local inhabitants. To arrive at an answer to this question one has to ask the question why is the government's fidelity in the District Tribunals questioned? The District Tribunals Act, by section 8, excludes all persons of non-African descent from the jurisdiction of the Tribunals. Under the authority of the same section Members of the House of Representatives, members of the armed force, Justices of the Peace, government servants, members of the Gambia Police Force are all exempt from the jurisdiction of the District Tribunals unless they otherwise consent. Such a partial exemption may be appreciated during the periods when virtually the persons falling within the exempted categories were colonial civil servants and persons of non-African descent. But to maintain such an exemption in present day Gambia is not only perpetuating discrimination in favour of an elite group but also absurd. The absurdity of the situation is the more glaring when it is realised that the majority of Members of the House of Representatives, the members of the police force and a large number of government servants are persons of provincial origins where the District Tribunals are located. The absurdity of the situation is further manifested by the fact that four traditional Chiefs Members of the House of Representatives, who sit and serve as Presidents of some of these District Tribunals, cannot be subject to the jurisdiction of these Tribunals unless they consent; this is like placing the magistrates and judges

of the superior courts of record beyond the jurisdiction of the Magistrate Courts or High Courts unless they freely submit themselves.

The query on the partial exemption of a certain group of Gambians and in particular the four traditional chiefs who are Members of the House of Representatives, from the jurisdiction of the District Tribunals leads one to question the propriety of the chiefs' membership of the District Tribunals. In the periods before independence chiefs were, as still they are, a vital link between the central administration and the local authorities. They were appointed from influential families who generally commanded respect among members of their communities; very often there were not more than three such families within a District and chieftaincy rotated among these families.

At the close of the colonial rule antagonism between the chiefs and the politicians, notably the members of the present ruling Progressive Peoples Party, was noticeable everywhere. The politicians, without sacrificing the institution of chieftaincy, outmanouevered the chiefs by retiring a great many of them and instituted elections to fill the vacant chieftaincies. Candidates for chieftaincy elections have to rely more on their political alliance to be allotted ballot boxes (this ensures nomination) and the allocation is done by the Minister responsible for Chieftaincy Affairs. Chieftaincy elections are conducted substantially on same line as ordinary constituency elections; campaigns are conducted more or less on party lines and supporters of the

opposition make no secret of their disapproval of the candidates as they see all of them as hand picked loyal supporters of the government. There is nothing inherently wrong with filling a vacant chieftaincy through fair and democratic elections as that method gives the people a voice in choosing their traditional ruler. What is, however, obnoxious about the system is that it allows a person who has gained such office by virtue of his political alliance to administer justice to a people, some of whom have overtly indicated how much they disapprove of him. One can hardly repose enough confidence in the administration of justice by a tribunal presided by an elected chief, especially during political campaigns, who knows that through his court he can intimidate and harass opponents to satisfy the politicians by whose grace he has acquired his community leadership.²

We may carry our inquiry further into the propriety for the traditional chiefs to try breaches of Area Council (these are the equivalents of County Councils) Regulations and some specified Acts of Parliament. The traditional chiefs are ex-officio members of the Area Councils and they are responsible, at the District level, for administering the regulations of these councils. In effect they are not only legislators but also the enforcers of legislation, and it appears that there is something manifestly wrong in one individual exercising the tripartite role

² A chief's dependence on the goodwill of the government is shown by the powers of the President to dismiss or suspend him. This is in itself strange; one would suppose that once a person is elected chief his removal from office should be done by the voters who elected him and not the President. Do chieftaincy elections have any meaning?

of legislator, administrator and "judicial" officer in his District. The four traditional chiefs who are Members of the House are active legislators and that fact raises questions as to the compatibility of their roles as legislators and at the same time as members and Presidents of their District Tribunals. It may well be argued that the dual role of a traditional chief as legislator and President of a District Tribunal is not essentially dissimilar to the position of the Lord Chancellor in England. But if there is any comparison between a Gambian traditional chief and the Lord Chancellor, that comparison stops at the duality of their roles. The Lord Chancellor, though a politician and legislator, does not allow political sentiments to affect his judicial mind, and in any case the decisions of the courts in which he usually sits are majority decisions. It is not suggested that the other members of a District Tribunal are not allowed to differ from the chief in their deliberations, but such a situation is very remote. While the Lord Chancellor may claim complete independence of his appointing authority, a traditional chief cannot claim such independence; it is because of his docility and willing subordination to his appointing authority that naturally leads to his elevation as chief within his community.

The foregoing comments endeavour to reveal that while the country's constitutional development was aimed at breaking with the colonial past--subordination at every level--there was no appreciable move to achieve such a break in so far as the

District Tribunals are concerned. The discrimination in the exercise of the District Tribunal's jurisdiction and the subordination of customary law continues to be perpetuated by the national government. The reasons for these are not far to seek; continuation of colonial policy in this area does not explicitly demonstrate to either the politicians or their principal advisors that Gambia's decolonisation is incomplete. To the politicians and their advisors political decolonisation matters more than the eradication of a system that is more germane in the colonial era. But it may as well be consistent with political decolonisation to promote some measure of decolonisation of the legal system. It is not enough that existing power should be consolidated nor is it enough to create new political power for politicians; these powers should be used to bring about changes in every institution of government so as to realistically reflect the republican status of the country. Whatever may be the philosophy of the government with respect to the District Tribunals and the traditional chiefs, it is high time that the chiefs be excluded from membership of the District Tribunals if the administration of justice in these Tribunals is to win the confidence of the people. In the alternative, if chiefs are to continue as members of the District Tribunals, then the selection or election to the office of a chief should be divorced from his political affiliation and be based on his integrity and knowledge of the customary law prevailing within his District. By this method, it is hoped, not only will the District Tribunals gain

the confidence and respect of the people but the institution of chieftaincy will win similar confidence and respect of the people.

If independence has not produced any appreciable effort to tackle the problems briefly pointed out in the preceding paragraphs, it has surely pushed the national government to depart from the colonial system of administration of justice by administrative officers. The departure has not as yet received statutory sanction, since the administrative officers continue, by virtue of their offices, to be magistrates. A system of Travelling Magistracy has been instituted to take over the judicial functions of the administrative officers and it is expected that these travelling or itinerant magistrates will mature into Resident Magistrates within the judicial service. But the departure from the colonial system is largely limited to the divesting of administrative officers of their judicial functions; all the itinerant or travelling magistrates are laymen whose connections with the administration of justice happened to be in their clerkship or registrarship of the Supreme Court. This situation is likely to continue for a while as The Gambia has not yet produced enough lawyers to meet the demands of the government. The institution of travelling magistracy has the virtues of divorcing the administration of justice from the executive, in short it completes the separation of powers. But the practice in its present form cannot commend itself to any one who is very much concerned with the proper administration of justice: the exercise of judicial power especially in criminal matters by non-professional

lawyers is one that falls short of the Rule of Law.³

The formal declaration of The Gambia as a Crown Colony was, as usual, followed by the establishment of the two political institutions of government--the legislature and the executive. Both institutions were established to serve the needs of the settlers, since they were entitled to carry with them into their new settlement the immunities and privileges of the laws of England. For the settlers one of the privileges conferred on them by English law was the privilege to have a legislature. The native Gambians, because of their backwardness and state of civilisation, were initially excluded from the legislature and, in keeping with the colonial policy, from the executive council. The uncertainty over the future of The Gambia led her to be exposed to as many constitutions as that uncertainty lasted. The inter-war years saw a complete stagnation in constitutional development of the territory. But after the second World War the constitution was revised to give the local people increased representation in the Legislative and Executive Councils. The revision of the constitution and the increased representation of the local people in the two main institutions of government did not affect the reserved powers of the Governor. The retention of the Governor's reserved powers in the constitution had the ultimate effect of making the Governor as autocratic, as he was under the first constitution. But the slow constitutional progress was not

³African Conference on the Rule of Law, Lagos I.C.J. Geneva, 1961, p. 20.

solely attributable to the desire of the British government to perpetuate colonial rule in The Gambia; her size, geographic location, and economic viability and the level of literacy among the majority of the people cautioned virtually every British administration to slow down the pace of constitutional development. The slow march to independence has, however, proved to be an asset for her; politicians have adjusted themselves and the game of politics and the entire administration to the dictates of constitutionalism.

The concept of democratic rules whereby governments are elected to office on the basis of the consent of the majority of people has been maintained. But why has this democratic principle not been discarded? Is it that the institutions of government and the rules--including electoral rules--under which they operate have earned the confidence of the people on account of their efficacy? It is difficult to provide any conclusive answers to these questions. It is not as yet known whether adherence to democratic rules and the principles enshrined in the constitution is based on the virtues of these rules and principles or whether these rules and principles are simply adhered to because of the sober political leadership of the country. In short it is not clear whether the constitution and institutions of government operate as they do on account of their own values or not. Events in some parts of the African continent have shown that national governments tamper with the constitutions and debase them to the role of suppressive instruments at the

hands of the ruling party. The constitutions in many of these countries have lost their purpose of being a check on the powers of the executive and an umpire between the government and its opponents. Every where amendments are introduced to more and more fortify the executive authority at the expense of other institutions of government: opposition parties have, through constitutional amendments, been proscribed. Such changes in the constitution indicate that the basic rules of democracy have really not taken deep roots in those countries. Such changes have mainly been injected in the constitution after the adoption of an executive presidential system and these accounted for some of the fears and reservations expressed by the opponents of an executive presidential system in The Gambia. It is, however, much to the credit of the government that the executive presidential system in The Gambia has not become the synonym of dictatorship, abuse of basic human rights, consistent degradation and dehumanization of political opponents and regular perversion of the constitution. In short, the dictates of constitutionalism which espouse a government by laws are still maintained. But judging from the utterances of some Members of the House of Representatives, adherence to constitutionalism and respect for the constitution has been influenced not by their own inherent virtues but by the political leadership. There have been calls or suggestions for the establishment of a one party system which would give the ruling party a recognised constitutional position in the

political set up of the country;⁴ but these suggestions have been resisted by the President. Such an attitude adopted by a sizable number of government henchmen paints a gloomy picture for the survival of constitutionalism in The Gambia and it does indicate to some degree that the reign of constitutionalism draws its force from the charismatic leadership of the country's leader and not from the values of government by law. It may be that the political leadership should utilise his charisma to educate the mass of the people, including the politicians, on the need to have the institutions derive their efficacy and legitimacy from their inherent values and not from the charisma of the political leadership.

While the government has not used its powers to aggrandise itself and reduce the legislature to a mere audience of the executive, party discipline has tended to achieve that result. Members of the House of Representatives, at least those on the government benches, are docile and have been greatly impaired in their freedom of speech by party discipline. With a few notable exceptions debates in the House of Representatives have tended to be sterile and lifeless. Legislation of the most importance, often drawn in the legal language of common law lawyers of the nineteenth century and containing far-reaching issues affecting the lives of the peasant electorates, has passed rapidly through all stages without comment on the fundamental

⁴These suggestions have been made by the Hon. H.O. Smegajaneh and H.E. Alhaji Musa Dabo M.P. The latter made the suggestion in the House of Representatives when Sierra Leone, the country to which he was accredited Ambassador, altered its constitution and established a one-party rule.

principles or careful scrutiny of Members of the House.

Inasmuch as the government has not used the law to emasculate the House of Representatives, there have been conscious efforts to exclude from it individuals who could bring life into it. These individuals form part of the civil service and though they may be members of a political party they are forbidden to hold any paid office in any such party; and to indirectly forbid them from taking part in active politics, the government has instituted what it termed as a cooling period of four years during which a civil servant who has been unsuccessful at an election cannot be re-employed. This amounts to shutting the doors of the House of Representatives to civil servants except the most daring since the government is the principal employer in the country. The reasons for such a policy can only be explained on the grounds of insulating the regular administration from political influence. But the insulation of the civil service from politics or rather from party politics cannot be complete if it is not applied to all facets of political activities. While some civil servants who are sympathisers of the opposition parties have been reprimanded, and in some cases dismissed, no such

⁵General Orders 03110. Dr. Lamin Saho the government candidate who unsuccessfully contested against the Leader of the Opposition in the 1977 general elections has been appointed by the Government as Executive Director of Seagull Cold Store in which the Government holds 49% of the shares. See West Africa No. 3172 of 1/5/78 p. 864. Dr. Saho was not a civil servant before he offered himself for elections but the principles involved in G.O. 03110 should be applicable to all.

action has been taken against civil servants who are sympathisers of the government, and who are very often seen at political rallies and actively involved in campaign organisations. This indeed undermines to some degree the freedom of association of those civil servants who for some reason do not feel disposed to give their support to the government's political programme. If the rhetorics of the government, namely freedom to belong to a party of one's choice, are to match its actions, then the treatment given to those civil servants who sympathise with the government ought to be granted to others.

The Civil Service Code prohibits civil servants from adopting a partisan political position, but they have been occasionally used to promote the political fortunes of the ruling party. The involvement of these civil servants, usually Divisional Commissioners, in what is regarded as party politics has been explained away by the Government ministers: their explanation is that these civil servants do not promote the political fortunes of the ruling party in attending on ministers or parliamentary secretaries at village or District meetings; these civil servants only attend those meeting to help explain to the people various government policies. Such an explanation may well be justified and valid, but there is indeed a thin line separating political campaigns from explaining government policies; the latter could be, and is indeed used in political campaigns. This is, however, to be expected as the politicians have now come to be vested with the powers and privileges of the departed colonial masters.

Time was when different political groupings could appeal to a non-partisan authority, but now the authority to which appeal may be made has a vested political interest and the law of self-preservation dictates him to sacrifice some of the rhetorics.

The occasional lapse of the government to adhere to some of its rhetorics has not reached a magnitude so as to warrant the conclusion that the basic rules of constitutionalism have been eroded. The electoral machinery has come to be accepted as the best means to change a government or a representative in the House. Politicians have come to accept defeat at the polls as the correct verdict of the electorate at their performances, and the electorate have been assured the opportunity to give their verdict on the politicians every five years. The opposition parties are accorded the most important facilities--the freedom of movement, and freedom of expression at any time and any where. It is much to the credit of the government and perhaps the 'Gambians' faith in the system of parliamentary democracy that political campaigns and open challenges to the President and his government are conducted in a manner unprecedented in Africa. It is not a condemnation of the system of democracy in other parts of Africa but the stands taken and public statements made by opposition parties in The Gambia would have opened the prison gates for them had they been in some other African country. If these trends continue, as both the government and the opposition parties believe they will, then Gambia will truly falsify the the statement that parliamentary democracy as practised in the

Western World cannot be transplanted in a developing nation and be expected to survive.

THE FUTURE: GAMBIA OR SENEGAMBIA?

A study of the growth of the Government and constitution of The Gambia cannot be complete without a consideration, however brief, of the possibility of a Senegambian federation, which will drastically alter the constitutional status of The Gambia. The idea of a Senegambian federation or at least some form of close political ties between The Gambia and Senegal has been seen by many political and economic analysts as the logical solution to dismantling the artificial and freakish boundaries brought about by the scramble for Africa, and as the solution to Gambia's weak economy. The very concept of Senegambia as a single territory is not new as The Gambia arose from the abandonment of the Crown Colony of Senegambia in 1783. Attempts to erase the artificial boundaries existing between Senegal and The Gambia were made in the 1880s when France and Britain were negotiating for the exchange of Gambia for some other French possession in other parts of the world. The Anglo-French diplomacy of exchange was frustrated by the Bathurst (as the capital of Gambia was then called) inhabitants by petitioning Her Majesty not to hand over Gambia to France because the Gambians have been exposed to a system of government--a system that guarantees them

freedom of speech, freedom of religion and the right to hold and enjoy property among others--which they might not enjoy under French Colonial rule. The elan and impetus for merging both territories evaporated and this was due to the desire of Gambians to keep their distinct identity. That desire was abundantly made clear in the Report of the Consultative Committee on the Constitution of The Gambia when the Committee advised the Governor that "our close co-operation with other West African territories is essential particularly in all spheres in which we have a common interest, but although small we must be able to speak with authority and not be bound to accept an inter-territorial majority view in all matters that concern us."⁶ The advice of the Committee did not materially influence succeeding British administrations which, rightly or wrongly, felt that Gambia's salvation lies, not in maintaining her separate identity, but in some form of political union with Senegal.

The subsequent constitutional conferences that ensued since 1961 focused greatly on The Gambia-Senegal relationship because the British Government felt a consideration on the future constitutional status of The Gambia must take into account the underlying economic realities. Perhaps the British Government did not want to be seen as coercing her small colony into any form of political union with Senegal and therefore opted for the granting of a more representative government which will be

⁶The Gambia Gazette No. 27 Vol. 70 of 1953, p. 180. Underlining mine.

"able to exercise responsibility in major fields of internal affairs and able, because of its representative nature, to foster closer relationship with its neighbours in the interest of economic and social development."⁷ Both Senegalese and Gambian leaders think that some form of close political association between the two countries is imperative because geographically Senegal carries The Gambia as "a big brother carries her sister," and the factors in favour of a union were stronger than their differences, and these factors justify the two countries to be called Senegambia. The enthusiasm for a Senegambia political union culminated in a request by the Government of Senegal and the Government of the United Kingdom on behalf of The Gambia for a Committee of experts under the United Nations' Programme of Technical Assistance to conduct a study on the alternatives for association between Senegal and Gambia. In exploring the alternatives of association the Committee was "to examine the present constitutional, legal. . . systems of Senegal and The Gambia and to provide data to enable the Governments and the peoples concerned to consider and to decide on the form which the future relationship of the two countries might take on the attainment of independence by The Gambia."⁸ The alternatives considered were integration, federation and entente. The idea of even a partial integration was ruled out while a Senegambian entente was considered as a means to and not an end to accomplishing union. After considering

⁷Report of The Gambia Constitutional Conference 1961, Sessional Paper No. 8 of 1961, p. 2.

⁸Report on the Alternatives for Association between The Gambia and Senegal: Sessional Paper No. 13 of 1964, p. 1.

the political and administrative systems of both countries the Committee favoured a Senegambian federation since that "would offer most advantages, if not in the immediate future, at least in the comparatively near future, both from the point of view of Senegal and The Gambia and from the general point of view of African Unity."⁹ The federal state would be established through evolution whereby both Gambia and Senegal will gradually surrender their sovereignty to the new central government.¹⁰

What is the nature of the government recommended by the Committee and how is it created? In the main, as the experiences of older federations have shown, the concept of federalism involves a division of powers between a general government and regional governments. That division of powers may be obtained by the federating states agreeing on some measure of delegation to the general government and in the main continue to preserve their original constitutions or by the federating states agreeing to delegate their powers to the general government with a view to entirely new constitutions even of the states themselves.¹¹ There seems to be present most of the prerequisites¹²--a desire to be under single independent government for some purpose; a desire to have independent regional governments responsible for

⁹Ibid., p. 32.

¹⁰Ibid., p. 25.

¹¹Attorney-General Vs Colonial Sugar Refining Co. Ltd. (1914) A.C. 237.

¹²K.C. Wheare: Federal Government (4th ed.) (Oxford University Press), pp. 35-52.

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certain matters; and geographical contiguity--for the establishment of a Senegambian federation.

Notwithstanding the existence of some of the basic prerequisites for the formation of a Senegambian federation some problems exist, which may impair the smooth working of the federation. Both Senegal and The Gambia have been exposed to different systems of colonial administration and these differences in their colonial past is reflected in their administrative and social institutions. During the fact finding project of the U.N. Mission both governments gave their views on matters that appeared to concern them most in the event of an association. Senegal has suggested that foreign policy and the defence of the two countries should be on a joint basis and that on matters of representation abroad, The Gambia would be assured of a share more than commensurate with its territorial extent or size of population as compared with Senegal. Gambia's attitude towards any form of association is geared to the preservation of its legal system, educational and professional standards, its links with the Commonwealth and the control of its police.¹³ The stated positions of both governments do not only reflect something short of a federal regime but also what sort of problems the federal regime may be faced with. Defence and external affairs in any federal set up fall within the jurisdiction of the federal government; the suggestion therefore that defence and foreign affairs should be conducted on a joint basis is incongruent with an orthodox

¹³ Sessional Paper No. 13 of 1964.

federal structure. By the same argument Gambia's desire to continue its association with the Commonwealth may not be consistent with the entire foreign policy of the federal government. It may be possible for Gambia to maintain cultural and educational ties with the other members of the Commonwealth, but to push it beyond that by recognising or accepting Gambia as a full member of the Commonwealth would amount to according independent and sovereign status to a component unit of the federation. Such a situation could induce in the Gambians a greater sense of loyalty and adherence to the Commonwealth than to the federation. Gambia's insistence to preserve its legal system bears out the glaring differences in some of the institutions of both countries, but this particular difference does not pose any insurmountable problem as the experience of Québec, with its civil law system surrounded by a sea of common law tradition, has shown.

To preserve Gambia's legal system may be said to be the safety valve for the institutional protection of the minority Gambians within a Senegambian federation, but such preservation would logically lead to the operation of a pluralistic legal system: the running or maintaining of a pluralistic legal system is a potential licence for the suppression of the legal system, at least at the federal level, with which the dominant group within the federation are not acquainted. General legislation, judicial organisation and the entire administration of justice will all tend to reflect the cultural values of the dominant group in the federation and this is likely to impair the autonomy of the minority groups. The same laws are not suitable for all

people: "on the contrary, laws have a cultural aspect; hence due consideration should be given in framing them to the character, conditions and beliefs of those for whom they are made. Autonomy is designed for the very purpose of meeting this requirement."¹⁴

The common law system, however foreign, forms an important part of Gambian values. There is nothing particularly sacred in the common law system, but the way in which it is administered, (especially in criminal matters) proves it to be a fair system.

Under the common law system the Gambians have been exposed to the due process of law with all its ramifications. Whether the Gambian will continue to enjoy within a Senegambian federation the basic rights in a criminal trial for offences within the federal jurisdiction will by and large depend on the attitude of the law enforcement officers towards the competing legal systems. That attitude may, if not suppressive of one legal system in favour of another, help blend the two legal systems to produce a legal system that can truly be called Senegambian.

The existence of a pluralistic legal system is not the only factor which may pose problems in a Senegambian federation. The viability and workability of a federal government depends very much on the sizes of the component units of the federation. "The capacity of states to work a federal union is greatly influenced by their sizes. It is undesirable that one or two units should be so powerful that they can overrule the others

¹⁴Louise-Philippe Pigeon: The Meaning of Provincial Autonomy (1951) 29 Can. Bar. Rev. 1126.

and bend the will of the federal government to themselves."¹⁵ While most of the essential prerequisites for a Senegambia federation exist, Gambia's size and population are intimidating factors for her membership of a Senegambian federation. These factors have to some extent been responsible for the loss of élan for an association with Senegal, which the euphoric enthusiasm and pronouncements of the political leaders in the sixties seem to hold out. The disparity in the sizes of the two countries is the result of the balkanisation of the African continent. If, having regard to one of the essential criteria for the workability of a federal union, a Senegambian federation is a logical step to the unification of the African continent then that federal state may be properly established by further balkanisation. We are aware that such a suggestion is not in tune with the views of many who deplore the unnecessary boundaries separating the same people, but it is a method of providing the legal framework within which the viability and durability of the federal structure can be maintained. But one cannot ignore the dangers of balkanisation however limited. It has the dangers of inculcating in the newly created regions within the federation a sense of regional loyalty that may outweigh their sense of national loyalty and may even provide aspirations for independent and sovereign status. Alternatively, to compensate for Gambia's size, a scheme may be devised whereby certain matters of great national

¹⁵ Wheare, p. 50.

importance may not be implemented without the consent of The Gambia. While this alternative suggestion would to some degree compensate for Gambia's size and population it may also provide fertile grounds for conservatism because the federal authorities are likely to find some of their policies frustrated by a regional government.

Both these suggestions have their shortcomings, but they alternatively provide some answers to the disparity in the sizes of the two countries in the event of a federation; either suggested solution will provide safeguards against the dictatorship of the majority and prevent it to use "its power to aggrandise itself to the utter disregard of the minority, and thus convert government into one, not by the majority, but for the majority."¹⁶ Some degree of balkanisation or a device in the form of a veto power can provide guarantees against encroachment by the federal government on the political autonomy of The Gambia.

The other problem to consider is whether both countries can in terms of manpower run the federal government and the regional governments efficiently. As a federal government involves a two-tier government, the demands on the federating states to provide the required personnel for the running of the governments may pose acute problems for the less advanced units of the federation. The general tendency would be for the regional governments, in a bid to get their fair share in the federal set

¹⁶Nwabueze: Constitutional Law of the Nigerian Republic, p. 145.

up, to second their best brains to the federal civil service, but this may seriously hamper the efficient administration of the regional governments.

The constitutional prerequisites for a Senegambian federation seem to be present, but the framework within which that federation can be operated seem at the present moment to be absent. The absence of that framework and the fundamental differences in the colonial past of the two countries puts the possibility of a political fusion of The Gambia and Senegal in the remote future.¹⁷ While a suitable framework for the working of a federal system and to some extent similarity in the pre-independence political experience of the federating states is essential for a viable federal structure, the attitude of the people in the federation is as important as any institutional device for the viability of the federal structure. It does appear that the people of the two countries, particularly the Gambians, are not psychologically prepared for a Senegambian federation, and that state of unpreparedness on the part of the Gambians is, by and large, the responsibility of the Senegalese whose actions and extroverted attitude are treated with suspicion by a great many Gambians. But the West African proverb that "no condition is permanent" may prove to be true as far as the psychological preparedness

¹⁷ Sir Hilary Blood: *Parliaments in Small Territories in Parliament as an Export* by Sir A. Burns (ed.) (George Allan and Unwin, London, 1966), pp. 259-261.

of the people is concerned. The peoples of the two countries may in the near future attain a degree of political consciousness that will generate the plan for a Senegambian federation; a political consciousness that will ensure the dominance of constitutional rules as is practised in the older federations. With the passage of time both Gambians and Senegalese may abandon their Anglo-French mentality and perhaps the Gambians will gradually be trustful of the Senegalese. When most of the human factors essential for the working of federalism come into existence, the artificial boundaries separating peoples with the same linguistic, ethnic and cultural (traditional) backgrounds will surely disappear and the dream for a Senegambian federation will then be a reality.

It has been stated that federalism provides a transitional stage for the complete integration of the federating states under a unitary government.¹⁸ The ultimate dismantling of a Senegambian federation through attrition of the powers and the autonomy of the regional governments and aggrandisement of power to the central government is a possibility, not a mere moot point, that cannot be discarded. That possibility is borne out by the defunct Federal Republic of Cameroon, which the U.N. Mission on the alternatives of association between The Gambia and Senegal held out as a perfect example of a federation embracing an ex-French Colony and an ex-British Colony.¹⁹ The federal

¹⁸ Edward McWhinney: Comparative Federalism (University of Toronto Press, 1962), p. 4.

¹⁹ The Cameroons were not strictly speaking colonies of the administering powers. Both France and Britain respectively administered East and West Cameroon as Mandated Territories.

system of government has, for reasons beyond the scope of this study, been abandoned in Cameroon. Such ultimate integration is bound to pose problems for Gambians if no consideration is given to the differing ways of life in the two countries. It suffices to mention only two of such problems.

Within the Gambian administrative and constitutional systems traditional chiefs enjoy a position that is officially recognised. They do not only provide a vital link between the central administration and the local authorities but also play a vital role in the representation of chiefs in the House of Representatives; being or at least expected to be conversant with customary law, they perform functions of adjudicators. There are no traditional chiefs in Senegal comparable to the ones in The Gambia; administration at every level in Senegal is carried out by the civil servants. The grand marabouts of Senegal (religious leaders) may be compared to traditional chiefs only in terms of their community leadership, but they, unlike the traditional chiefs, have no official position recognised and sanctioned by the constitution. For uniformity of administrative practices the institution of chieftaincy in The Gambia will gradually be eroded under a unitary government.

Perhaps more important than the likely abolition of the institution of chieftaincy is the curtailment of political freedom and activities. As Sir Hilary Blood, an ex-Governor of The Gambia, has pointed out, The Gambia holds parliamentary democracy in high esteem and cherishes freedom of political expression and association and free elections. It is not suggested that there

is no freedom of political expression and free elections in Senegal, but recent government attitude towards the formation of political parties (freedom to form political parties is consistent with freedom of political association) indicate that if there exists freedom of political association in Senegal it is in a limited form. The Government of Senegal has decreed that no more than four parties can be allowed to legally operate and that each party must propagate either Marxist-Leninism, Socialism, Liberalism or Conservatism as its political philosophy before it can be registered and recognised for purposes of elections. It cannot be over-emphasised that limitations as to what type of political philosophy a given political party must manifest and propagate is a serious limitation on the constitutional and democratic rights of the people to form a political association for the propagation and manifestation of a philosophy not consistent with those the government of the day recognises. A complete integration of Senegal and The Gambia will of course mean that the same rules restricting political activities will apply throughout the country. The Gambian has never been subjected to a limitation of his political right to form or belong to what party he desires; any such limitation will indeed be a potential source of conflict between the Westminster oriented Gambians and the government of a bigger Senegal.

Whatever may be the form of government in the Senegambian region--whether an integrated unitary Senegambia or a federal Senegambia--the prescriptions of the political theorist or the

institutional devices of a constitutional lawyer cannot provide the needed safeguards for the protection of the Gambians as a minority group; habits of tolerance must be widely diffused if institutional protection of the minorities is to be effective, and by the same habits of tolerance can the differing ways of life in the two countries be reconciled.²⁰

²⁰S.A. de Smith: Federalism, Human Rights, and the Protection of Minorities in D.P. Currie (ed.) Federalism in the New Nations of Africa (Chicago, 1964), p. 279.

APPENDIX I

The Constitution of the Republic of The Gambia



THE GAMBIA.

NO. 1 OF 1970.

Assented to in Her Majesty's
name this Twenty-fourth day of
April, 1970.

LS

A. S. JACK,
Acting Governor-General.

AN ACT to establish and to make provision for
the Constitution of the Republic of The Gambia.

[24th April, 1970.]

ENACTED by The Parliament of The Gambia.

CHAPTER I

THE REPUBLIC

1. The Gambia is a Sovereign Republic.
2. The Public Seal of the Republic shall be such device as Parliament shall prescribe.

Date of
commence-
ment
Enactment.

Declaration
of the
Republic.
Public Seal.

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CHAPTER II

CITIZENSHIP

Persons who become citizens on 18th February, 1965.

3.—(1) Every person who, having been born in The Gambia, is on 17th February, 1965 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of The Gambia on 18th February, 1965:

Provided that a person shall not become a citizen of The Gambia by virtue of this subsection if—

(a) neither of his parents nor any of his grandparents was born in The Gambia; or

(b) neither of his parents was naturalized in The Gambia as a British subject under the British Nationality Act, 1948, (a) or before that Act came into force.

(2) Every person who, on 17th February, 1965, is a citizen of the United Kingdom and Colonies—

(a) having become such a citizen under the British Nationality Act 1948 by virtue of his having been naturalised in The Gambia as a British subject before that Act came into force; or

(b) having become such a citizen by virtue of his having been naturalised or registered in The Gambia under that Act, shall become a citizen of The Gambia on 18th February 1965.

(3) Every person who, having been born outside The Gambia, is on 17th February 1965 a citizen of the United Kingdom and Colonies or a British protected person, shall, if his father becomes, or would but for his death have become a citizen of The Gambia by virtue of subsection (1) or subsection (2) of this section, become a citizen of The Gambia on 18th February 1965.

Persons entitled to be registered as citizens by virtue of connection with The Gambia before 18th February 1965.

4.—(1) Any person who, but for the proviso to subsection (1) of section 3 of this Constitution, would be a citizen of The Gambia by virtue of that subsection shall be entitled, upon making application before the specified date in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of The Gambia:

Provided that a person who has not attained the age of twenty-one years (other than a woman who is or has been married) may not himself make an application under this subsection, but an application may be made on his behalf by his parent or guardian.

(2) Any woman who, on 17th February 1965, has been married to a person—

(a) who becomes a citizen of The Gambia by virtue of section 3 of this Constitution; or

(a) 11 and 12 Geo. 6. c. 56.

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(b) who, having died before 18th February 1965, would, but for his death, have become a citizen of The Gambia by virtue of that section

but whose marriage has been terminated by death or dissolution before 18th February 1965 shall be entitled, upon making application in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of The Gambia.

(3) Any woman who, on 17th February 1965, has been married to a person who becomes, or would but for his death have become, entitled to be registered as a citizen of The Gambia under subsection (1) of this section but whose marriage has been terminated by death or dissolution before 18th February 1965 or is so terminated on or after that date but before 18th February 1967 and before that person exercises his right to be registered as a citizen of The Gambia under subsection (1) of this section, shall be entitled, upon making application before the specified date in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of The Gambia.

(4) In this section "the specified date" means —

(a) in relation to a person to whom subsection (1) of this section refers, 18th February 1967; and

(b) in relation to a woman to whom subsection (3) of this section refers, 18th February 1967 or the expiration of a period of two years commencing with the termination of her marriage (whichever is the later),

or such later date as may in any particular case be prescribed by or under an Act of Parliament.

5. Every person born in The Gambia after 17th February 1965 shall become a citizen of The Gambia at the date of his birth:

Persons born in The Gambia after 17th February 1965.

Provided that a person shall not become a citizen of The Gambia by virtue of this section if at the time of his birth—

(a) neither of his parents is a citizen of The Gambia and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to The Gambia; or

(b) his father is a citizen of a country with which The Gambia is at war and the birth occurs in a place then under occupation by that country.

6. A person born outside The Gambia after 17th February 1965 shall become a citizen of The Gambia at the date of his birth if, at that date, his father is a citizen of The Gambia otherwise than by virtue of this section or section 3(3) of this Constitution.

Persons born outside The Gambia after 17th February 1965.

7. Any woman who is married to a citizen of The Gambia or who has been married to a man who was, during the subsistence of the marriage, a citizen of The Gambia shall be entitled, upon making application in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of The Gambia.

Marriage to citizen of The Gambia.

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Commonwealth citizenship.

8.—(1) Every person who, under this Constitution or any Act of Parliament, is a citizen of The Gambia or who, under any enactment for the time being in force in any country to which this section applies, is a citizen of that country shall, by virtue of that citizenship, have the status of a Commonwealth citizen.

(2) Every person who is a British subject without citizenship under the British Nationality Act 1948, or who continues to be a British subject under section 2 of that Act, shall, by virtue of that status, have the status of a Commonwealth citizen.

(3) The countries to which this section applies are the United Kingdom and Colonies, Canada, Australia, New Zealand, India, Pakistan, Ceylon, Ghana, Malaysia, Nigeria, The Republic of Cyprus, Sierra Leone, Tanzania, Jamaica, Trinidad and Tobago, Uganda, Kenya, Malawi, Malta, Zambia, Singapore, Guyana, Botswana, Lesotho, Barbados, Mauritius and Swaziland.

(4) Subsection (3) of this section may from time to time be amended by resolution of the House of Representatives.

Powers of Parliament.

9.—(1) Parliament may make provision for the acquisition of citizenship of The Gambia by persons who are not eligible or who are no longer eligible to become citizens of The Gambia under the provisions of this Chapter.

(2) Parliament may make provision authorising the Minister to deprive of his citizenship of The Gambia any person who is a citizen of The Gambia otherwise than by virtue of section 3, section 5 or section 6 of this Constitution.

(3) Parliament may make provision for the renunciation by any person of his citizenship of The Gambia.

Deprivation of citizenship on acquisition or exercise of right of other citizenship.

10.—(1) If the Minister is satisfied that any citizen of The Gambia has at any time after 17th February 1965 acquired by registration, naturalisation or other voluntary and formal act (other than marriage) the citizenship of any country other than The Gambia, the Minister may by order deprive that person of his citizenship.

(2) If the Minister is satisfied that any citizen of The Gambia has at any time after 17th February 1965 voluntarily claimed and exercised in a country other than The Gambia any rights available to him under the law of that country, being rights accorded exclusively to its citizens, the Minister may by order deprive that person of his citizenship.

Procedure for deprivation of citizenship.

11.—(1) Before any order is made under section 10 of this Constitution or under a law made in pursuance of section 9(2) of this Constitution depriving a person of his citizenship of The Gambia, the Minister shall give that person notice in writing informing him of the ground on which the order is proposed to be made and of his right to have his case referred to a committee of enquiry.

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(2) If any person to whom notice is given applies to have his case referred to a committee of enquiry the Minister shall, and in any other case the Minister may, refer the case to a committee of enquiry which he shall appoint for that purpose and which shall consist of a chairman who shall be selected by the Chief Justice from among persons who are entitled to practise as a barrister or a solicitor in The Gambia and two other members who shall be selected by the Minister.

(3) Where any case is referred to a committee under this section, the committee shall hold an enquiry in such manner as the Minister may direct and submit its report to the Minister; and the Minister shall have regard to the report in determining whether to make the order but shall not be obliged to act in accordance with any recommendation contained in the report.

12.—(1) In this Chapter—

Interpre-
tation.

“British protected person” means a person who is a British protected person for the purposes of the British Nationality Act 1948; and

“the Minister” means the Minister who is for the time being responsible for matters relating to citizenship of The Gambia.

(2) For the purposes of this Chapter, a person born aboard a registered ship or aircraft, or aboard an unregistered ship or aircraft of the Government of any country, shall be deemed to have been born in the place in which the ship or aircraft was registered or, as the case may be, in that country.

(3) Any reference in this Chapter to the national status of the father of a person at the time of that person's birth shall, in relation to a person born after the death of his father, be construed as a reference to the national status of the father at the time of the father's death; and where that death occurred before 18th February 1965 and the birth occurred after 17th February 1965 the national status that the father would have had if he had died on 18th February 1965 shall be deemed to be his national status at the time of his death.

CHAPTER III

PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

13. Whereas every person in The Gambia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

Fundamental
rights and
freedoms.

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and

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- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

Protection of
right to life.

14.—(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of The Gambia of which he has been convicted.

(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case—

- (a) for the defence of any person from violence or for the defence of property;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) for the purpose of suppressing a riot, insurrection or mutiny; or
 - (d) in order to prevent the commission by that person of a criminal offence,
- or if he dies as the result of a lawful act of war.

Protection
of right to
personal
liberty.

15.—(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say:—

- (a) in execution of the sentence or order of a court, whether established for The Gambia or some other country, in respect of a criminal offence of which he has been convicted;
- (b) in execution of the order of the Supreme Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal;
- (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;
- (d) for the purpose of bringing him before a court in execution of the order of a court;
- (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia;

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- (f) under the order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of eighteen years;
- (g) for the purpose of preventing the spread of an infectious or contagious disease;
- (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;
- (i) for the purpose of preventing the unlawful entry of that person into The Gambia, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from The Gambia or for the purpose of restricting that person while he is being conveyed through The Gambia in the course of his extradition or removal as a convicted prisoner from one country to another; or
- (j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within The Gambia, or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person with a view to the making of any such order or relating to such an order after it has been made, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of The Gambia in which, in consequence of any such order, his presence would otherwise be unlawful.
- (2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.
- (3) Any person who is arrested or detained—
- (a) for the purpose of bringing him before a court in execution of the order of a court; or
- (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia;
- and who is not released, shall be brought without undue delay before a court.
- (4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court.

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(5) If any person arrested or detained as mentioned in subsection (3)(b) of this section is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(6) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person or from any other person or authority on whose behalf that other person was acting.

Protection
from slavery
and forced
labour.

16.—(1) No person shall be held in slavery or servitude.

(2) No person shall be required to perform forced labour.

(3) For the purposes of this section, the expression "forced labour" does not include—

(a) any labour required in consequence of the sentence or order of a court;

(b) labour required of any person while he is lawfully detained that, though not required in consequence of the sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained;

(c) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service;

(d) any labour required during any period of public emergency or in the event of any other emergency or calamity that threatens the life and well-being of the community, to the extent that the requiring of such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation; or

(e) any labour reasonably required as part of reasonable and normal communal or other civic obligations.

Protection
from in-
human
treatment.

17.—(1) No person shall be subjected to torture or inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in The Gambia on 23rd April, 1970.

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18.—(1) No property of any description shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of The Gambia except by or under the provisions of a law that—

Protection from deprivation of property.

- (a) requires the payment of adequate compensation therefor; and
- (b) gives to any person claiming such compensation a right of access, for the determination of his interest in the property and the amount of compensation to the Supreme Court.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section—

- (a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right—
 - (i) in satisfaction of any tax, rate or due;
 - (ii) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of The Gambia;
 - (iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;
 - (iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;
 - (v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants;
 - (vi) in consequence of any law with respect to the limitation of actions; or
 - (vii) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required and has without reasonable excuse refused or failed to carry out), and except so far as that provision or as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or

(b) to the extent that the law in question makes provision for the taking of possession or acquisition of any of the following property (including an interest in or a right over property) that is to say:—

- (i) enemy property;
- (ii) property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;
- (iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or
- (iv) property subject to a trust for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

(3) Nothing contained in or done under the authority of any Act of Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the Act in question makes provision for the compulsory taking of possession of any property, or the compulsory acquisition of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided by Parliament.

(4) The provisions of this section shall apply in relation to the compulsory taking of possession of property of any description and the compulsory acquisition of rights over and interests in such property by or on behalf of the Republic.

Protection
against
arbitrary
search or
entry.

19.—(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, or the development or utilisation of any property for a purpose beneficial to the community;
- (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

- (c) that authorises an officer or agent of the Government of The Gambia, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority or body corporate, as the case may be; or
- (d) that authorises, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order,

and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

20.—(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within reasonable time by an independent and impartial court established by law.

Provisions
to secure
protection
of law.

(2) Every person who is charged with a criminal offence—

- (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
- (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
- (c) shall be given adequate time and facilities for the preparation of his defence;
- (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice;
- (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
- (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge,

and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

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(3) When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(6) No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

(9) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority shall be held in public.

(10) Nothing in subsection (9) of this section shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority—

(a) may by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or

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(b) may by law be empowered or required to do in the interests of defence, public safety or public order.

(11) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of—

(a) subsection (2)(a) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;

(b) subsection (2)(d) of this section to the extent that the law in question prohibits legal representation in proceedings before a court, by whatever name called administering customary law of before another court on appeal from such a court;

(c) subsection (2)(e) of this section to the extent that the law in question imposes reasonable conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds; or

(d) subsection (5) of this section to the extent that the law in question authorises a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so, however, that any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.

(12) In the case of any person who is held in lawful detention the provisions of subsection (1), paragraphs (d) and (e) of subsection (2) and subsection (3) of this section shall not apply in relation to his trial for a criminal offence under the law regulating the discipline of persons held in such detention.

(13) In this section "criminal offence" means a criminal offence under the law of The Gambia.

21.—(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, including freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance. Protection of freedom of conscience.

(2) Except with his own consent (or, if he is a minor, the consent of his guardian) no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own.

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(3) Every religious community shall be entitled, at its own expense, to establish and maintain places of education and to manage any place of education which it wholly maintains; and no such community shall be prevented from providing religious instruction for persons of that community in the course of any education provided at any places of education which it wholly maintains or in the course of any education which it otherwise provides.

(4) No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief.

(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required—

(a) in the interests of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(6) References in this section to a religion shall be construed as including references to a religious denomination, and cognate expressions shall be construed accordingly.

Protection of
freedom of
expression.

22.—(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

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(c) that imposes restrictions upon public officers, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

23.—(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests. Protection of freedom of assembly and association.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons; or

(c) that imposes restrictions upon public officers, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

24.—(1) No person shall be deprived of his freedom of movement, that is to say, the right to move freely throughout The Gambia, the right to reside in any part of The Gambia and immunity from expulsion from The Gambia. Protection of freedom of movement.

(2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) for the imposition of restrictions on the movement or residence within The Gambia of any person or on any person's right to leave The Gambia that are reasonably required in the interests of defence, public safety or public order;

(b) for the imposition of restrictions on the movement or residence within The Gambia or on the right to leave The Gambia of persons generally or any class of persons in the interests of defence, public safety, public order, public morality or public health and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;

- (c) for the imposition of restrictions, by order of a court, on the movement or residence within The Gambia of any person or on any person's right to leave The Gambia either in consequence of his having been found guilty of a criminal offence under the law of The Gambia or for the purpose of ensuring that he appears before a court at a later date for trial of such a criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or lawful removal from The Gambia;
- (d) for the imposition of restrictions on the freedom of movement of any person who is not a citizen of The Gambia;
- (e) for the imposition of restrictions on the acquisition or use by any person of land or other property in The Gambia;
- (f) for the imposition of restrictions upon the movement or residence within The Gambia or on the right to leave The Gambia of any public officer;
- (g) for the removal of a person from The Gambia to be tried or punished in some other country for a criminal offence under the law of that other country or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under the law of The Gambia of which he has been convicted; or
- (h) for the imposition of restrictions on the right of any person to leave The Gambia that are reasonably required in order to secure the fulfilment of any obligations imposed on that person by law and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.
- (4) If any person whose freedom of movement has been restricted by virtue of such a provision as is referred to in subsection (3)(a) of this section so requests at any time during the period of that restriction not earlier than three months after the order was made or three months after he last made such a request, as the case may be, his case shall be reviewed by an independent and impartial tribunal presided over by a person appointed by the Chief Justice from among persons who are entitled to practise as a barrister or a solicitor in The Gambia.
- (5) On any review by a tribunal in pursuance of subsection (4) of this section of the case of any person whose freedom of movement has been restricted, the tribunal may make recommendations concerning the necessity or expediency of the continuation of that restriction to the authority by whom it was ordered:
- Provided that authority, unless it is otherwise provided by law, shall not be obliged to act in accordance with any such recommendations.

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25. (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

Protection from discrimination

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

on the grounds of race etc.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—

- (a) for the appropriation of public revenues or other public funds;
- (b) with respect to persons who are not citizens of The Gambia;

(c) for the application, in the case of persons of any such description as is mentioned in subsection (3) of this section (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description;

(d) for the application of customary law with respect to any matter in the case of persons who, under that law, are subject to that law; or

(e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to race, tribe, place of origin, political opinions, colour or creed) to be required of any person who is appointed to or to act in any office in the public service, any office in a disciplined force, any office in the service of a local government authority or any office in a body corporate established by law for public purposes.

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(6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or subsection (5) of this section.

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 19, 21, 22, 23 and 24 of this Constitution being such a restriction as is authorised by section 19(2), section 21(5), section 22(2), section 23(2) or paragraph (a) or paragraph (b) of section 24(3), as the case may be.

(8) Nothing in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.

Derogations from fundamental rights and freedom under emergency powers.

26. Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of section 15 or section 25 of this Constitution to the extent that the Act authorises the taking during any period of public emergency of measures that are reasonably justifiable for dealing with the situation that exists in The Gambia during that period.

Protection of persons detained under emergency laws.

27.—(1) When a person is detained by virtue of any such law as is referred to in section 26 of this Constitution the following provisions shall apply, that is to say:—

- (a) he shall, as soon as reasonably practicable and in any case not more than seven days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained;
- (b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Official Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorised;
- (c) not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice from among persons who are entitled to practise as a barrister or a solicitor in The Gambia;
- (d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the detained person; and

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(e) at the hearing of his case by the tribunal appointed for the review of his case he shall be permitted to appear in person or by a legal representative of his own choice.

(2) On any review by a tribunal in pursuance of this section of the case of a detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

(3) Nothing contained in subsection (1)(d) or subsection (1)(e) of this section shall be construed as entitling a person to legal representation at public expense.

28.—(1) If any person alleges that any of the provisions of sections 13 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

Enforcement
of protective
provisions.

(2) The Supreme Court shall have original jurisdiction—

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 13 to 27 (inclusive) of this Constitution:

Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of sections 13 to 27 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court unless, in his opinion the raising of the question is merely frivolous or vexatious.

(4) Where any question is referred to the Supreme Court in pursuance of subsection (3) of this section, the Supreme Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal under section 95 of this Constitution to the Court of Appeal or to the Judicial Committee, in accordance with the decision of the Court of Appeal or, as the case may be, of the Judicial Committee.

(5) Parliament may confer upon the Supreme Court such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section.

(6) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which applications may be brought and references shall be made to the Supreme Court).

Declaration of emergency. 29.—(1) The President may, at any time, by proclamation which shall be published in the Official Gazette, declare that—

(a) a state of public emergency exists for the purposes of this Chapter; or

(b) a situation exists which, if it is allowed to continue, may lead to a state of public emergency.

(2) Every declaration made under subsection (1) of this section shall lapse—

(a) in the case of a declaration made when Parliament is sitting, at the expiration of a period of seven days beginning with the date of publication of the declaration; and

(b) in any other case, at the expiration of a period of twenty-one days beginning with the date of publication of the declaration,

unless it has in the meantime been approved by a resolution of the House of Representatives supported by the votes of two-thirds of all the voting members of the House.

(3) A declaration made under subsection (1) of this section may at any time be revoked by the President by proclamation which shall be published in the Official Gazette.

(4) A declaration made under subsection (1) of this section that has been approved by a resolution of the House of Representatives in pursuance of subsection (2) of this section, shall, subject to the provisions of subsection (3) of this section, remain in force so long as that resolution remains in force and no longer.

(5) A resolution of the House of Representatives passed for the purposes of this section shall remain in force for twelve months or such shorter period as may be specified therein:

Provided that any such resolution may be extended from time to time by a further such resolution, supported by the votes of two-thirds of all the voting members of the House, each extension not exceeding twelve months from the date of the resolution effecting the extension; and any such resolution may be revoked at any time by a resolution supported by the votes of a majority of all the voting members of the House.

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(6) Any provision of this section that a declaration made under subsection (1) of this section shall lapse or cease to be in force at any particular time is without prejudice to the making of a further such declaration whether before or after that time.

(7) The President may summon the House of Representatives to meet for the purposes of subsection (2) of this section notwithstanding that Parliament then stands dissolved, and the persons who were members of the House of Representatives immediately before the dissolution shall be deemed, for those purposes, still to be members of that House but, subject to the provisions of section 67(4) of this Constitution (which relates to the election of the Speaker of the House of Representatives), the House shall not, when summoned by virtue of this subsection, transact any business other than debating and voting upon a resolution for the purposes of subsection (2) of this section.

30.—(1) In this Chapter, unless the context otherwise requires—

Interpreta-
tion and
savings

“contravention”, in relation to any requirement, includes a failure to comply with that requirement, and cognate expressions shall be construed accordingly;

“court” means any court of law having jurisdiction in The Gambia other than a court established by a disciplinary law, and includes the Judicial Committee and in sections 14 and 16 of this Constitution a court established by a disciplinary law;

“disciplinary law” means a law regulating the discipline of any disciplined force;

“disciplined force” means—

- (a) a naval, military or air force;
- (b) a Police Force; or
- (c) a prison service;

“legal representative” means a person entitled to practise as a barrister or a solicitor in The Gambia; and

“member”, in relation to a disciplined force, includes any person who, under the law regulating the discipline of that force, is subject to that discipline.

(2) In this Chapter “a period of public emergency” means any period during which—

- (a) The Gambia is at war; or
- (b) a declaration is in force under subsection (1) of section 29 of this Constitution.

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(3) in relation to any person who is a member of a disciplined force raised under an Act of Parliament, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than sections 14, 16 and 17 of this Constitution.

(4) In relation to any person who is a member of a disciplined force raised otherwise than as aforesaid and lawfully present in The Gambia, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter.

CHAPTER IV

THE PRESIDENT

Part I

OFFICE OF PRESIDENT

Office of
President.

31. There shall be a President of the Republic of The Gambia who shall be Head of State and Commander-in-Chief of the armed forces of the Republic.

Part II

THE FIRST PRESIDENT OF THE GAMBIA

First
President.

32.—(1) Notwithstanding the provisions of this Chapter, the first President of The Gambia shall be the person who immediately before 24th April, 1970, holds the office of Prime Minister under the Constitution of The Gambia established by The Gambia Independence Order, 1965(a), and he shall assume office as President of the Republic on that date as if he had been elected in pursuance of the provisions of this Constitution and shall, unless he sooner dies or resigns, or unless he ceases to hold office by virtue of section 37 or section 38 of this Constitution, continue in office until the person elected President in the next following Presidential election assumes office.

(2) On the assumption of his office under subsection (1) of this section, the first President of The Gambia shall cease to be a member of the House of Representatives and his seat shall be declared vacant.

Part III

ELECTION, TENURE AND CONDITIONS OF
OFFICE OF THE PRESIDENTPresident's
qualifica-
tions.

33. A person shall be qualified for election as the President if he is a citizen of The Gambia who—

(a) has attained the age of 30 years, and

(a) S.I. 1965/135

- (b) is qualified to be registered as a voter for the purposes of elections to the House of Representatives: Provided that a Head Chief, notwithstanding any provision of law disqualifying him to be registered, as a voter for the purposes of elections to the House of Representatives, shall be qualified for election as President if he otherwise fulfils the qualifications at paragraph (a), (c) and (d) of this section, and
- (c) in the case of an election held on the dissolution of Parliament, is nominated in such manner as may be prescribed by or under an Act of Parliament by not less than 100 persons registered as voters for the purposes of elections to the House of Representatives, and
- (d) in the case of an election held under section 39(2)(b) of this Constitution, is an elected member of the House of Representatives.

34.—(1) Whenever Parliament is dissolved an election shall be held to the office of President in the manner prescribed by this section and subject thereto, by or under an Act of Parliament for regulating the election of a President.

Election of President after dissolution of Parliament.

(2) Where only one qualified candidate is validly nominated in an election of a President, the returning officer shall declare him to be elected and where more than one candidate is validly nominated the following provisions shall apply—

- (a) The candidates nominated for election to the House of Representatives as elected members may, with the consent of the Presidential candidate concerned, declare their preference for a Presidential candidate and the Presidential candidate who obtains the preference of more than one half of the total number of persons elected as elected members of the House of Representatives at that general election shall be elected as President.
 - (b) if no Presidential candidate is elected in accordance with the provisions of subsection 2(a) of this section, the voting members shall elect, by secret ballot, one of the Presidential candidates who has obtained the preference of at least one elected member.
- (3) Where an election is to be determined by secret ballot by the voting members of the House of Representatives—
- (a) The Presidential candidate who obtains the votes of more than one half the total number of the persons entitled to vote at such ballot shall be elected President;
 - (b) where two ballots have been held and no candidate has obtained the votes of more than one half of the total number of persons entitled to vote thereat, the Presidential candidate who, at a subsequent ballot, obtains the greatest numbers of votes cast by the persons voting at such ballot shall be elected President.

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Returning
Officer at
elections of
President.

35.—(1) The Chief Justice shall be the returning officer for the election of a President.

(2) Any question which may arise as to whether—

(a) any provision of this Constitution or any law relating to the election of a President under section 34 or section 39 of this Constitution has been complied with; or

(b) any person has been validly elected as President under those sections;

shall be referred to and determined by the returning officer whose decision shall be conclusive and shall not be questioned in any court.

Assump-
tion and
tenure of
office.

36.—(1) The President shall assume office on the day following his election under section 34 and shall, unless he sooner dies or resigns, or unless he ceases to hold office by virtue of section 37 or section 38 of this Constitution, continue in office until the person elected President at the next following presidential election assumes office.

(2) Any person who is elected President and also member of the House of Representatives at the same general election shall, on assuming office as President, cease to be a member of the House of Representatives and his seat shall be declared vacant.

(3) Upon his assumption of office, the President shall take and subscribe the oath of allegiance, and the oath for the due execution of his office as set out in the First Schedule to this Constitution.

Removal
of Presi-
dent on
grounds of
incapacity.

37.—(1) If the Cabinet resolves, upon a resolution supported by the votes of a majority of all the members of the Cabinet, that the question of the mental or physical capacity of the President to discharge the functions of his office ought to be investigated and informs the Chief Justice accordingly, the Chief Justice shall appoint a board consisting of not less than three persons selected by him from among persons who are qualified as medical practitioners under the law of The Gambia and the Board shall enquire into the matter and shall make a report to the Chief Justice stating the opinion of the board whether or not the President is, by reason of any infirmity of mind or body, incapable of discharging the functions of his office.

(2) If the board reports that the President is incapable of discharging the functions of the office of President, the Chief Justice shall certify in writing accordingly and thereupon the President shall cease to hold office.

(3) Where the Cabinet resolves that the question of the mental or physical capacity of the President to discharge his functions ought to be investigated in accordance with the provisions of subsection (1) of this section, the President shall, until another person assumes the office of President or the board, appointed in pursuance of subsection (1) of this section, reports that the President is not incapable of discharging the functions of his office (whichever is the earlier), cease to perform the functions of his office and those functions shall be performed by—

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(a) the Vice-President; or

(b) during any period when there is no Vice-President or the Vice-President is absent from The Gambia or is unable, by reason of mental or physical infirmity, to discharge the functions of his office, any such Minister as the Cabinet shall appoint:

Provided that any person performing the functions of the office of President under this subsection shall not exercise the powers of the President to revoke the appointment of the Vice-President or to dissolve Parliament.

(4) A motion for the purposes of subsection (1) of this section may be proposed at any meeting of the Cabinet by any member thereof.

(5) For the purposes of this section—

(a) the Cabinet may act notwithstanding any vacancy in its membership or the absence of any member;

(b) a Certificate by the Chief Justice that the President is by reason of mental or physical infirmity, unable to discharge the functions of his office shall, in respect of any period for which it is in force, be conclusive and shall not be questioned in any Court.

38.—(1) If notice in writing is given to the Speaker of the House of Representatives, signed by not less than one-half of all the members of the House of Representatives, of a motion alleging that the President has committed any violation of the Constitution or any gross misconduct and specifying the particulars of the allegations and proposing that a tribunal be appointed under this section to investigate those allegations, the Speaker shall—

(a) if Parliament is then sitting or has been summoned to meet within five days, cause the motion to be considered by the House within 7 days of the notice; or

(b) if Parliament is not then sitting (and notwithstanding that it may be prorogued) summon the House to meet within 21 days of the notice and cause the motion to be considered at that meeting.

(2) Where a motion under this section is proposed for consideration by the House of Representatives, the House shall not debate the motion but the person presiding in the House shall forthwith cause a vote to be taken on the motion and, if the motion is supported by the votes of not less than two-thirds of all the voting members of the House, shall declare the motion to be passed.

(3) If a motion is declared to be passed under subsection (2) of this section—

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- (a) the Chief Justice shall appoint a tribunal which shall consist of a Chairman and not less than two others selected by the Chief Justice, one of whom shall hold or shall have held high judicial office;
- (b) the tribunal shall investigate the matter and shall report to the House of Representatives whether or not they find the particulars of the allegation specified in the motion to have been sustained;
- (c) the President shall have the right to appear and be represented before the tribunal during its investigation of the allegations against him.

(4) If the tribunal reports to the House of Representatives that the tribunal finds that the particulars of any allegation against the President specified in the motion have not been substantiated, no further proceedings shall be taken under this section in respect of that allegation.

(5) If the tribunal reports to the House of Representatives that the tribunal finds that the particulars of any allegation specified in the motion have been substantiated the House may, on a motion supported by the votes of not less than two-thirds of all the voting members of the House, resolve that the President has been guilty of such violation of the Constitution or, as the case may be, such gross misconduct as is incompatible with his continuance in office as President and, if the House so resolves, the President shall cease to hold office upon the third day following the passage of the resolution unless he sooner dissolves Parliament.

(6) No proceedings shall be taken or continued under this section at any time when Parliament is dissolved.

Vacancy in
office of
President.

39.—(1) If the office of President becomes vacant by reason of the death or resignation of the President or by reason of the President ceasing to hold office by virtue of section 37 or 38 of this Constitution, the Vice-President shall assume the office of President.

(2) If the office of President becomes vacant as aforesaid in circumstances in which there is no Vice-President—

- (a) until a President assumes office in accordance with this section or section 36 of this Constitution the functions of the office of President shall be performed by such Minister as the Cabinet shall appoint;
- (b) unless Parliament is dissolved and notwithstanding that it may be prorogued, the House of Representatives shall meet on the fourteenth day after the office of the President becomes vacant, or on such earlier day as may be appointed by the Speaker and the voting members shall elect by secret ballot as President one of the elected members qualified in accordance with section 33 and in accordance with the provisions of subsection (3) of section 34 of this Constitution;

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(c) a person elected as President under this section shall assume the office of President on the day upon which he is declared to be elected.

(d) a person elected as President under this section shall, on assuming office as President, cease to be a member of the House of Representatives and his seat shall be declared vacant.

(3) Whenever the President is absent from The Gambia or considers it desirable so to do by reason of illness or any other cause he may by direction in writing, authorise the Vice-President to discharge such of the functions of the office of President as he may specify and the Vice-President may discharge those functions until his authority is revoked by the President.

(4) If the President is incapable by reason of physical or mental infirmity of discharging the functions of his office and the infirmity is of such a nature that the President is unable to authorise another person under this section to perform those functions—

(a) the Vice-President; or

(b) during any period when there is no Vice-President or the Vice-President is absent from The Gambia or the Vice-President is by reason of physical or mental infirmity, unable to perform the functions of his office, such Minister as the Cabinet shall appoint,

shall perform the functions of the office of President:

Provided that any person performing the functions of the office of President under this subsection shall not exercise the powers of the President to revoke the appointment of the Vice-President or to dissolve Parliament.

(5) Any person performing the functions of the office of President by virtue of subsection (4) of this section shall cease to perform those functions if he is notified by the President that the President is about to resume those functions.

(6) For the purposes of this section, a certificate of the Chief Justice that—

(a) the President is incapable by reason of physical or mental infirmity of discharging the functions of his office and the infirmity is of such a nature that the President is unable to authorise another person under this section to perform the functions of his office; or

(b) the Vice-President is by reason of physical or mental infirmity unable to discharge the functions of his office,

shall, in respect of any period for which it is in force, be conclusive and shall not be questioned in any court:

Provided that any such certificate as is referred to in paragraph (a) of this subsection shall cease to have effect if the President notifies any person under subsection (5) of this section that he is about to resume the functions of the office of President.

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(7) The Vice-President or a Minister shall not, by reason of his exercising the functions of the office of President under subsections (2)(a), (3) or (4) of this section, vacate his seat in, or be disqualified for election to the House of Representatives.

Salary and Allowances of President.

40.—(1) The President shall receive such salary and allowances, as may be prescribed by resolution of the House of Representatives; and such salary and allowances payable to the President are hereby charged on the Consolidated Revenue Fund.

(2) The salary and allowances of the President shall not be altered to his disadvantage during his period of office.

(3) The President shall be exempt from personal taxation.

(4) Until the House of Representatives prescribes the salary and allowances of the first President he shall receive the same salary and allowances as the Prime Minister was receiving.

Protection of President in respect of legal proceedings during office.

41. Whilst any person holds or performs the functions of the office of President no civil or criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official capacity or in his private capacity.

CHAPTER V

THE EXECUTIVE

Executive power.

42.—(1) The executive power of the Republic shall vest in the President and, subject to the provisions of this Constitution, shall be exercised by him either directly or through officers subordinate to him.

(2) In the exercise of any function conferred upon him by this Constitution or any other law, the President shall, unless it is otherwise provided, act in his own deliberate judgment and shall not be obliged to follow the advice tendered by any other person or authority.

(3) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the President.

Establishment of offices and functions of Vice-President, Ministers and Parliamentary Secretaries.

43.—(1) There shall be a Vice-President of The Gambia who shall be the principal assistant of the President in the discharge of his executive functions and the leader of Government business in the House of Representatives.

(2) Where the Vice-President is performing the functions of the President in accordance with section 39(1) of this Constitution he may appoint a person from among the members of the House of Representatives to perform the functions of Vice-President and any person so appointed may discharge those functions accordingly:

Provided that a person appointed under this section shall cease to perform the functions of the office of Vice-President—

- (a) if his appointment is revoked by the Vice-President;
- (b) if he ceases to be a member of the House of Representatives otherwise than by reason of a dissolution of Parliament or
- (c) if the Vice-President ceases to perform the functions of the office of President.

(3) Notwithstanding the provisions of subsection (1) of section 45 and if occasion arises for making the appointment of a Vice-President or other Minister or of a Parliamentary Secretary while Parliament is dissolved, the President may appoint a person who was a member of the House of Representatives immediately before such dissolution.

(4) There shall be such other offices of Minister of the Government and such offices of Parliamentary Secretary as may be established by the President.

(5) Subject to the provisions of section 50 the Vice-President and the other Ministers under the direction of the President shall be responsible for such departments of State or other business of the Government as the President may assign to them.

(6) Notwithstanding the provisions of subsection (5) of this section the President shall be responsible for such departments of State or other business of the Government as he may determine.

(7) The function of Parliamentary Secretaries shall be to assist Ministers in the performance of their duties.

44. Where any Minister has been charged with responsibility for a department or departments of government, he shall exercise general direction and control over those departments; and, subject to such direction and control, every department of government shall be under the supervision of a public officer whose office is referred to in this Constitution as the office of permanent secretary:

Permanent Secretaries.

Provided that two or more government departments may be placed under the supervision of one permanent secretary.

45.—(1) Appointments to the office of Vice-President, Minister or Parliamentary Secretary shall be made by the President from among the members of the House of Representatives by instrument under the Public Seal:

Appointment of Ministers and Parliamentary Secretaries

Provided that the Vice-President shall be appointed from among the elected members of the House of Representatives by instrument under the Public Seal.

(2) If the Vice-President is absent from The Gambia or is incapable by reason of illness or any other cause of discharging the functions of his office, the President may appoint a person from among the elected members of the House of Representatives to perform the functions of the office of Vice-President and any person so appointed may discharge those functions accordingly:

Provided that a person appointed under this subsection shall cease to perform the functions of the office of Vice President—

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- (a) if his appointment is revoked by the President;
- (b) if he ceases to be a member of the House of Representatives otherwise than by reason of a dissolution of Parliament; or
- (c) upon the assumption by any person of the office of President.

Tenure of
office of
Minister and
Parliamentary
Secretary.

46. The office of Vice-President, or other Minister or Parliamentary Secretary, shall become vacant—

- (a) if the President removes the holder from office by instrument under the Public Seal; or
- (b) if the holder ceases to be a member of the House of Representatives otherwise than by reason of a dissolution of Parliament; or
- (c) on the acceptance of the President of the resignation of the holder of this office; or
- (d) immediately before the assumption of office of a President; or
- (e) if, in the case of the Vice-President, the holder of that office assumes the office of President in accordance with the provisions of section 39 of this Constitution.

Attorney
General.

47.—(1) There shall be an Attorney-General who shall be appointed by the President by instrument under the public seal and who shall be a Minister of the Government.

(2) The Attorney-General shall be a voting member of the House of Representatives by virtue of this subsection if he is not such a voting member apart from this subsection.

(3) If the person holding the office of Attorney-General is for any reason unable to perform the functions conferred upon him by this Constitution or any other law, those functions (other than functions as a member of the House of Representatives) may be performed by such other person, whether or not that person is a Minister, as may from time to time be designated in that behalf by the President.

(4) A person shall not be qualified to hold or perform the functions of the office of Attorney-General unless he is qualified for admission as an advocate in The Gambia and has been so qualified for not less than five years.

Public
Prosecu-
tions.

48.—(1) There shall be a Director of Public Prosecutions, whose office shall be an office in the public service of The Gambia and, without prejudice to the provisions of this Constitution relating to the Public Service Commission, an office in the department of Government for which responsibility is assigned to the Attorney-General.

(2) The Attorney General shall have power in any case in which he considers it desirable so to do—

- (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;
- (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
- (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(3) The powers of the Attorney-General under subsection (2) of this section may be exercised by the Attorney-General in person and through the Director of Public Prosecutions, acting under and in accordance with the general or special instructions of the Attorney-General, and through other officers of the department mentioned in subsection (1) of this section, acting under and in accordance with such instructions.

(4) The powers conferred upon the Attorney-General by paragraphs (b) and (c) of subsection (2) of this section shall be vested in him to the exclusion of any other person or authority:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

(5) For the purposes of this section any appeal from any determination in any criminal proceedings before any court of law or any case stated or question of law reserved for the purposes of any such proceedings to any other court shall be deemed to be part of those proceedings:

Provided that the power conferred on the Attorney-General by subsection (2)(c) of this section shall not be exercised in relation to any appeal by a person convicted in any criminal proceedings or to any case stated or question of law reserved at the instance of such a person.

49.—(1) There shall be a Cabinet comprised of the Vice-President and the other Ministers, and at the meetings of which the President, or in his absence, the Vice-President, or some other Minister appointed by the President, shall preside. Cabinet.

(2) Subject to the powers of the President, the Cabinet shall be the instrument of policy and shall be responsible for advising the President with respect to the policy of the Government.

(3) The Cabinet may act notwithstanding any vacancy in its membership.

50. The Cabinet shall be collectively responsible to Parliament for all things done by or under the authority of the President or the Vice-President or any other Minister in the execution of his office. The provisions of this section shall not apply to— Collective Responsibility.

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- (a) the appointment and removal from office of Ministers of the Government and Parliamentary Secretaries, the assignment of portfolios to Ministers or any authorisation or appointment, as the case may be, under subsection (3) of section 39 or subsection (2) of section 45 of this Constitution;
- (b) the dissolution of Parliament;
- (c) the exercise of the powers conferred on the Attorney-General by sections 47 and 48 of this Constitution; or
- (d) the matters referred to in section 54 of this Constitution (which relates to the exercise of the prerogative of mercy).

Oaths to be taken by Ministers and Parliamentary Secretaries.

51. The Vice-President, a Minister or a Parliamentary Secretary shall not enter upon the duties of his office unless he has taken and subscribed the oath of allegiance and the oath for the due execution of his office as set out in the Second Schedule to this Constitution.

Secretary to the Cabinet.

52.—(1) There shall be a Secretary to the Cabinet whose office shall be a public office.

(2) The Secretary to the Cabinet shall have charge of the Cabinet Office and shall be responsible, in accordance with such instructions as may be given him by the President, for arranging the business for, and keeping the minutes of, the Cabinet and for conveying the decisions of the Cabinet to the appropriate person or authority, and shall have such other functions as the President may from time to time direct.

Constitution of and appointments to Public Offices.

53. Subject to the provisions of this Constitution and of any Act of Parliament the President may constitute offices for the Republic, make appointments to any such office and terminate any such appointment.

Prerogative of Mercy.

54. The President may—

- (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 imposed on any person for any offence or any penalty or forfeiture otherwise due to the Republic on account of any offence.

Advisory Committee.

55.—(1) There shall be an Advisory Committee on the Prerogative of Mercy which shall consist of such persons not being less than two nor more than four as may be appointed by the President.

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(2) A member of the Advisory Committee shall hold office during the pleasure of the President.

(3) Where any person has been sentenced to death for any offence, the President shall cause the question of the exercise, in relation to that person, of the powers conferred by section 54 of this Constitution to be considered at a meeting of the Advisory Committee.

(4) The President may determine the procedure of the Advisory Committee and, if present, shall preside at any meeting of the Committee.

(5) Subject to the provisions of subsection (3) of this section, the President may refer to the Advisory Committee any question as to the exercise of the powers conferred upon him by section 54 of this Constitution.

CHAPTER VI

PARLIAMENT

Part I

COMPOSITION OF PARLIAMENT

56.—(1) There shall be a Parliament which shall consist of the President and a House of Representatives. Establishment of Parliament.

(2) The legislative power of the Republic is vested in Parliament.

(3) Parliament shall have power to make laws for the peace, security, order and good government of The Gambia.

57.—(1) The House of Representatives shall consist of a Speaker and the following other members, that is to say:— House of Representatives.

(a) until Parliament otherwise prescribes, thirty-two members who shall be known as "elected members" and who shall be elected in accordance with the provisions of section 60 of this Constitution;

(b) four members who shall be known as "Chiefs' representative members" and who shall be elected in accordance with the provisions of section 63 of this Constitution;

(c) the Attorney-General; and

(d) until Parliament otherwise prescribes, three members who shall be known as "nominated members" and who shall be appointed in accordance with the provisions of section 65 of this Constitution.

(2) Only an elected member or a Chiefs' representative member or the Attorney-General shall be entitled to vote upon any question before the House of Representatives and the elected members, the Chiefs' representative members and the Attorney-General are in this Constitution collectively referred to as "voting members".

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Qualifica-
tions for
member-
ship of
House of
Representa-
tives.

58. Subject to the provisions of section 59 of this Constitution, a person shall be qualified to be nominated for election or appointed as a voting member of the House of Representatives or to be appointed as a nominated member if, and shall not be so qualified unless, at the date of his nomination for election or, as the case may be, at the date of his appointment—

- (a) he has attained the age of twenty-one years;
- (b) he can speak English well enough to take an active part in the proceedings of the House;
- (c) in the case of a voting member, he is a citizen of The Gambia and
- (d) in the case of an elected member, he is registered in some constituency as a voter in elections of elected members of the House and is not disqualified from voting in such elections.

Disquali-
fications
for mem-
bership of
House of
Representa-
tives.

59.—(1) No person shall be qualified to be nominated for election or appointed as a voting member of the House of Representatives or to be appointed as a nominated member if, at the date of his nomination for election or, as the case may be, at the date of his appointment—

- (a) in the case of a voting member, he is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to any foreign power or state;
- (b) he holds the office of Speaker
- (c) he is, under any law in force in The Gambia, adjudged or otherwise declared to be of unsound mind;
- (d) he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in The Gambia;
- (e) he is under a sentence of death imposed on him by a court in The Gambia, or is serving or has within five years of the date of his nomination or appointment completed serving a sentence of imprisonment for a term of or exceeding six months imposed on him by such a court or substituted by competent authority for some other sentence imposed on him by such a court and has not received a free pardon; or
- (f) subject to such exceptions and limitations as may be prescribed by Parliament, he has any such interest in any such government contract as may be so prescribed.

(2) Parliament may provide that a person shall not be qualified to be nominated for election or appointed as a voting member of the House of Representatives or to be appointed as a nominated member if, at the date of his nomination for election or, as the case may be, at the date of his appointment, he holds or is acting in any office that is specified by Parliament and the functions of which involve responsibility for, or in connection with, the conduct of any election to the House or the compilation of any register of voters for the purposes of such an election.

(3) Parliament may provide that a person who is convicted by any court of any offence that is prescribed by Parliament and that is connected with the election of members of the House of Representatives or is reported guilty of such an offence by the court trying an election petition shall not be qualified, for such period (not exceeding five years) following his conviction or, as the case may be, following the report of the court as may be so prescribed, to be nominated for election as a voting member of the House or to be appointed as a nominated member.

(4) No person shall be qualified to be nominated for election or appointed as an elected member of the House of Representatives who, at the date of his nomination for election, is, or is nominated for election as, a Chiefs' representative member; and no person shall be qualified to be nominated for election as a Chiefs' representative member who, at the date of his nomination for election, is, or is nominated for election as, an elected member.

(5) No person shall be qualified to be nominated for election as a voting member of the House of Representatives, who, at the date of his nomination for election, is a nominated member; and no person shall be qualified to be appointed as a nominated member who, at the date of his appointment, is, or is nominated for election as, a voting member or who has, at any time since Parliament was last dissolved, stood as a candidate for election as a voting member but was not elected.

(6) Parliament may provide that, subject to such exceptions and limitations as Parliament may prescribe, a person shall not be qualified to be nominated for election or appointed as a voting member of the House of Representatives or to be appointed as a nominated member if, at the date of his appointment—

- (a) he holds or is acting in any office or appointment that may be prescribed by Parliament;
- (b) he is a member of any naval, military, or air force that may be so prescribed; or
- (c) he is a member of any police force.

(7) For the purposes of subsection (1)(e) of this section—

- (a) two or more terms of imprisonment that are required to be served consecutively shall be regarded as a single term of imprisonment for the aggregate period of those terms; and
- (b) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine.

(8) In subsection (1)(f) of this section "government contract" means any contract made with the Government of The Gambia or with a department of that Government or with an officer of that Government contracting as such.

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*The Constitution of the Republic of The Gambia*Election of
elected
members.

60.—(1) The Gambia shall, in accordance with the provision of section 62 of this Constitution, be divided into constituencies and each constituency shall elect one elected member to the House of Representatives, in such manner as may, subject to the provisions of this Constitution, be prescribed by or under any law.

(2) The election of elected members of the House of Representatives shall be based upon universal adult suffrage, that is to say—

- (a) every citizen of The Gambia who has attained the age of twenty-one years shall, unless he is disqualified by Parliament from registration as a voter for the purposes of elections of elected members of the House of Representatives, be entitled to be registered as such a voter under any law in that behalf, and no other person may be so registered; and
- (b) every person who is registered as aforesaid in any constituency shall, unless he is disqualified by Parliament from voting in that Constituency in any election of elected members of the House of Representatives, be entitled so to vote, in accordance with the provisions of any law in that behalf, and no other person may so vote.

(3) In any election of elected members of the House of Representatives the votes shall be given by ballot in such manner as not to disclose how any particular person votes.

Consti-
tuency
Boundaries
Commissen.

61.—(1) There shall be a Constituency Boundaries Commission which shall be appointed by the President in the circumstances specified in section 62(4) of this Constitution and which shall consist of a Chairman and two other members.

(2) The Chairman and the other members of the Commission shall be appointed by the President after consultation with the Judicial Service Commission.

(3) A person shall not be qualified to be appointed as a member of the Commission if—

- (a) he is a member of the House of Representatives;
- (b) he is, or has at any time during the two years immediately preceeding his appointment been, nominated as a candidate for election as a member of the House of Representatives or of any such House of Representatives established for The Gambia by order of Her Majesty in Council before the coming into operation of this Constitution;
- (c) he is, or has at any time during the said two years been, the holder of an office in any organisation that sponsors or otherwise supports, or that has at any time sponsored or otherwise supported, a candidate for election as a member of the House of Representatives or of any such House of Representatives established as aforesaid or of any local government authority; or
- (d) he is a public officer.

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(4) Subject to the provisions of this section, the office of a member of the Commission shall become vacant—

- (a) when the order of the Commission is published in the Official Gazette in accordance with the provisions of section 62(7) of this Constitution; or
- (b) if any circumstances arise that, if he were not a member of the Commission, would cause him to be disqualified to be appointed as such under subsection (3) of this section.

(5) The President after consultation with the Judicial Service Commission may remove a member of the Commission from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.

(6) A member of the Commission shall not upon enter the duties of his office until he has taken and subscribed the oath of allegiance and the oath for the due execution of his office that is set out in the Second Schedule to this Constitution.

(7) In the exercise of its functions under this Constitution the Commission shall not be subject to the direction or control of any other person or authority.

(8) The Commission may by regulation or otherwise regulate its own procedure and, with the consent of the President, may confer powers or impose duties on any public officer or on any authority of the Government of The Gambia for the purpose of the exercise of its functions.

(9) The Commission may, subject to its rules of procedure, act notwithstanding any vacancy in its membership or the absence of any member and its proceedings shall not be invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings:

Provided that any decision of the Commission shall require the concurrence of a majority of all its members.

62.—(1) For the purpose of the election of elected members of the House of Representatives The Gambia shall, in accordance with the provisions of this section, be divided into constituencies so that—

- (a) the number of such constituencies shall correspond with the number of seats in the House of Representatives (excluding the seats of nominated members, the Attorney-General if he is not an elected member and Chiefs' representative members); and
- (b) the boundaries of such constituencies shall, if approved by the House of Representatives in accordance with the provisions of subsection (7) of this section, be such as the Constituency Boundaries Commission may prescribe.

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(2) Each constituency shall return one member to the House of Representatives.

(3) All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Commission to be reasonably practicable but the Commission may depart from this principle to such extent as it considers expedient in order to take account of the following factors, that is to say—

- (a) the density of population, and in particular the need to ensure the adequate representation of sparsely populated rural areas;
- (b) the means of communication;
- (c) geographical features; and
- (d) the boundaries of existing administrative areas.

(4) The President shall appoint a Constituency Boundaries Commission for the purposes of reviewing the boundaries of the constituencies into which The Gambia is divided, in the following circumstances, that is to say:—

- (a) whenever a census of the population of The Gambia has been held in pursuance of any law;
- (b) whenever Parliament has made provision so as to alter the number of the constituencies into which The Gambia is divided; or
- (c) at such times (being not less than eight years and not more than ten since the boundaries of the constituencies were last reviewed) as the President, in pursuance of a resolution of the House of Representatives, may from time to time appoint.

(5) Without prejudice to the provisions of subsection (7) of this section whenever the Constituency Boundaries Commission has been appointed in the circumstances specified in subsection 4(a) or in the circumstances specified in subsection (4)(b) of this section it shall forthwith carry out a review of the boundaries of the constituencies into which The Gambia is divided and may (and in the circumstances specified in subsection (4)(b) shall), by order alter the boundaries in accordance with the provisions of this section to such extent as it thinks desirable in the light of those circumstances and the review:

Provided that a Commission established by reason of the holding of a census of the population may, if the Commission considers that the changes in the distribution of population reported on the census do not justify an alteration in the boundaries, so report to the President without entering upon a review of the boundaries of the constituencies.

(6) Without prejudice to the provisions of subsection (7) of this section whenever the Constituency Boundaries Commission has been appointed in the circumstances specified in subsection (4)(c) of this section it shall, within the period of two years commencing with its appointment, carry out a review of the boundaries of the constituencies into which The Gambia is divided and may by order alter the boundaries in accordance with the provisions of this section to such extent as it considers desirable in the light of the review.

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(7) Every order made by the Constituency Boundaries Commission under this section shall, if approved by resolution of the House of Representatives, be published in the Official Gazette and shall come into effect upon the next dissolution of Parliament after it was made.

(8) Any provision by Parliament altering the number of seats in the House of Representatives (other than the seats of Chiefs' representative members, the Attorney General if he is not an elected member and of nominated members) shall come into effect with the alteration of the constituencies that, in accordance with the provisions of subsection (5) of this section, is consequential thereon comes into effect: and any alteration of constituencies shall come into effect upon the next dissolution of Parliament.

(9) For the purposes of subsection (3) of this section the number of inhabitants of any part of The Gambia shall be ascertained by reference to the latest census of the population held in pursuance of any law.

63.—(1) The Chiefs' representative members shall be elected by the Head Chiefs from among their own number in such manner as, subject to the provisions of this Constitution, may be prescribed by or under any law. Chiefs' Representative members.

(2) In any election of the Chiefs' representative members the votes shall be given by ballot in such manner as not to disclose how any particular person votes.

64.—(1) There shall be a Supervisor of Elections whose duty it shall be to exercise general supervision over the registration of voters in elections of the members of the House of Representatives and over the conduct of such elections. Supervisor of Elections.

(2) The functions of the Supervisor of Elections shall be exercised either by the person holding or acting in such public office as may for the time being be designated in that behalf by the President acting in consultation with the Public Service Commission, or by such other person who is not a public officer as may for the time being be so designated by the President acting in consultation with the Public Service Commission.

(3) A person shall not enter upon the duties of the office of Supervisor of Elections until he has taken and subscribed the oath of allegiance and the oath for the due execution of his office that is set out in the Second Schedule to this Constitution.

(4) For the purposes of the exercise of his functions under subsection (1) of this section, the Supervisor of Elections may give such directions as he considers necessary or expedient to any registering officer, presiding officer or returning officer relating to the exercise by that officer of his functions under any law regulating the registration of voters or the conduct of elections, and any officer to whom directions are given under this subsection shall comply with those directions.

(5) The Supervisor of Elections may, whenever he considers it necessary or expedient so to do, report to the House of Representatives on the exercise of his functions under the foregoing provisions of this section; he shall submit every such report to the Minister for the time being responsible for matters relating to the election of members of the House of Representatives and that Minister shall, not later than seven days after the House first meets after he has received the report, lay it before the House.

(6) In the exercise of his functions under the fore-going provisions of this section, the Supervisor of Elections shall not be subject to the direction or control of any other person or authority.

(7) The Supervisor of Elections shall exercise such other functions in relation to elections (whether to the House of Representatives or to local government authorities) as may be prescribed by or under an Act of Parliament.

Nominated
members.

65. The nominated members shall be appointed by the President.

Tenure of
seats of mem-
ber of House
of Represent-
atives.

66.—(1) A voting member or a nominated member of the House of Representatives shall vacate his seat therein—

(a) if he is elected as Speaker;

(b) if any other circumstances arise that, if he were not such member, would cause him to be disqualified under section 59(1) of this Constitution or under a law made in pursuance of section 59(2) or section 59(3) or section 59(6) of this Constitution to be elected as such or, as the case may be, to be appointed as such;

(c) in the case of a voting member, if he ceases to be a citizen of The Gambia;

(d) in the case of an elected member, if he ceases to be registered as a voter in elections of elected members to the House of Representatives or if he ceases to be qualified to vote in such election; or

(e) in the case of a Chiefs' representative member, if he ceases to be a Head Chief; or

(f) in the case of the Attorney-General, if he is not an elected member, if he is removed from office.

(2) Parliament may, in order to permit any member of the House of Representatives who has been adjudged or declared to be of unsound mind, adjudged or declared bankrupt, sentenced to death or imprisonment or convicted or reported guilty of any offence prescribed under section 59 of this Constitution to appeal against the decision in accordance with any law, provide that, subject to such conditions as may be prescribed by Parliament, the decision shall not have effect for the purposes of this section until such time as may be so prescribed.

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67.—(1) There shall be a Speaker of the House of Representatives Speaker. who shall be elected by the House and who must be a citizen of The Gambia.

(2) A Minister or a Parliamentary Secretary shall not be qualified to be elected as Speaker.

(3) The Speaker shall vacate his office—

(a) in the case of a Speaker who was elected from among the members of the House of Representatives, if any circumstances arise that, if he had not been so elected, would have caused him to vacate his seat as a member under section 66 of this Constitution;

(b) if any circumstances arise that, if he were not Speaker, would cause him to be disqualified to be elected as such;

(c) when the House of Representatives first meets after a dissolution of Parliament; or

(d) if he is removed from office by resolution of the House of Representatives supported by the votes of not less than two-thirds of all the voting members.

(4) No business shall be transacted in the House of Representatives (other than the election of a Speaker) at any time when the office of Speaker is vacant.

68.—(1) There shall be a Deputy Speaker of the House of Representa- Deputy tives who shall be elected by the House from among persons who are Speaker. members thereof.

(2) A Minister or a Parliamentary Secretary shall not be qualified to be elected as Deputy Speaker.

(3) The House of Representatives shall elect a Deputy Speaker—

(a) subject to the provisions of section 67(4) of this Constitution, when it first meets in every session; and

(b) when it first meets after the office of Deputy Speaker has become vacant, or as soon thereafter as may be convenient.

(4) The Deputy Speaker shall vacate his office—

(a) if he vacates his seat as a member of the House of Representatives;

(b) when the House first meets in each session;

(c) if he becomes a Minister or a Parliamentary Secretary; or

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(d) if he is removed from office by resolution of the House of Representatives.

Clerk to the House of Representatives and his staff. 69.—(1) There shall be a Clerk to the House of Representatives.

(2) The office of the Clerk of the House of Representatives and the offices of the members of his staff shall be public offices.

Decision of questions as to membership of House of Representatives. 70.—(1) The Supreme Court shall have jurisdiction to hear and determine any question whether—

- (a) any person has been validly elected or appointed as a voting member of the House of Representatives;
- (b) any person has been validly appointed as a nominated member of the House;
- (c) any person who has been elected as Speaker of the House from among persons who are not members thereof was qualified to be so elected; or

(d) the seat in the House of any member thereof has become vacant.

(2) An application to the Supreme Court for the determination of any question under subsection (1)(a) of this section may be made by any person qualified to vote in the election to which the application relates or by the Attorney-General and, if it is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear or be represented in the proceedings.

(3) An application to the Supreme Court for the determination of any question under subsection (1)(b) or subsection (1)(c) of this section may be made by any voting member of the House of Representatives or by the Attorney-General and, if it is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear or be represented in the proceedings.

(4) An application to the Supreme Court for the determination of any question under subsection (1)(d) of this section may be made—

- (a) by any voting member of the House or by the Attorney-General,
- (b) in the case of the seat of an elected member of the House, by any person registered in some constituency as a voter in elections of elected members of the House; or
- (c) in the case of the seat of a Chiefs' representative member, by any Head Chief,

and if it is made by a person other than the Attorney-General, the Attorney General may intervene and may then appear or be represented in the proceedings.

(5) Parliament may make provision with respect to—

(a) the circumstances and manner in which and the imposition of reasonable conditions upon which any application may be made to the Supreme Court for the determination of any question under this section; and

(b) the powers, practice and procedure of the Supreme Court in relation to any such application.

(6) The determination of the Supreme Court of any question under this section shall not be subject to appeal.

(7) In the exercise of his functions under this section, the Attorney-General shall not be subject to the direction or control of any other person or authority.

Part II

LEGISLATION AND PROCEDURE IN HOUSE OF REPRESENTATIVES

71.—(1) Subject to the provisions of this Constitution, the legislative power of Parliament shall be exercised by bills passed by the House of Representatives and assented to by the President and a bill shall not become law unless it is so passed and assented to. Legislative Power of Parliament.

(2) When a bill is presented to the President for assent he shall either assent to the bill or withhold his assent and return the bill to the House of Representatives with a message stating the reasons why he has withheld his assent.

(3) A bill returned to the House of Representatives under subsection (2) of this section shall not be presented to the President for his assent for a second time within six months of it being so returned unless it is supported in the House of Representatives at the last stage before it is again presented by the votes of not less than two-thirds of all the voting members of the House.

(4) When a bill which has been returned to the House of Representatives and has thereafter been supported in the House in the manner specified in subsection (3) of this section by the votes of not less than two-thirds of all the voting members of the House, is presented to the President for assent a second time within six months of it being so returned, the President shall, unless he has first dissolved Parliament, assent to the bill within twenty-one days of its presentation.

(5) When a bill which has been duly passed is assented to in accordance with the provisions of this Constitution it shall become law and the President shall thereupon cause it to be published in the Gazette as law.

(6) No law made by Parliament shall come into operation until it has been published in the Gazette but Parliament may postpone the coming into operation of any such law and may make laws with retrospective effect.

(7) All laws made by Parliament shall be styled "Acts" and the words of enactment shall be "Enacted by the Parliament of The Gambia".

(8)(a) Nothing in this section or in section 56 of this Constitution shall prevent Parliament from conferring on any person or authority the power to make statutory instruments.

(b) Every statutory instrument shall be published in the Gazette not later than twenty-eight days after it is made or, in the case of a statutory instrument which will not have the force of law unless it is approved by some person or authority other than the person or authority by which it is made, not later than twenty-eight days after it is approved, and if it is not so published it shall be void from the date on which it was made.

Alteration of
this Consti-
tution.

72.—(1) Subject to the provisions of this section, Parliament may alter this Constitution.

(2) A bill for an Act of Parliament under this section shall not be passed by the House of Representatives unless—

(a) before the first reading of the bill in the House of Representatives, the text of the bill is published in at least two issues of the Gazette; and

(b) the bill is supported on the second and third readings by the votes of not less than two-thirds of all the voting members of the House.

(3) A bill for an Act of Parliament to alter any of the following provisions of this Constitution, this is to say—

(a) this section;

(b) Chapter 1, section 1, Chapter III and Chapter VII, except so far as Chapter VII makes provision for appeals to the Judicial Committee;

(c) Section 56, Section 71, Section 84, Section 85, Section 86 and Section 87,

shall not be submitted to the President for his assent unless the bill, after it has been passed by the House of Representatives and in the form in which it was so passed, has, in accordance with the provisions of any law in that behalf, been submitted to and been approved at a referendum.

(4) Every person who is entitled to vote in elections of elected members of the House of Representatives shall be entitled to vote at a referendum held for the purposes of subsection (3) of this section and no other person may so vote; and the bill shall not be regarded as having been approved at that referendum unless it was so approved by the votes of not less than one-half of all such persons or by not less than two-thirds of all the votes validly cast at the referendum:

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Provided that a Head Chief shall be entitled to vote at a referendum held for the purposes of subsection (3) of this section notwithstanding that he is not registered as a voter for the purposes of elections of elected members of the House of Representatives in accordance with the provisions of subsection (2) of section 60 of this Constitution.

(5) The conduct of any referendum for the purposes of subsection (3) of this section shall be under the general supervision of the Supervisor of Elections and the provisions of subsections (4), (5) and (6) of section 64 of this Constitution shall apply in relation to the exercise by the Supervisor of Elections or by any other officer of his functions with respect to a referendum as they apply in relation to the exercise of his functions with respect to elections of members of the House of Representatives.

(6) A bill for an Act of Parliament under this section shall not be submitted to the President for his assent unless it is accompanied by a certificate under the hand of the Speaker of the House of Representatives (or, if the Speaker is for any reason unable to exercise the functions of his office, the Deputy Speaker) that the provisions of subsection (2) of this section and, where appropriate, the provisions of subsections (3) and (4) of this section have been complied with, and every such certificate shall be conclusive for all purposes and shall not be enquired into in any court.

(7) in this section—

- (a) references to this Constitution include references to any law that amends or replaces any of the provisions of this Constitution; and
- (b) references to the alteration of this Constitution or of any chapter or section of this Constitution include references to the amendment, modification or re-enactment, with or without amendment or modification, of any provision for the time being contained in this Constitution or chapter or section thereof, the suspension or repeal of any such provision, the making of a different provision in lieu of such provision and the addition of new provisions to this Constitution or chapter or section thereof, and references to the alteration of any particular provision of this Constitution shall be construed likewise.

73.—(1) Subject to the provisions of this section Parliament may make laws for The Gambia with respect to titles of honour, decorations and other dignities. Titles of Honour etc.

(2) Any such law providing for the award of a title, decoration or other dignity shall confer the power to make the award upon the President.

(3) Except with the prior consent of the President—

- (a) a person who is a citizen of The Gambia; and
- (b) any other person who is a member of the public service or of the armed forces of the Republic,

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shall not accept a title of honour, decoration or other dignity (other than a distinction conferred by an educational, professional or scientific body) from an authority of a country other than The Gambia.

Office of
Chief.

74. No provision of law, in so far as it provides for the abolition of the office of Head Chief, Deputy Head Chief, Sub-Chief or Headman, shall have effect unless it is included in an Act of Parliament; and the provisions of section 72 of this Constitution shall apply in relation to a Bill for such an act as they apply in relation to a bill for an Act to alter this Constitution not being such a bill as is referred to in subsection (3) of section 72.

Oath to be
taken by
member of
House of
Representa-
tives.

75.—(1) Every member of the House of Representatives shall, before taking his seat in the House, take and subscribe before the House the oath of allegiance but a member may before taking that oath take part in the election of a Speaker of the House.

(2) Any person elected to the office of Speaker of the House of Representatives shall, if he has not already taken and subscribed the oath of allegiance under subsection (1) of this section as set out in the Second Schedule to this Constitution, take and subscribe that oath before the House before entering upon the duties of his office.

Presiding in
the House of
Representa-
tives.

76. There shall preside at any sitting of the House of Representatives—

(a) the Speaker; or

(b) in the absence of the Speaker, the Deputy Speaker; or

(c) in the absence of the Speaker and the Deputy Speaker, such member of the House (not being a Minister or a Parliamentary Secretary) as the House may elect for that purpose.

Quorum in
House of
Representa-
tives.

77. If objection is taken by any member of the House of Representatives present that there are present in the House (besides the person presiding) less than one-fourth of all the members of the House and, after such interval as may be prescribed in the Standing Orders of the House, the person presiding ascertains that the number of members present is still less than one-fourth of all the members of the House, he shall thereupon adjourn the House.

Use of
English in
House of
Representa-
tives.

78. The business of the House of Representatives shall be conducted in English.

Voting in
House of
Representa-
tives.

79.—(1) Save as otherwise provided in this Constitution any question proposed for decision in the House of Representatives shall be determined by a majority of votes of the members present and voting.

(2) The Speaker shall have neither an original nor a casting vote.

(3) The Deputy Speaker or other member of the House of Representatives presiding in the absence of the Speaker shall have a casting vote but no original vote.

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(4) If there is an equality of votes on any question before the House of Representatives and either the Speaker is presiding or the Deputy Speaker or other member presiding does not exercise his casting vote the motion before the House shall be deemed to be lost.

80.—(1) Any person who sits or votes in the House of Representatives knowing or having reasonable grounds for knowing that he is not entitled to do so shall be guilty of an offence and liable to a fine not exceeding £20, or such other sum as may be prescribed by Parliament, for each day on which he so sits or votes in the House. Unqualified persons sitting or voting.

(2) Any prosecution for an offence under this section shall be instituted in the Supreme Court and shall not be so instituted except by the Director of Public Prosecutions acting under the instructions of the Attorney-General.

81. Except on the motion of a Minister, the House of Representatives shall not— Restrictions with regard to certain financial measures.

(a) proceed upon any bill (including any amendment to a bill) that, in the opinion of the person presiding, makes provision for any of the following purposes:—

(i) for the imposition of taxation or the alteration of taxation otherwise than by reduction;

(ii) for the imposition of any charge upon the Consolidated Revenue Fund or any other public fund of The Gambia or the alteration of any other public fund of The Gambia or the alteration of any such charge otherwise than by reduction;

(iii) for the payment, issue or withdrawal from the Consolidated Revenue Fund or any other public fund of The Gambia of any moneys not charged thereon or any increase in the amount of such a payment, issue or withdrawal; or

(iv) for the composition or remission of any debt due to the Government of The Gambia; or

(b) proceed upon any motion (including any amendment to a motion) the effect of which, in the opinion of the person presiding, would be to make provision for any of those purposes.

82.—(1) The President may, at any time, attend and address the House of Representatives. President's right to attend and to address House of Representatives.

(2) The President may send messages to the House of Representatives and any such message shall be read, at the first convenient sitting of the House after it is received, by the Vice-President or by a Minister designated in that behalf by the President.

83.—(1) Subject to the provisions of this Constitution, the House of Representatives may regulate its own procedure and may in particular make, amend and revoke Standing Orders for the orderly conduct of its own proceedings. Regulation of procedure in House of Representatives, etc.

(2) The House of Representatives may act notwithstanding any vacancy in its membership (including any vacancy not filled when the House first meets after any general election) and the presence or participation of any person not entitled to be present at or to participate in the proceedings of the House shall not invalidate those proceedings.

(3) Parliament may, for the purpose of the orderly and effective discharge of the business of the House of Representatives, make provision for the powers, privileges and immunities of the House and the committees and the members thereof.

Part III

SUMMONING, PROROGATION AND DISSOLUTION

Sessions of
Parliament,
etc.

84.—(1) Each session of Parliament shall be held at such place within The Gambia and shall begin at such time (not being later than twelve months from the end of the preceding session if Parliament has been prorogued or twenty-eight days from the holding of a general election of members of the House of Representatives if Parliament has been dissolved) as the President shall appoint.

(2) Subject to the provisions of subsection (1) of this section, the sittings of the House of Representatives shall be held at such time and place as the House may, by its Standing Orders or otherwise, determine.

Prorogation
and dissolution
of Par-
liament.

85.—(1) The President may at any time prorogue Parliament.

(2) Subject to the provisions of this Constitution, the President may at any time dissolve Parliament.

(3) If the House of Representatives passes a resolution which is supported by the votes of a majority of all the voting members of that House, and of which not less than seven days' notice has been given in accordance with the procedure of that House, declaring that it has no confidence in the Government of The Gambia and the President does not within three days of the passing of that resolution dissolve Parliament, Parliament shall stand dissolved on the fourth day following the day on which that resolution was passed.

(4) Subject to the provisions of subsection (5) of this section, Parliament, unless sooner dissolved, shall continue for five years from the date of the first sitting of the House of Representatives after any dissolution and shall then stand dissolved.

(5) At any time when The Gambia is at war, Parliament may extend the period of five years specified in subsection (4) of this section for not more than twelve months at a time:

Provided that the life of Parliament shall not be extended under this subsection for more than five years.

(6) If, after a dissolution of Parliament and before the holding of a general election of members of the House of Representatives, the President considers that owing to a state of emergency arising or existing in The Gambia or any part thereof, it is necessary to recall Parliament, the President may summon the Parliament which has been dissolved to meet and the Parliament shall be deemed to be the Parliament for the time being, but the general election of members of the House of Representatives shall proceed and the Parliament that has been recalled shall, if not sooner dissolved, again stand dissolved on the day appointed for the nomination of candidates in that general election.

86.—(1) The President may at any time summon a meeting of the House of Representatives. Summoning meetings of the House of Representatives.

(2) Subject to the provisions of subsection (1) of this section and of sections 38 and 39 of this Constitution, the sittings of the House of Representatives in any session of Parliament after the commencement of that session shall be held at such times and on such days as the House shall appoint.

87. Subject to the provisions of subsection (6) of section 85 of this Constitution, a general election of members of the House of Representatives shall be held at such time within three months after any dissolution of Parliament as the President may appoint. General Elections.

CHAPTER VII

THE JUDICATURE

Part I

THE COURT OF APPEAL AND THE SUPREME COURT

88.—(1) There shall be a Court of Appeal which shall have such jurisdiction and powers as may be conferred on it by this Constitution or any other law. Establishment of Court of Appeal.

(2) The judges of the Court of Appeal shall be—

- (a) the President of the Court;
- (b) such number, if any, of other judges (hereinafter referred to as "Justices of Appeal" which expression shall where the context allows include the President of the Court) as may be prescribed by Parliament:

Provided that the office of a judge of the Court of Appeal shall not be abolished while there is a substantive holder thereof; and

- (c) the Chief Justice and other judges of the Supreme Court ex-officio.

(3) The Court of Appeal shall be a superior court of record and save as otherwise provided by Parliament, shall have all the powers of such a court.

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(4) When the Court of Appeal is determining any matter, other than an interlocutory matter, it shall be composed of an uneven number of judges, not being less than three.

Establishment of Supreme Court.

89.—(1) There shall be a Supreme Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.

(2) The judges of the Supreme Court shall be the Chief Justice and such number, if any, of other judges (hereinafter referred to as "the puisne judges") as may be prescribed by Parliament.

Provided that the office of a puisne judge shall not be abolished while there is a substantive holder thereof.

(3) The Supreme Court shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court.

(4) The Supreme Court shall sit in such places as the Chief Justice may appoint.

Appointment of Judges of the Court of Appeal and Supreme Court.

90.—(1) The President of the Court of Appeal and the Chief Justice shall be appointed by the President.

(2) The Justices of Appeal and the puisne judges shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission.

(3)(a) A person shall not be qualified to be appointed as a Justice of Appeal or as a judge of the Supreme Court unless—

(i) he holds or has held office as a judge of a court having unlimited jurisdiction, in civil and criminal matters in some part of the Commonwealth or in any country outside the Commonwealth that may be prescribed by Parliament or a court having jurisdiction in appeals from such a court;

(ii) he holds one of the specified qualifications and has held one or other of those qualifications for a total period of not less than seven years.

(b) In this subsection "the specified qualifications" means the professional qualifications specified under the Courts Act (a) (or by or under any law amending or replacing that Act) one of which must be held by any person before he may apply under that Act (or under any such law) to be admitted to practise as a barrister or a solicitor in The Gambia.

(a) Laws of The Gambia, 1966 Revised Edition Cap. 36.

(4) If the office of President of the Court of Appeal is vacant or the President of the Court of Appeal is for any reason unable to exercise the functions of his office, then, until a person has been appointed to and has assumed the functions of that office or until the person holding that office has resumed those functions, as the case may be, they shall be exercised by such one of the other judges of the Court as may for the time being be designated in that behalf by the President.

(5) If the office of Chief Justice is vacant or the Chief Justice is for any reason unable to exercise the functions of his office, then, until a person has been appointed to and has assumed the functions of that office or until the person holding that office has resumed those functions, as the case may be, they shall be exercised by such one of the Justices of Appeal or the puisne judges or such other person qualified to be appointed as a judge of the Supreme Court as the President may appoint:

Provided that—

(a) a person may be appointed under subsections (4) or (5) of this section notwithstanding that he has attained the age prescribed for the purposes of section 91(1) of this Constitution; and

(b) a person appointed under subsections (4) or (5) of this section may, notwithstanding the assumption or resumption of the functions of the office of the President of the Court of Appeal or the office of Chief Justice as the case may be, by the holder of that office continue to act as President of the Court of Appeal or Chief Justice, as the case may be, for so long thereafter and to such extent as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him previously thereto.

(6) If the office of any Justice of Appeal is vacant or if any Justice of Appeal is appointed to act as President of the Court of Appeal or is for any reason unable to perform the functions of his office or if the President of the Court of Appeal advises that the state of business of the Court of Appeal so requires, the President, acting in accordance with the advice of the Judicial Service Commission, may appoint a person qualified for appointment as a Justice of Appeal to act as a Justice of Appeal.

(7) If the office of any puisne judge is vacant or if any such judge is appointed to act as Chief Justice or is for any reason unable to perform the functions of his office or if the Chief Justice advises the President that the state of business in the Supreme Court so requires, the President, acting in accordance with the advice of the Judicial Service Commission, may appoint a person who is qualified to be appointed as a judge of the Supreme Court to act as a puisne judge of that court:

Provided that a person may act as a Justice of Appeal or as a puisne judge under subsections (6) or (7) of this section, notwithstanding that he has attained the age prescribed for the purposes of section 91(1) of this Constitution.

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(8) Any person appointed under subsections (6) or (7) of this section to act as a Justice of Appeal or as a puisne judge, as the case may be, shall subject to the provisions of section 91(4) of this Constitution, continue to act for the period of his appointment or, if no such period is specified until his appointment is revoked by the President, acting in accordance with the advice of the Judicial Service Commission:

Provided that, notwithstanding the expiration of the period of his appointment or the revocation of his appointment, he may thereafter continue to act as a Justice of Appeal or as a puisne judge as the case may be, for so long as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him previously thereto.

Tenure of
office of
Judges of the
Court of
Appeal and
Supreme
Court.

91.—(1) Subject to the provisions of this section, a person holding the office of a Justice of Appeal or the office of a judge of the Supreme Court shall vacate that office when he attains the prescribed age.

(2) Notwithstanding that he has attained the age prescribed for the purposes of subsection (1) of this section, a person holding the office of a Justice of Appeal or the office of a judge of the Supreme Court may continue in office for so long after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age.

(3) A person holding the office of Justice of Appeal or judge of the Supreme Court may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

(4)(a) A Justice of Appeal or a judge of the Supreme Court may be removed from his office if notice in writing is given to the Speaker, signed by not less than one-third of all the voting members of the House of Representatives, of a motion alleging that a Justice of Appeal or a judge of the Supreme Court, as the case may be, is unable to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) and proposing that the matter should be investigated under this subsection.

(b) Where a motion under subsection (4)(a) of this section is proposed for consideration by the House of Representatives, the House shall not debate the motion but the person presiding in the House shall forthwith cause a vote to be taken on the motion, and, if the motion is supported by the votes of not less than two-thirds of all the voting members of the House, shall declare the motion to be passed.

(c) If a motion is declared to be passed under subsection (4)(b) of this section—

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- (i) the House shall, by resolution, appoint a tribunal which shall consist of a Chairman and not less than two other members, one of whom shall hold or shall have held high judicial office;
- (ii) the tribunal shall investigate the matter and shall report to the Speaker of the House of Representatives on the facts thereof;
- (iii) the Justice of Appeal or judge of the Supreme Court whose inability to exercise the functions of his office is under enquiry in accordance with the provisions of this subsection, shall have the right to appear and to be represented before the tribunal during the investigation by the tribunal of the facts of the case;
- (iv) the House shall consider the report of the tribunal at the first convenient sitting of the House after the report is received and may, on a motion supported by the votes of not less than two-thirds of all the voting members of the House, resolve that the aforesaid Justice of Appeal or judge of the Supreme Court be removed from office and, if the House so resolves, he shall thereupon cease to hold office.
- (d) if the question of removing a Justice of Appeal or judge of the Supreme Court from office has been referred to a tribunal under this subsection, the House of Representatives may, by resolution, suspend that judge from performing the functions of his office and any such suspension may at any time be revoked by the House by resolution and shall, in any case, cease to have effect if, upon consideration of the report of the tribunal in accordance with the provisions of this subsection, the House does not remove the Justice of Appeal or judge of the Supreme Court, as the case may be, from office.
- (5) The prescribed age for the purposes of subsection (1) of this section is the age of sixty-five years in the case of a Justice of Appeal and sixty-two years in the case of a judge of the Supreme Court, or such other age as may be prescribed by Parliament:

Provided that an Act of Parliament, to the extent to which it alters the prescribed age after the appointment of a person to be a Justice of Appeal or a judge of the Supreme Court, shall not have effect in relation to that person unless he consents that it should have effect.

92. A Justice of Appeal or judge of the Supreme Court shall not enter upon the duties of his office until he has taken and subscribed the oath of allegiance and the oath for the due execution of his office that is set out in the Second Schedule to this Constitution.

Oaths to be taken by judges of the Court of Appeal and Supreme Court.

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Reference to
Supreme
Court in
cases involv-
ing interpre-
tation of
Constitution.

93.—(1) Where any question as to the interpretation of this Constitution arises in any proceedings in any subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court.

(2) Where any question is referred to the Supreme Court in pursuance of this section, the Supreme Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal under section 98 of this Constitution to the Court of Appeal or the Judicial Committee, in accordance with the decision of the Court of Appeal or, as the case may be, the Judicial Committee.

Part II

SUBORDINATE COURTS AND COURTS-MARTIAL

Establish-
ment of
other Courts.

94.—(1) Parliament may establish courts subordinate to the Supreme Court and courts-martial, and any such court shall, subject to the provisions of this Constitution, have such jurisdiction and powers as may be conferred on it by any law.

(2) The Supreme Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court-martial and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court.

(3) The Rules Committee established under the Courts Act (a) may make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred on it by subsection (2) of this section.

Part III

APPEALS

Appeals on
Constitutional ques-
tions and
questions
relating to
fundamental
rights.

95.—(1) Subject to the provisions of section 70(6) of this Constitution, an appeal shall lie as of right to the Court of Appeal from decisions of the Supreme Court in the following cases, that is to say:—

- (a) final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution; and
- (b) final decisions given in exercise of the jurisdiction conferred on the Supreme Court by section 28 of this Constitution (which relates to the enforcement of fundamental rights and freedoms);

and an appeal shall lie as of right direct to the Judicial Committee from any decision of the Court of Appeal in any such case.

(a) Laws of The Gambia, 1966 Revised Edition Cap. 36.

(2) In this section—

- (a) references to final decisions of the Supreme Court shall be construed as including references to decisions given in pursuance of section 28(4) or section 93(2) of this Constitution; and
- (b) references to decisions of the Court of Appeal in any cases specified in subsection (1) of this section shall be construed as including references to decision given by that court on appeal from decision of the Supreme Court in any such cases.

96.—(1) Subject to the provision of section 70(6) of this Constitution, an appeal shall lie as of right to the Court of Appeal from any decision given by the Supreme Court in the following cases, that is to say:—

Other Appeals from Supreme Court and Appeal.

- (a) final decisions in any civil proceedings where the matter in dispute on the appeal is above the value of £50, or where the appeal involves directly or indirectly, a claim to or question respecting property or a right above the value of £50;
- (b) final decisions in proceedings for dissolution or nullity of marriage; and
- (c) such other cases as may be prescribed by Parliament.

(2) Subject to the provisions of section 70(6) of this Constitution, an appeal shall lie as of right to the Judicial Committee from any decision given by the Court of Appeal in the following cases, that is to say:—

- (a) final decisions in any civil proceedings where the matter in dispute on the appeal is of the value of £500 or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £500 or upwards;
- (b) decisions in proceedings for dissolution or nullity of marriage; and
- (c) such other cases as may be prescribed by Parliament.

(3) Subject to the provisions of section 70(6) of this Constitution, an appeal shall lie, with the leave of the court that gave the decision, from the Supreme Court to the Court of Appeal and from the Court of Appeal to the Judicial Committee in the following cases, that is to say:—

- (a) decisions in any civil proceedings where, in the opinion of the court that gave the decision, the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Court of Appeal or to the Judicial Committee, as the case may be; and
- (b) such other cases as may be prescribed by Parliament.

(4) An appeal shall lie to the Judicial Committee with the special leave of the Committee from any decision given by the Court of Appeal in any civil or criminal matter.

Appeals
from sub-
ordinate
courts and
courts-
martial.

97.—(1) Subject to the provisions of subsection (2) of this section, an appeal shall lie as of right to the Supreme Court from final decisions given by any subordinate court or a court-martial in any civil or criminal proceedings on questions as to the interpretation of this Constitution (not being questions that have been referred to the Supreme Court in pursuance of section 93(1) of this Constitution or as to the contravention of any of the provisions of sections 13—27 (inclusive) of this Constitution (not being questions that have been referred to the Supreme Court in pursuance of section 28(3) of this Constitution).

(2) An appeal from a decision given by a subordinate court or a court-martial in any of the cases referred to in subsection (1) of this section—

- (a) shall not lie direct to the Court of Appeal; and
- (b) shall not lie direct to the Supreme Court if, under any law—
 - (i) an appeal lies as of right from that decision to another subordinate court or court-martial; or
 - (ii) an appeal lies from that decision to another subordinate court or court-martial with the leave of the court that gave the decision or of some other court and that leave has not been withheld.

(3) An appeal shall lie as of right to the Supreme Court from final decisions given by any subordinate court in any case in which, if the decision of the subordinate court were a decision of the Supreme Court, an appeal would lie as of right to the Court of Appeal under section 96 of this Constitution:

Provided that—

- (a) an appeal shall not lie to the Supreme Court from a decision given by a subordinate court in any such case if, under any law—
 - (i) an appeal lies as of right from that decision to the Court of Appeal; or
 - (ii) an appeal lies from that decision to the Court of Appeal with the leave of the court that gave the decision or of some other court and that leave has not been withheld; and
- (b) an appeal shall not lie direct to the Court of Appeal or direct to the Supreme Court from a decision given by a subordinate court in any such case if, under any law—

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(i) an appeal lies as of right from that decision to another subordinate court; or

(ii) an appeal lies from that decision to another subordinate court with the leave of the court that gave the decision or of some other court and that leave has not been withheld.

(4) An appeal shall lie from a subordinate court or a court-martial to—

(a) the Supreme Court; or

(b) the Court of Appeal

in such cases (other than the cases referred to in subsection (1) or subsection (3) of this section) as may be prescribed by any law.

98.—(1) The provisions of the Judicial Committee Act, 1833(a) and any rules made thereunder from time to time shall, in so far as they relate to the powers of the Committee and the procedure to be adopted with respect to proceedings before the Committee apply in relation to proceedings before the Committee under this Chapter and for that purpose shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary by reason of the nature of those proceedings otherwise to bring them into conformity with the provisions of this Constitution. Supplementary.

(2) Subject to the provisions of this Chapter, provision may be made by or under an Act of Parliament regulating the procedure to be adopted by the Court of Appeal with respect to any appeal to the Judicial Committee under this Chapter or by the parties to any such appeal.

(3) Any decision given by the Judicial Committee in any appeal under this Chapter shall be enforced in like manner as if it were a decision of the Court of Appeal.

(4) The Judicial Committee shall, in relation to any appeal to it under this Chapter in any case, have all the jurisdiction and powers possessed in relation to that case by the Court of Appeal.

Part IV**JUDICIAL SERVICE COMMISSION**

99.—(1) There shall be a Judicial Service Commission which shall consist of— Judicial
Service
Commission.

(a) The Chief Justice, as Chairman;

(b) the Chairman of the Public Service Commission; and

(c) a member who shall be styled "the appointed member" and who shall be appointed by the President, acting in consultation with the Chief Justice.

(a) 3 and 4 Will 4, c. 41.

(2) A person shall not be qualified to be the appointed member of the Commission if—

- (a) he is a member of the House of Representatives;
- (b) he is, or has at any time during the two years immediately preceding his appointment been, nominated as a candidate for election as a member of the House of Representatives established for The Gambia by order of Her Majesty in Council before the coming into operation of this Constitution;
- (c) he is, or has at any time during the said two years been, the holder of an office in any organisation that sponsors or otherwise supports, or that has at any time sponsored or otherwise supported, a candidate for elections as a member of the House of Representatives established as aforesaid or of any local government authority; or
- (d) he is a public officer.

(3) Subject to the provisions of this section, the office of the appointed member of the Commission shall become vacant—

- (a) at the expiration of two years from the date of his appointment; or
- (b) if any circumstances arise that, if he were not the appointed member of the Commission, would cause him to be disqualified to be appointed as such under subsection (2) of this section.

(4) The appointed member of the Commission may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

(5) The appointed member of the Commission shall be removed from office by the President if the question of his removal from office has been referred to a tribunal appointed under subsection (7) of this section and the tribunal has recommended to the President that he ought to be removed from office for inability as aforesaid or for misbehaviour.

(6) If the Chief Justice represents to the President that the question of removing the appointed member of the Commission under this section ought to be investigated, then—

- (a) the President shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected by the Chief Justice, one of whom shall hold or shall have held high judicial office; and
- (b) the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to him whether the appointed member ought to be removed under this section.

(7) If the question of removing the appointed member of the Commission has been referred to a tribunal under this section, the President, acting in accordance with the advice of the Chief Justice, may suspend that member from the exercise of the functions of his office and any such suspension may at any time be revoked by the President, acting in accordance with such advice as aforesaid, and shall in any case cease to have effect if the tribunal recommends to the President that that member should not be removed.

(8) If the office of the appointed member of the Commission is vacant or if the person holding that office is for any reason unable to exercise the functions of his office, the President, acting in accordance with the advice of the Chief Justice, may appoint a person who is qualified to be the appointed member to act as that member, and any person so appointed shall, subject to the provisions of subsection (3) of this section, continue to act until the office in which he is acting is filled or, as the case may be, until the holder thereof resumes his functions or until his appointment to act is revoked by the President, acting in accordance with the advice of the Chief Justice.

(9) The appointed member of the Commission shall not enter upon the duties of his office until he has taken and subscribed the oath of allegiance and the oath for the due execution of his office that is set out in the Second Schedule to this Constitution.

(10) In the exercise of its functions under this Constitution, the Commission shall not be subject to the direction or control of any other person or authority.

(11) The Commission may by regulation or otherwise regulate its own procedure and, with the consent of the President, may confer powers or impose duties on any public officer or on any authority of the Government of The Gambia for the purpose of the exercise of its functions.

(12) The Commission may, subject to its rules of procedure, act notwithstanding any vacancy in its membership or the absence of any member and its proceedings shall not be invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings:

Provided that any decision of the Commission shall require the concurrence of a majority of all its members.

100.—(1) The power to appoint persons to hold or act in any offices to which this section applies (including the power to confirm appointments) the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Judicial Service Commission. Appoint-
ment etc. of
Judicial offi-
cers.

(2) The Judicial Service Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate any of its powers under subsection (1) of this section to any one or more of its members or to any judge of the Supreme Court or to any person holding or acting in an office to which this section applies.

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(3) The offices to which this section applies are—

- (a) the office of Registrar or Assistant Registrar of the Supreme Court;
- (b) the office of Magistrate;
- (c) subject to the provisions of subsection (4) of this section, the office of member of any subordinate court (other than the court of any magistrate who is authorised, by or under the law, to hold such a court by virtue of his holding or acting in any other public office and other than a court administering customary law and which has jurisdiction only in the Provinces); or
- (d) subject as aforesaid, such other offices of member of any court or connected with any other court as may be prescribed by Parliament.

(4) Where provision is made by or under any law for the appointment of assessors to assist or take part in the decision of the court in any case, the power to appoint persons to be such assessors, the power to exercise disciplinary control over persons so appointed and the power to remove such persons from office shall vest in the judges presiding over the court in that case.

CHAPTER VIII

FINANCE

Restriction
on taxation.

101.—(1) No taxation shall be imposed otherwise than by or under the authority of an Act of Parliament or by or under the authority of a provision upon which Parliament has conferred the force of law.

(2) Parliament may confer on any authority established by law for the purposes of local government power to impose taxation within the area for which that authority is established and to alter taxation so imposed.

Consolida-
ted Revenue
Fund.

102. All revenues or other moneys raised or received by The Gambia (not being revenues or other moneys that are payable, by or under an Act of Parliament, or by or under any other law, into some other fund established for any specific purpose or that may, by or under such an Act or by or under any other law; be retained by the authority that receives them for the purpose of defraying the expenses of that authority) shall be paid into and from a Consolidated Revenue Fund.

Withdrawals
from Con-
solidated
Revenue
Fund or
other public
funds.

103.—(1) No moneys shall be withdrawn from the Consolidated Revenue Fund except—

- (a) to meet expenditure that is charged upon the fund by this Constitution or by any Act of Parliament or by or under any other law; or
- (b) where the issue of those moneys has been authorised by an Appropriation Act or by an Act made in pursuance of section 105 of this Constitution.

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(2) Where any moneys are charged by this Constitution or by any Act of Parliament or by or under any other law, upon the Consolidated Revenue Fund or any other Public fund, they shall be paid out of that fund by the Government of The Gambia to the person or authority to whom payment is due.

(3) No moneys shall be withdrawn from any public fund other than the Consolidated Revenue Fund unless the issue of those moneys has been authorised by or under any law.

(4) Parliament may prescribe the manner in which withdrawals may be made from the Consolidated Revenue Fund or any other public fund.

104.—(1) The Minister for the time being responsible for finance shall cause to be prepared and laid before the House of Representatives in each financial year estimates of the revenues and expenditure of The Gambia for the next following financial year.

Authorisation of expenditure from Consolidated Revenue Fund by appropriation.

(2) When the estimates of expenditure (other than expenditure charged upon the Consolidated Revenue Fund by this Constitution or by any Act of Parliament) have been approved by the House of Representatives, a bill, to be known as an Appropriation bill, shall be introduced in the House, providing for the issue from the Consolidated Revenue Fund of the sums necessary to meet that expenditure and the appropriation of those sums, under separate votes, for the several services required, to the purposes specified therein.

(3) If in respect of any financial year it is found—

(a) that the amount appropriated by the Appropriation Act to any purpose is insufficient or that a need has arisen for expenditure for a purpose to which no amount has been appropriated by that Act; or

(b) that any moneys have been expended for any purpose in excess of the amount appropriated to that purpose by the Appropriation Act or for a purpose to which no amount has been appropriated by that Act,

a supplementary estimate or, as the case may be, a statement of excess showing the sums required or spent shall be laid before the House of Representatives and a supplementary Appropriation bill shall be introduced in the House, providing for the issue of such sums from the Consolidated Revenue Fund and appropriating them to the purposes specified therein.

105. Parliament may make provision under which, if the Appropriation Act in respect of any financial year has not come into operation by the beginning of that financial year, the Minister responsible for finance may authorize the withdrawal of moneys from the Consolidated Revenue Fund for the purpose of meeting expenditure necessary to carry on the services of the Government until the expiration of four months from the beginning of that financial year or the coming into operation of that Act, whichever is the earlier.

Authorisation of expenditure in advance of appropriation.

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cies Fund.

106.—(1) Parliament may make provisions for the establishment of a Contingencies Fund and for authorising the Minister for the time being responsible for finance, if satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exists, to make advances from that fund to meet that need.

(2) Where any advance is made from the Contingencies Fund, a supplementary estimate shall be presented and a supplementary Appropriation bill shall be introduced as soon as possible for the purpose of replacing the amount so advanced.

Remunera-
tion for cer-
tain officers.

107.—(1) There shall be paid to the holders of the offices to which this section applies such salary and such allowances as may be prescribed by Parliament.

(2) Any salaries and any allowances prescribed in pursuance of this section in respect of the holders of the offices to which this section applies shall be a charge on the Consolidated Revenue Fund.

(3) The salary prescribed in pursuance of this section in respect of the holder of any office to which this section applies and his other terms of service (other than allowances that are not taken into account in computing, under any law in that behalf, any pension payable in respect of his service in that office) shall not be altered to his disadvantage after his appointment.

(4) Where a person's salary or other terms of service depend upon his option, the salary or terms for which he opts shall, for the purposes of subsection (3) of this section, be deemed to be more advantageous to him than any others for which he might have opted.

(5) This section applies to the offices of a Justice of Appeal, a judge of the Supreme Court, a member of the Constituency Boundaries Commission, a member of the Public Service Commission and the Director of Audit.

(6) In relation to a person who, not being a public officer, is for the time being designated under section 64(2) of this Constitution to exercise the functions of the office of Supervisor of Elections, this section shall also apply to that office and shall so apply as if that person were the holder of that office.

(7) Nothing in this section shall be construed as prejudicing the provisions of section 116 of this Constitution (which protects pension rights in respect of service as a public officer).

Public debt.

108.—(1) All debt charges for which The Gambia is liable shall be charge on the Consolidated Revenue Fund.

(2) For the purposes of this section debt charges include interest, sinking fund charges, the repayment or amortisation of debt and all expenditure in connection with the raising of loans on the security of the Consolidated Revenue Fund and the Service and redemption of debt created thereby.

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109.—(1) There shall be a Director of Audit whose office shall be a public office. Director of Audit.

(2) It shall be the duty of the Director of Audit—

(a) to satisfy himself that the provisions of this chapter of this Constitution are being complied with;

(b) to satisfy himself that all moneys that have been appropriated by Parliament and expended have been applied to the purposes to which they were so appropriated and that the expenditure conforms to the authority that governs it; and

(c) at least once in every year to audit and report on the public accounts of The Gambia, the accounts of all officers and authorities of the Government of The Gambia, the accounts of all the courts in The Gambia (other than courts no part of the expenses of which are defrayed directly out of moneys provided by Parliament), the accounts of every Commission established by this Constitution and the accounts of the Clerk to the House of Representatives.

(3) The Director of Audit and any officer authorised by him shall have access to all books, records, returns, reports and other documents and shall have authority to make such enquiry which in his opinion relate to any of the accounts referred to in subsection (2) of this section.

(4) The Director of Audit shall submit every report made by him in pursuance of subsection (2) of this section to the Minister for the time being responsible for finance who shall, not later than seven days after the House of Representatives first meets after he has received the report, lay it before the House: and if the Minister for the time being responsible for finance shall make default in laying the report before the House, the Director of Audit shall submit the report to the Speaker of the House (or if the office of Speaker is vacant, or if the Speaker is for any reason unable to perform the functions of his office, to the Deputy Speaker) who shall cause it to be laid before the House

(5) The Director of Audit shall exercise such other functions in relation to the accounts of the Government of The Gambia or the accounts of other authorities or bodies established by law for public purposes as may be prescribed by or under an Act of Parliament.

(6) In the exercise of his functions under subsections (2), (3) and (4) of this section, the Director of Audit shall not be subject to the direction or control of any other person or authority.

CHAPTER IX**THE PUBLIC SERVICE**

110.—(1) There shall be a Public Service Commission which shall consist of a Chairman and a Vice-Chairman and not less than two nor more than four other members, who shall be appointed by the President. Public Service Commission.

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(2) A person shall not be qualified to be appointed as a member of the Commission if—

(a) he is a member of the House of Representatives;

(b) he is, or has at any time during the two years immediately preceding his appointment been, nominated as a candidate for election as a member of the House of Representatives or of any such House of Representatives established for The Gambia by Order of Her Majesty in Council before the coming into operation of this Constitution;

(c) he is, or has at any time during the said two years been, the holder of an office in any organisation that sponsors or otherwise supports, or that has at any time sponsored or otherwise supported, a candidate for election as a member of the House of Representatives or of any such House of Representatives established as aforesaid or of any local government authority; or

(d) he is a public officer.

(3) A member of the Commission shall not, except with the leave of the President, within the period of two years commencing with the day on which he last held or acted in the office of member of the Commission, be eligible for appointment to or to act in any public office other than an office to which section 113 of this Constitution applies.

(4) Subject to the provisions of this section, the office of a member of the Commission shall become vacant—

(a) at the expiration of two years from the date of his appointment; or

(b) if any circumstances arise that, if he were not a member of the Commission, would cause him to be disqualified to be appointed as such under subsection (2) of this section.

(5) A member of the Commission may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

(6) A member of the Commission shall be removed from office by the President if the question of his removal from office has been referred to a tribunal appointed under subsection (7) of this section and the tribunal has recommended to the President that the member ought to be removed from office for inability as aforesaid or for misbehaviour.

(7) If the President considers that the question of removing a member of the Commission under this section ought to be investigated, then—

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Appoint-
ment etc. of
public
officers.

111.—(1) Subject to the provisions of this Constitution, the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from offices shall vest in the Public Service Commission.

(2) The Public Service Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate any of its powers under subsection (1) of this section to any one or more members of the Commission or, with the consent of the President, to any public officer.

(3) The provisions of this section shall not apply in relation to the following offices, that is to say:—

- (a) the office of Justice of Appeal or Judge of the Supreme Court;
- (b) the office of Director of Audit;
- (c) any office to which section 100 of this Constitution (which relates to the offices within the jurisdiction of the Judicial Service Commission) applies;
- (d) any office to which section 114 of this Constitution (which relates to the offices of the principal representatives of The Gambia abroad) applies;
- (e) the office of Permanent Secretary or Secretary to the Cabinet or Establishment Secretary; or
- (f) subject to the provisions of section 115 of this Constitution any office in the Police Force.

(4) No person shall be appointed under this section to or to act in any office on the President's personal staff except with the concurrence of the President.

(5) Before any of the powers conferred by this section in relation to the Clerk of the House of Representatives or a member of his staff are exercised by the Public Service Commission or any other person or authority, the Commission or that person or authority shall consult with the Speaker of the House.

(6) Before the Public Service Commission or any other person or authority exercises its powers under this section to appoint to or to act in any public office any person who holds or is acting in any office the power to make appointments to which is vested by this Constitution in the Judicial Service Commission, the Public Service Commission or that person or authority shall consult with the Judicial Service Commission.

(7) A public officer shall not be removed from office, or subjected to any other punishment under this section on the grounds of any act done or omitted by him in the exercise of a judicial function conferred on him unless the Judicial Service Commission concurs therein.

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- (a) the President shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected by the Chief Justice, one of whom shall hold or shall have held high judicial office; and
- (b) the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to him whether the member ought to be removed under this section.
- (8) If the question of removing a member of the Commission has been referred to a tribunal under this section, the President may suspend that member from the exercise of the functions of his office and any such suspension may at any time be revoked by the President, and shall in any case cease to have effect if the tribunal recommends to the President that that member should not be removed.
- (9) If the office of Chairman of the Commission is vacant or if the person holding that office is for any reason unable to exercise the functions of his office, then, until a person has been appointed to and has assumed the functions of that office, or until the person holding that office has resumed those functions, as the case may be, they shall be exercised by the Vice-Chairman or in his absence by such one of the other members of the Commission as may for the time being be designated in that behalf by the President.
- (10) If at any time there are less than two members of the Commission besides the Chairman or if any such member is acting as Chairman or is for any reason unable to exercise the functions of his office, the President may appoint a person who is qualified to be appointed as a member of the Commission to act as a member, and any person so appointed shall, subject to the provisions of subsection (4) of this section, continue to act until the office in which he is acting has been filled or, as the case may be, until the holder thereof has resumed his functions or until his appointment to act has been revoked by the President.
- (11) A member of the Commission shall not enter upon the duties of his office until he has taken and subscribed the oath of allegiance and the oath for the due execution of his office that is set out in the Second Schedule to this Constitution.
- (12) Subject to the provisions of section 123(5) of this Constitution, the Commission shall, in the exercise of its functions under this Constitution, not be subject to the direction or control of any other person or authority.
- (13) The Commission may by regulation or otherwise regulate its own procedure and, with the consent of the President, may confer powers or impose duties on any public officer or on any authority of the Government of The Gambia for the purpose of the exercise of its functions.
- (14) The Commission may, subject to its rules of procedure, act notwithstanding any vacancy in its membership or the absence of any member and its proceedings shall not be invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings:
- Provided that any decision of the Commission shall require the concurrence of a majority of all its members.

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112.—(1) The Director of Audit shall be appointed by the President, Director of acting in accordance with the advice of the Public Service Commission. Audit.

(2) If the office of Director of Audit is vacant or if the Director of Audit is for any reason unable to exercise the functions of his office, the President, acting in accordance with the advice of the Public Service Commission may appoint a person to act as Director of Audit, and any person so appointed shall, subject to the provisions of subsections (3), (5) and (7) of this section, continue to act until a person has been appointed to the office of Director of Audit and has assumed the functions of that office, or, as the case may be, until the person in whose place he is acting has resumed those functions.

(3) Subject to the provisions of subsection (5) of this section, the Director of Audit shall vacate his office when he attains the prescribed age.

(4) A person holding the office of Director of Audit may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be removed except in accordance with the provisions of this section.

(5) The Director of Audit may be removed from office if the House of Representatives resolves that this matter should be investigated under this section, in which circumstance—

- (a) the House shall, by resolution, appoint a tribunal which shall consist of a Chairman and not less than two other members, one of whom shall hold or shall have held high judicial office;
- (b) the tribunal shall enquire into the matter and report on the facts thereof to the House; and
- (c) the House shall consider the report of the tribunal at the first convenient sitting of the House after the report is received and may, upon such consideration, by resolution remove the Director of Audit from office.

(6) If the question of removing a person holding the office of Director of Audit from office has been referred to a tribunal under this section, the House of Representatives may, by resolution, suspend that person from performing the functions of his office, and any such suspension may at any time be revoked by the House by resolution and shall in any case cease to have effect if, upon consideration of the report of the tribunal in accordance with the provisions of this section, the House does not remove the Director of Audit from office.

(7) The prescribed age for the purposes of subsection (3) of this section is the age of fifty-five years or such other age as may be prescribed by Parliament:

Provided that an Act of Parliament, to the extent to which it alters the prescribed age after a person has been appointed to be or to act as Director of Audit, shall not have effect in relation to that person unless he consents that it should have effect.

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Principal representatives of The Gambia abroad.

113.—(1) The power to appoint persons to hold or act in offices to which this section applies and to exercise disciplinary control over or to remove from office persons holding or acting in such offices shall vest in the President.

(2) The offices to which this section applies are the offices of Ambassador, High Commissioner or other principal representatives of The Gambia in any other country or accredited to any international organisation.

Permanent Secretaries, Secretary to the Cabinet and Establishment Secretary.

114.—(1) The power to appoint a person to hold or to act in the office of Permanent Secretary or Secretary to the Cabinet or Establishment Secretary and to remove from office a person holding or acting in any such office shall vest in the President acting after consultation with the Public Service Commission.

(2) In this section and in section 111(3)(e) of this Constitution "the Establishment Secretary" means the public officer who is for the time being in charge of staff and establishment matters in respect of the public service.

Police Force.

115.—(1) The power to appoint a person to hold or act in the office of Commissioner of Police and the power to remove the Commissioner of Police from office shall vest in the President acting after consultation with the Public Service Commission.

(2) The power to appoint persons to hold or act in offices in the Police Force below the rank of Commissioner of Police but above the rank of Chief Inspector (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Public Service Commission.

(3) The Public Service Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate any of its powers under subsection (2) of this section to any one or more of its members or, with the consent of the President, to the Commissioner of Police or to any other member of the Police Force.

(4) The power to appoint persons to hold or act in offices in the Police Force of or below the rank of Chief Inspector (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Commissioner of Police.

(5) The Commissioner of Police may, by directions given in such manner as he thinks fit and subject to such conditions as he thinks fit, delegate any of his powers under subsection (4) of this section to any other member of the Police Force.

(6) Parliament may provide that where the power to exercise disciplinary control over any member of the Police Force (including the power to remove him from office) has been exercised under subsection (4) or subsection (5) of this section by any member of the Police Force (hereinafter referred to as "the disciplinary authority"), the member of the Police Force in respect of whom it was so exercised may appeal from the decisions of the disciplinary authority to the Public Service Commission:

Provided that Parliament or (in the case of the exercise of a power under subsection (5) of this section) the Commissioner of Police may require appeals to be made to a member of the Police Force of higher rank than the disciplinary authority before they are made to the Public Service Commission.

(7) In this section "Commissioner of Police" means the officer, by whatever name called, commanding the Police Force.

(8) If provision is made by or under any law—

- (a) altering the ranks into which The Gambia Police Force established by the Police Act (a) is divided; or
- (b) establishing a police force other than The Gambia Police Force or altering the ranks into which any such other police force is divided,

the Public Service Commission may, by order published in the Official Gazette, specify some rank (other than the rank of Chief Inspector) in The Gambia Police Force or, as the case may be, in that other police force as being equivalent to the rank of Chief Inspector as it exists in The Gambia Police Force under the law in force immediately before the coming into operation of this Constitution and the references in subsections (2) and (4) of this section to the rank of Chief Inspector shall then be construed as if they were, in relation to The Gambia Police Force or, as the case may be, in relation to that other police force, references to the rank for the time being so specified.

116.—(1) The law to be applied with respect to any pensions benefits that were granted to any person before 18th February 1965 shall be the law that was in force at the date on which those benefits were granted or any law in force at a later date that is not less favourable to that person.

Pensions
Laws and
Protection of
pensions
rights.

(2) The law to be applied with respect to any pensions benefits (not being benefits to which subsection (1) of this section applies) shall—

- (a) in so far as those benefits are wholly in respect of a period of service as a public officer that commenced before 18th February 1965 be the law that was in force on 17th February 1965; and
- (b) in so far as those benefits are wholly or partly in respect of a period of service as a public officer that commenced after 17th February 1965, be the law in force on the date on which that period of service commenced, or any law in force at a later date that is not less favourable to that person.

(a) Laws of The Gambia, 1966 Revised Edition Cap. 144.

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(3) Where a person is entitled to exercise an option as to which of two or more laws shall apply in his case, the law for which he opts shall, for the purposes of this section, be deemed to be more favourable to him than the other law or laws.

(4) All pensions benefits shall (except to the extent to which, in the case of benefits under the Widows' and Orphans' Pensions Act (a) or under any law amending or replacing that Act or under any other law providing for the funding of pensions benefits, they are a charge on a fund established by that Act or by any such law and have been duly paid out of that fund to the person or authority to whom payment is due) be a charge on the Consolidated Revenue Fund.

(5) All sums that, under the Widows' and Orphans' Pensions Act or under any law amending or replacing that Act, or under any other law providing for the funding of pensions benefits, are to be paid by the Government of The Gambia into any fund established by that Act or by any such law or are otherwise to be paid by the Government of The Gambia for the purposes of that Act or any such law shall be a charge on the Consolidated Revenue Fund.

(6) In this section "pensions benefits" means any pensions, compensation, gratuities or other like allowances for persons in respect of their service as public officers or for the widows, children, dependants or personal representatives of such persons in respect of such service.

(7) Reference in this section to the law with respect to pensions benefits include (without prejudice to their generality) references to the law regulating the circumstances in which such benefits may be granted or in which the grant of such benefits may be refused, the law regulating the circumstances in which any such benefits that have been granted may be withheld, reduced in amount or suspended and the law regulating the amount of any such benefits.

Power to
Withhold
pensions, etc.

117.—(1) Where under any law any person or authority has a discretion—

- (a) to decide whether or not any pensions benefits shall be granted; or
- (b) to withhold, reduce in amount or suspend any such benefits that have been granted,

those benefits shall be granted and may not be withheld, reduced in amount or suspended unless the Public Service Commission concurs in the refusal to grant the benefits or, as the case may be, in the decision to withhold them, reduce them in amount or suspend them.

(2) Where the amount of any pensions benefits that may be granted to any person is not fixed by law, the amount of the benefits to be granted to him shall be the greatest amount for which he is eligible unless the Public Service Commission concurs, in his being granted benefits of a smaller amount.

(a) Laws of The Gambia, 1966 Revised Edition Cap. 193.

(3) The Public Service Commission shall not concur under subsection (1) or subsection (2) of this section in any action taken on the ground that any person who holds or has held the office of Justice of Appeal, judge of the Supreme Court, or Director of Audit has been guilty of misbehaviour in that office unless he has been removed from that office by reason of such misbehaviour.

(4) Before the Public Service Commission concurs under subsection (1) or subsection (2) of this section in any action taken on the ground that any person who holds or has held any office to which, at the time of such action, section 100 of this Constitution applies has been guilty of misbehaviour in that office, the Public Service Commission shall consult the Judicial Service Commission.

(5) In this section "pensions benefits" means any pensions, compensation, gratuities or other like allowances for persons in respect of their service as public officers or for the widows, children, dependants or personal representatives of such persons in respect of such service.

CHAPTER X

TRANSITIONAL PROVISIONS

118. Subject to the provisions of this Chapter, the Act of Parliament of the United Kingdom entitled The Gambia Independence Act, 1964(a) and The Gambia Independence Order, 1965(b) (hereinafter referred to as "the existing Order") are hereby repealed.

Repeal of
Constitutional
instruments.

119.—(1) The existing laws shall continue to be the law of The Gambia as from the commencement of this Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.

Existing
Laws.

(2) Where any matter that falls to be prescribed or otherwise provided for under this Constitution by Parliament or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section) or is otherwise prescribed or provided for immediately before the commencement of this Constitution by or under the existing Order, that prescription or provision shall, as from the commencement of this Constitution, have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution) as if it had been made under this Constitution by Parliament or, as the case may require, by the other authority or person.

(3) The President may, by Order, made at any time before 24th April, 1972, make such amendments to any existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of this Constitution or otherwise for giving effect or enabling effect to be given to the provisions of this Constitution.

(a) 13 Eliz. 2. c. 93.

(b) L.N. No. 9/65. S. I. 1965 No. 135.

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(4) The provisions of this section shall be without prejudice to any powers conferred by this Constitution or by any other law upon any person or authority to make provision for any matter, including the amendment or repeal of any existing law.

(5) For the purposes of this section, the expression "existing law" means any Act, law, rule, regulation, order or other instrument made in pursuance of (or continuing in operation under) the existing Order and having effect as part of the law of The Gambia or of any part thereof immediately before the commencement of this Constitution or any Act of the Parliament of the United Kingdom or Order of Her Majesty in Council so having effect.

Existing
officers.

120.—(1) Where any office has been established by or under the existing Order or any existing law and this Constitution establishes or provides for the establishment of a similar or an equivalent office, any person who, immediately before the commencement of this Constitution, holds or is acting in the former office shall, so far as is consistent with the provisions of this Constitution, be deemed as from the commencement of this Constitution to have been appointed, elected or otherwise selected to or to act in the latter office in accordance with the provisions of this Constitution:

Provided—

- (i) that any person who under the existing Order or any existing law would have been required to vacate his office at the expiration of any period or on the attainment of any age shall vacate his office at the expiration of that period or on the attainment of that age;
- (ii) that no alteration made in the functions, powers or duties of any office by this Constitution shall entitle the holder thereof for the purpose of any law with respect to pensions benefit to be treated as if his office had been abolished.

(2) Any person who, by virtue of this section, is deemed as from the commencement of this Constitution to have been appointed, elected or otherwise selected to hold or act in any office shall also be deemed to have taken and subscribed any necessary oath under this Constitution.

(3) A person who is a member of the Public Service Commission established by the existing Order may, notwithstanding that, by reason of his having held or been nominated for election to any office before 24th April 1970, he is disqualified to be appointed as a member of the Public Service Commission established by this Constitution continue in office under this section as a member of that Commission and be re-appointed thereto upon the expiration of his term of office.

(4) The provisions of this section shall be without prejudice to the provisions of section 121 of this Constitution.

(5) In this section "existing law" means such a law as is referred to in section 119(5) of this Constitution.

(6) In this section "pensions benefits" means any pensions, compensation, gratuity or other like allowances for the holder of that office in respect of his service as a public officer or for the widow, children, dependants or personal representative of such holder in respect of such service.

(7) Reference in this section to the law with respect to pensions benefits include (without prejudice to their generality) references to the law regulating the circumstances in which such benefits may be granted or in which the grant of such benefits may be refused, the law regulating the circumstances in which any such benefits that have been granted may be withheld, reduced in amount or suspended and the law regulating the amount of any such benefits.

121.—(1) The House of Representatives constituted by the existing Parliament. Order (hereinafter referred to as "the existing House of Representatives") shall be the House of Representatives during the period beginning with the commencement of this Constitution and ending with the first dissolution of Parliament thereafter.

(2) The constituencies into which The Gambia was divided immediately before the commencement of this Constitution and until other provision is made in that behalf in accordance with this Constitution to be the constituencies into which The Gambia is divided in pursuance of section 62 of this Constitution; and the persons who, immediately before the commencement of this Constitution, are the elected members of the existing House of Representatives representing those constituencies shall be deemed as from the commencement of this Constitution to have been elected to the House of Representatives in accordance with the provisions of this Constitution as the elected members representing the respective constituencies corresponding to those constituencies and shall hold their seats in accordance with those provisions.

(3) The registers of voters having effect immediately before the commencement of this Constitution for the purposes of elections to the existing House of Representatives shall as from the commencement of this Constitution, have effect as if they have been compiled in pursuance of this Constitution.

(4) The persons who immediately before the commencement of this Constitution are the Chiefs' representative members, the person who immediately before the commencement of this Constitution is the Attorney General, and the persons who, immediately before the commencement of this Constitution are the nominated members of the existing House of Representatives shall, as from the commencement of this Constitution, be deemed to have been elected or as the case may be appointed as the Chiefs' representative members, as Attorney-General and nominated as the nominated members of the House of Representatives in accordance with the provisions of this Constitution and shall hold their seats in the House of Representatives in accordance with those provisions.

(5) The person who, immediately before the commencement of this Constitution is the Speaker of the existing House of Representatives shall be deemed as from the commencement of this Constitution to have been elected as Speaker of the House of Representatives in accordance with the provisions of this Constitution and shall hold office in accordance with those provisions.

(6) Until Parliament otherwise provides, any person who holds or acts in any office the holding of which would, under the existing Order have disqualified him for membership of the existing House of Representatives shall be disqualified to be nominated for election as a voting member or appointed as a nominated member of the House of Representatives as though provision in that behalf had been made in pursuance of section 59(6) of this Constitution.

(7) The Standing Orders of the existing House of Representatives as in force immediately before the commencement of this Constitution shall until it is otherwise provided by the House of Representatives under section 83(1) of this Constitution, be the Standing Orders of the House but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.

(8) Parliament shall, unless sooner dissolved, stand dissolved twelve months after the date on which the existing House of Representatives would, apart from this Constitution, have stood dissolved in pursuance of subsection (2) of section 60 of the existing Order repealed by section 118 of this Constitution.

(9) The President, in pursuance of a resolution of the House of Representatives, may, at any time after the commencement of this Constitution and before the date specified in subsection (8) of this section, appoint a Constituency Boundaries Commission in accordance with the provisions of this Constitution to review the boundaries of the constituencies into which The Gambia is divided.

(10) The Commission that is appointed in pursuance of subsection (9) of this section shall be deemed to have been appointed in the circumstances specified in section 62(4)(c) of this Constitution.

(11) Any person who, by virtue of this section, is deemed as from the commencement of this Constitution to have been elected as Speaker or any other member of the House of Representatives shall be deemed to have taken and subscribed any necessary oath under this Constitution.

122.—(1) Without prejudice to the generality of section 119 of this Constitution, all property which, immediately before the date of the commencement of this Constitution, was held by the Crown or by some other body or person (not being an authority of the Government of The Gambia) on behalf of or in trust for the Crown shall on that date, by virtue of this subsection and without further assurance, vest in the President and be held by him on behalf of, or as the case may be on the like trusts for the benefit of, the Government of the Republic; and all property which immediately before the date aforesaid, was held by an authority of the Government of The Gambia on behalf of or in trust for the Crown shall be held by that authority on behalf of, or as the case may be on the like trusts for the benefits of, the Government of the Republic.

Miscellaneous
transactional
provisions.

(2) References to the Crown in subsection (1) of this section are references to the Crown in right of the Government of The Gambia; and that subsection shall, with necessary modifications, apply in relation to rights, liabilities and obligations arising out of the contract or other arrangement as it applies in relation to property.

123.—(1) The provisions of this section shall have effect for the purpose of enabling an officer to whom this section applies or his personal representatives to appeal against any of the following decisions, that is to say—

Appeals in respect of certain decisions affecting pensions benefits.

- (a) a decision of the Public Service Commission to give such concurrence as is required by section 117(1) or section 117(2) of this Constitution in relation to the refusal, withholding, reduction in amount or suspending of any pensions benefits in respect of such an officer's service as a public officer;
- (b) a decision of any authority to remove such an officer from office if the consequence of the removal is that any pensions benefits cannot be granted in respect of the officer's service as a public officer; or
- (c) a decision of any authority to take some other disciplinary action in relation to such an officer if the consequence of the action is, or in the opinion of the authority might be, to reduce the amount of any pensions benefits that may be granted in respect of the officer's service as a public officer.

(2) Where any such decision as is referred to in subsection (1) of this section is taken by any authority, the authority shall cause to be delivered to the officer concerned or to his personal representatives, a written notice of that decision stating the time, not being less than twenty-eight days from the date on which the notice is delivered, within which he, or his personal representatives, may apply to the authority for the case to be referred to an Appeals Board.

(3) If application is duly made within the time stated in the notice, the authority shall notify the President in writing of that application and the President shall thereupon appoint an Appeals Board consisting of—

- (a) one member selected by the President;
- (b) one member selected by an association representative of public officers or a professional body, nominated in either case by the applicant; and
- (c) one member selected by the other members jointly (or, in default of agreement between those members, by the Judicial Service Commission)

who shall be the Chairman of the Board.

(4) The Appeals Board shall enquire into the facts of the case, and for that purpose—

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- (a) shall, if the applicant so requests in writing, hear the applicant either in person or by a legal representative of his choice, according to the terms of the request, and shall consider any representations that he wishes to make in writing;
- (b) may hear any other person who, in the opinion of the Board is able to give the Board information on the case; and
- (c) shall have access to, and shall consider, all documents that were available to the authority concerned and shall also consider any further document relating to the case that may be produced by or on behalf of the applicant or the authority.
- (5) When the Appeals Board has completed its consideration of the case, then—
- (a) if the decision that is the subject of the reference to the Board is such a decision as is mentioned in paragraph (a) of subsection (1) of this section, the Board shall advise the Public Service Commission whether the decision should be affirmed, reversed or modified and the Commission shall act in accordance with that advice; and
- (b) if the decision that is the subject of the reference to the Board is such a decision as is referred to in paragraph (b) or paragraph (c) of subsection (1) of this section, the Board shall not have power to advise the authority concerned to affirm, reverse or modify the decision but—
- (i) where the officer has been removed from office the Board may direct that there shall be granted all or any part of the pensions benefits that, under any law, might have been granted in respect of his service as a public officer if he had retired voluntarily at the date of his removal and may direct that any law with respect to pensions benefits shall in any other respect that the Board may specify have effect as if he has so retired; and
- (ii) where some other disciplinary action has been taken in relation to the officer the Board may direct that, on the grant of any pensions benefits under any law in respect of the officer's service as a public officer, those benefits shall be increased by such amount or shall be calculated in such manner as the Board may specify in order to offset all or any part of the reduction in the amount of those benefits that, in the opinion of the Board, would or might otherwise be a consequence of the disciplinary action,
- and any direction given by the Board under this paragraph shall be complied with notwithstanding the provisions of any other law.
- (6) In this section—

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"pension benefits" has the meaning assigned to that expression in section 117 of this Constitution, and

"legal representative" means a person entitled to practise as a barrister or as a solicitor in The Gambia.

(7) This section applies to any officer who is the holder of a pensionable office and

(a) is designated under the Overseas Service Aid Scheme and

(b) is, immediately before the commencement of this Constitution a member of Her Majesty's Overseas Civil Service or Her Majesty's Overseas Judiciary.

124.—(1) If the President so requests, the authorities having power to make appointments in any branch of the public service shall consider whether there are more local candidates suitably qualified for appointment to, or promotion in, that branch than there are vacancies in that branch that could appropriately be filled by such local candidates; those authorities, if satisfied that such is the case, shall, if so requested by the President, select officers in that branch to whom this section applies and whose retirement would, in the opinion of those authorities, cause vacancies that could appropriately be filled by such suitably qualified local candidates as are available and fit for appointment and inform the President of the number of officers so selected; if the President specifies a number of officers to be called upon to retire (not exceeding the number of officers so selected), those authorities shall nominate that number of officers from among the officers so selected and require them by notice in writing to retire from the public service; and any officer who is so required to retire shall retire accordingly.

Compulsory retirements to facilitate appointment of local candidates.

(2) Any notice given under subsection (1) of this section requiring any officer to retire from the public service shall—

(a) in the case of an officer who, when he receives the notice, is on leave of absence upon the completion of a tour of duty, specify the date on which he shall so retire which shall be not earlier than the expiration of six months from the date when he receives the notice or, if his leave of absence would otherwise expire later, not earlier than when it would otherwise expire; and

(b) in the case of any other officer, specify the period, which shall be not less than six months from the date when he receives notice, at the expiration of which he shall proceed upon leave of absence pending retirement:

Provided that the officer may agree to the notice specifying an earlier date or, as the case may be, a shorter period.

(3) This section applies to any officer who holds a pensionable office and—

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- (a) is designated under the Overseas Service Aid Scheme; and
- (b) is, immediately before the commencement of this Constitution, a member of Her Majesty's Overseas Civil Service or Her Majesty's Overseas Judiciary; or
- (c) is an overseas officer who, after the commencement of this Constitution, is appointed to any public office (otherwise than on promotion or transfer from another public office) and who is notified, at the time of his appointment, that this section will apply to him.

(4) In this section "overseas officer" means an officer in the public service who is, either individually or as a member of a class, declared by the appropriate Commission to be an overseas officer, and "the appropriate Commission" means —

- (a) in relation to an officer who can be removed from office by the Judicial Service Commission, that Commission; and
- (b) in any other case, the Public Service Commission.

Transitional provisions relating to functions of existing public service authorities.

125.—(1) Any power that, immediately before the commencement of this Constitution, is vested in an existing public service authority (that is to say, the Governor-General acting on the advice of the Public Service Commission established by the existing Order, or the Commissioner of Police) and that, under the existing Order is then delegated to some other person or authority shall, as from the commencement of this Constitution and so far as is consistent with the provisions of this Constitution, be deemed to have been delegated to such person or authority in accordance with those provisions.

(2) Any matter that, immediately before the commencement of this Constitution, is pending before an existing public service authority shall, so far as is consistent with the provisions of this Constitution, be continued before the corresponding public service authority established by this Constitution, and any matter that, immediately before the commencement of this Constitution, is pending before a person or authority to whom power to deal with that matter has been delegated by an existing public service authority shall, so far as is consistent with the provisions of this Constitution, be continued before the person or authority to whom that power was delegated:

Provided that, where the hearing of a disciplinary proceeding has begun but has not been completed immediately before the commencement of this Constitution, the continued hearing shall not be held before any person unless the hearing that has already taken place was also held before him; and where, by virtue of this proviso, the hearing cannot be continued it shall be re-commenced.

126.—(1) All proceedings that, immediately before the commencement of this Constitution, are pending before any court established by or under the existing Order or by or under any law continuing in operation under the existing Order may be continued and concluded after the commencement of this Constitution before the corresponding court established by this Constitution or by or under an existing law. Legal proceedings.

(2) Any decision given before the commencement of this Constitution by any such court as aforesaid shall, for the purpose of its enforcement or for the purpose of any appeal therefrom, have effect after the commencement of this Constitution as if it were a decision of the corresponding court established by this Constitution or by or under an existing law.

(3) Until otherwise provided by any law, any proceedings pending in any court immediately before 24th April, 1970 in which Her Majesty or any public officer is a party in respect of The Gambia, or the Government of The Gambia is a party, shall continue after that day—

(a) in the case of proceedings brought in accordance with the Criminal Procedure Code (a) with the Republic (whether or not that expression is used) substituted as a party; and

(b) in the case of all other proceedings with the Attorney-General, or some other public officer representing the Republic, as a party.

(4) In this section "existing law" means such a law as is referred to in section 119(5) of this Constitution.

127.—(1) Any appeal or petition for special leave to appeal to the Judicial Committee from a decision given by the Court of Appeal established by the existing Order, being an appeal or a petition that is pending immediately before the commencement of this Constitution and— Appeals to the Judicial Committee.

(a) in the case of an appeal, is one in which the records have been registered in the Office of the Judicial Committee before the commencement of this Constitution; or

(b) in the case of a petition is one that has been filed in that Office before the commencement of this Constitution,

shall continue to lie to the Judicial Committee and may be prosecuted and disposed of in accordance with the law regulating the procedure in such appeals that is in force immediately before the commencement of this Constitution.

(2) Any Order made by the Judicial Committee on an appeal that lies to the Judicial Committee by virtue of subsection (1) of this section or on any appeal that has been made to the Judicial Committee at any time before the commencement of this Constitution shall be enforced in accordance with the law regulating the enforcement of such Orders that is in force immediately before the commencement of this Constitution.

(a) Laws of The Gambia, 1966 Revised Edition Cap. 39.

Prerogatives
and privi-
leges of the
Crown.

128. Where under any law in force in The Gambia immediately before the commencement of this Constitution any prerogatives or privileges are vested in Her Majesty, those prerogatives or privileges shall, from the commencement of this Constitution, vest in the President.

Rights,
liabilities and
obligations.

129.—(1) All rights, liabilities and obligations of—

(a) Her Majesty the Queen or the Governor-General, in respect, or in right, of the Government of The Gambia; and

(b) the Government of The Gambia or any public officer on behalf of the Government of The Gambia,

shall on and after the commencement of this Constitution, be the rights, liabilities and obligations of the Republic.

(2) In this section, rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise, other than the rights to which sections 122 and 128 of this Constitution refer.

Public Seal.

130. Until Parliament otherwise provides, the Public Seal shall be the Public Seal in use immediately before the 24th April, 1970.

CHAPTER XI

MISCELLANEOUS

Resignation.

131.—(1) Any person who is appointed, elected or otherwise selected to any office established by this Constitution or any office of Minister established under this Constitution may resign from that office by writing under his hand addressed to the person or authority by whom he was appointed, elected or otherwise selected:

Provided that—

(a) in the case of a person who holds office as President, his resignation from that office shall be addressed to the Chief Justice;

(b) the resignation of a person from the office of Speaker or Deputy Speaker of the House of Representatives shall be addressed to the House; and

(c) the resignation of any person from the office of member of the House of Representatives shall be addressed to the Speaker of the House.

(2) The resignation of any person from any such office as aforesaid shall take effect when the writing signifying the resignation is received by the person or authority to whom it was addressed or any person authorised by that person or authority to receive it.

132.—(1) Where any person has vacated any office established by this Constitution or any office of Minister established under this Constitution, he may, if qualified, again be appointed, elected or otherwise selected to hold that office in accordance with the provisions of this Constitution.

Re-appointments and concurrent appointments.

(2) Where this Constitution vests in any person or authority the power to make any appointment to any office, a person may be appointed to that office, notwithstanding that some other person may be holding that office, when that other person is on leave of absence pending the relinquishment of the office; and where two or more persons are holding the same office by reason of an appointment made in pursuance of this subsection, then, for the purposes of any function conferred upon the holder of that office, the person last appointed shall be deemed to be the sole holder of the office.

133.—(1) In this Constitution, unless the context otherwise requires— Interpretation.

“the Commonwealth” means The Gambia, any country to which section 8 of this Constitution applies and any dependency of any such country;

“financial year” means the period of twelve months ending on 30th June in any year or on such other day as Parliament may prescribe:

Provided that whenever Parliament alters the date on which the financial year ends it shall provide either—

(a) that the period beginning at the end of the last complete financial year under the law in force before the alteration takes effect and ending with the beginning of the first complete financial year under the law in force after the alteration takes effect shall be added to either of those years (as Parliament prescribes) and that the aggregate period, though greater than twelve months, shall be reckoned as one financial year;

(b) that the period beginning and ending as aforesaid, though less than twelve months, shall itself be reckoned as a complete financial year;

“Provinces” has the same meaning as in the Provinces Act (a);

“The Gambia” means the territory comprised in The Gambia on the 23rd April 1970;

“The Gazette” means the official gazette of the Government.

“Head Chief”, “Deputy Head Chief”, “Sub-Chief” and “Headman” have the same meaning as in the Provinces Act (a);

“high judicial office” means the office of a judge of a court of unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland or in any country outside the Commonwealth that may be prescribed by Parliament or the office of judge of a court having jurisdiction in appeals from such a court.

(a) Laws of The Gambia, 1966 Revised Edition, Cap. 151.

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(f) except for the purposes of sections 61(3)(d), 99(d), 100(3) 110(2)(d) and 110(3) of this Constitution (which relate to disqualification for election or appointment to certain offices) references to an office in a naval, military or air force.

(4) For the purposes of this Constitution, a person shall not be regarded—

(a) as holding an office by reason only of the fact that he is in receipt of a pension or other like allowance,

(b) as disqualified for election to the House of Representatives or for appointment to any office to which a public officer is not qualified to be appointed by reason only that he holds a public office and he is on leave of absence pending relinquishment of that office.

(5) In this Constitution, unless the context otherwise requires, a reference to the holder of an office by the term designating his office shall be construed as including, to the extent of his authority, a reference to any person for the time being authorised to exercise the functions of that office:

Provided that nothing in this subsection shall apply to references to the President or Vice-President in sections 37, 38, 39(3) and (4) or 43 of this Constitution.

(6) Except in the case where this Constitution provides for the holder of any office thereunder to be such person holding or acting in any other office as may for the time being be designated in that behalf by some specified person or authority, no person may, without his consent, be nominated for election to any such office or be appointed to or to act therein or otherwise be selected therefor.

(7) References in this Constitution to the power to remove a public officer from his office shall be construed as including references to any power conferred by any law to require or permit that officer to retire from the public service:

Provided that—

(a) nothing in this subsection shall be construed as conferring on any person or authority the power to require a Justice of Appeal or a judge of the Supreme Court or the Director of Audit to retire from the public service: and

(b) any power conferred by any law to permit a person to retire from the public service shall, in the case of any public officer who may be removed from office by some person or authority other than a Commission established by this Constitution, vest in the Public Service Commission.

(8) Any provision in this Constitution that vests in any person or authority the power to remove any public officer from his office shall be without prejudice to the power of any person or authority to abolish any office or to any law providing for the compulsory retirement of public officers generally or any class of public officer on attaining an age specified by or under that law.

(9) Where this Constitution vests in any person or authority the power to appoint any person to act in or to exercise the functions of any office if the holder thereof is himself unable to exercise those functions, no such appointment shall be called in question on the grounds that the holder of the office was not unable to exercise those functions.

(10) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law.

(11) Where, under any provisions of this Constitution, any person or authority is authorised or required to exercise any function acting after consultation with some other person or authority, the person or authority first referred to shall not be required to act in accordance with the advice of the other person or authority and the question whether such consultation was made shall not be enquired into in any court.

(12) Where any power is conferred by this Constitution to make any order, regulation or rule or pass any resolution or give any direction or make any declaration or designation, the power shall be construed as including the power, exercisable in like manner and subject to the like conditions, if any, to amend or revoke any such order, regulation, rule, resolution, direction, declaration or designation:

Provided that nothing in this subsection shall apply to the power to issue a certificate conferred by section 37 of this Constitution.

(13) Any reference in this Constitution to a law made before 24th April 1970 shall, unless the context otherwise requires, be construed as a reference to that law as it had effect on 23rd April 1970.

(14) Any reference in this Constitution to a law that amends or replaces any other law or any provision of any other law shall be construed as including a reference to a law that modifies, re-enacts, with or without amendment or modification, suspends, repeals, adds new provisions or makes different provision in lieu of that other law or that provision.

(15) For the avoidance of doubt it is hereby declared that—

(a) any power to make laws conferred by this Constitution includes power to make laws having extra-territorial operation;

"the Judicial Committee" means the Judicial Committee of the Privy Council established by the Judicial Committee Act 1833(b) as from time to time amended by any Act of the Parliament of the United Kingdom;

"law" includes—

- (a) any instrument having the force of law made in exercise of a power conferred by a law; and
- (b) native law and custom and any other unwritten rule of law, and "lawful" and "lawfully" shall be construed accordingly;

"meeting" means all sittings of the House of Representatives held during a period when the House first sits after being summoned at any time and terminating when the House is adjourned *sine die* or at the conclusion of a session;

"oath" includes affirmation;

"Minister" includes the Vice-President and a Minister of State but does not include a Parliamentary Secretary.

"the Police Force" means The Gambia Police Force established by the Police Act (a) and includes any other police force established by or under an Act of Parliament to succeed to or to supplement the functions of The Gambia Police Force but does not, save in the definition of a "disciplined force" in section 30(1) of this Constitution, include any police force forming part of any naval, military or air force or any police force for the protection of harbours, waterways, railways or air fields or any police force established by any local government authority;

"The President" means the President of the Republic;

"public office" means any office of emolument in the public service;

"public officer" means a person holding or acting in any public office;

"the public service" means, subject to the provisions of this section, the civil service of the Government of The Gambia;

"session" means the period beginning when the House of Representatives first meets after 23rd April 1970 or after Parliament has at any time been prorogued or dissolved and ending when Parliament is prorogued or when Parliament is dissolved without having been prorogued;

"sitting" means the period during which the House of Representatives is sitting continuously without adjournment and includes any period during which it is in committee;

(b) 3 and 4 Wil. 4. c. 4.

(a) Laws of The Gambia, 1966 Revised Edition Cap. 144.

"statutory instrument" means any proclamation, regulations order, rule or other instrument (not being an Act of Parliament) having the force of law;

"subordinate court" means any court of law established for The Gambia other than—

- (a) the Judicial Committee;
- (b) the Court of Appeal;
- (c) the Supreme Court; or
- (d) a court-martial; and

"voting member" has the meaning assigned to that expression by section 57(2) of this Constitution.

(2) In this Constitution, unless the context otherwise requires, references to offices in the public service shall be construed as including references to the offices of Justice of Appeal and Judges of the Supreme Court and the offices of members of all subordinate courts (being offices the emoluments attaching to which or any part of the emoluments attaching to which, are paid directly out of moneys provided by Parliament) but not as including references to any office that, by virtue of subsection (3)(c) of section 100 of this Constitution, is excluded from the offices to which that section applies or to the office of assessor in any court.

(3) In this Constitution reference to offices in the public service shall not be construed as including—

- (a) references to the office of the President, the Vice-President, the Speaker, or Deputy Speaker of the House of Representatives, or any Minister, Parliamentary Secretary or a member of the House of Representatives;
- (b) references to the office of a member of any Commission established by this Constitution or a member of the Advisory Committee on the Prerogative of Mercy;
- (c) save in so far as may be provided by Parliament, references to the office of a member of any other council, board, panel, committee or other similar body (whether incorporated or not) established by or under any law;
- (d) references to the office of Head Chief, Deputy Head Chief, Sub-Chief, or Headman;
- (e) references to the office of any District Authority or member of any District Authority declared to be, or established as, such an Authority under the Local Government Act, (a) or (to the extent to which any such law makes provision for the administration of Districts within the former Protectorate) by or under any law for the time being amending or replacing that Act; or

(a) Laws of The Gambia 1966 Revised Edition Cap. 109.

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- (b) any reference in this Constitution to the functions of the President includes a reference to his functions as Commander-in-Chief of the armed forces of the Republic;
- (c) the functions of the Commander-in-Chief of the armed forces of the Republic shall be such as may be prescribed by Parliament.

(16) Subject to the provisions of section 72 of this Constitution, no amendment made to the Interpretation Act(a) as in force at the date of the commencement of this Constitution, shall have effect in relation to this Constitution.

Short title
and com-
mencement.

134. This Act may be cited as the Constitution of the Republic of The Gambia and shall come into operation on 24th April, 1970.

APPENDIX II

CHAPTER 91

PART. I - Preliminary

1. This Act may be cited as the House of Representatives (Powers and Privileges) Act.

2. In this Act--

"Clerk" means the Clerk of the House of Representatives;

"committee" means a committee of the whole House of Representatives or any standing, select, or other committee of the House of Representatives;

"journals" means the minutes of the House of Representatives or the official record of the votes or proceedings thereof;

"Member" means any member of the House of Representatives;

"officer of the House of Representatives" means the Clerk or any other officer or person acting within the precincts of the House of Representatives under the orders of the Speaker, and includes any constable on duty within the precincts of the House of Representatives;

"precincts of the House of Representatives" means the building in which the House of Representatives sits in session for the transaction of business, and the enclosure in which such building stands;

"Speaker" means the Speaker of the House of Representatives, and includes the Deputy Speaker or any other member when presiding over that House or any committee thereof;

"Standing Orders" means the Standing Orders of the House of Representatives for the time being in force;

"stranger" means any person other than a Member or any officer of the House of Representatives.

PART II - Privileges and Immunities

3. No civil or criminal proceedings may be instituted against any Member for words spoken before, or written in a report to, the House of Representatives or to a committee or by reason of any matter or thing brought by him therein by petition, bill, motion or otherwise.

4. No Member shall be liable to arrest for any civil debt, except a debt the contraction of which constitutes a criminal offence, whilst going to, attending at, or returning from a sitting of the House of Representatives or any committee.

PART III - Regulations of Admittance to the House of Representatives

5. No stranger shall be entitled, as of right, to enter or to remain within the precincts of the House of Representatives.

6. (1) The Speaker is hereby authorised to issue orders as he may in his discretion deem necessary for the regulation of the admittance of strangers to the precincts of the House of Representatives.

(2) Copies of orders made by the Speaker under this section shall be duly authenticated by the Clerk and exhibited in a conspicuous position in the precincts of the House of Representatives; and such copies when so authenticated and exhibited, shall be deemed to be sufficient notice to all persons affected thereby.

7. The Speaker may at any time order any stranger to withdraw from the precincts of the House of Representatives without assigning any reason therefor.

PART IV - Offences and Penalties

8. Any persons who, being a stranger--

- (a) enters or attempts to enter the precincts of the House of Representatives in contravention of any orders of the Speaker; or
- (b) fails or refuses to withdraw from the precincts of the House of Representatives when ordered to withdraw therefrom by the Speaker; or
- (c) contravenes any rule made by the Speaker under the Standing Orders; or
- (d) attends any sitting of the House of Representatives or any committee as the representative of any journal or newspaper after the general permission granted under the Standing Orders to the representative or representatives of that journal or newspaper has been revoked,

shall be guilty of an offence and shall on summary conviction, be liable to a fine not exceeding twenty-five pounds or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

9. (1) If any person to the number of twelve or more shall come in a riotous, tumultuous or disorderly manner to the precincts of the House of Representatives while the House of Representatives or any committee is sitting, in order either to hinder or to promote the passing of any bill, resolution, or other matter depending before the House of Representatives or such committee, they shall each be guilty of an offence and shall, on summary conviction, each be liable to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.

(2) If any person shall incite any other person to come in a riotous, tumultuous or disorderly manner to the precincts of the House of Representatives while the House of Representatives or any committee is sitting in order either to hinder or to promote the passing of any bill, resolution or other matter depending before the House of Representatives or such committee, he shall be guilty of an offence and shall, on summary conviction, be liable to a fine not exceeding one hundred pounds, or to imprisonment for a term not exceeding twelve months, or to both such fine and imprisonment.

10. Any person who--

- (a) whether directly or indirectly offers to any Member or to any officer of the House of Representatives any bribe, fee, compensation, gift or reward in order to influence him in his conduct as such Member or officer, or for or in respect of the promotion of or opposition to any bill, motion, matter, rule or thing submitted to or intended to be submitted to the House of Representatives or any committee; or
- (b) assaults, obstructs, molests or insults any Member coming to, being within, or going from the precincts of the House of Representatives;
- (c) makes use of or threatens to make use of any force, violence or restraint or inflicts or threatens to inflict any temporal or spiritual injury, damage, harm or loss upon or against any Member in order to compel such Member to declare himself in favour of or against any proposition or matter pending or expected to be brought before the House of Representatives or any committee, or on account of such Member having declared himself in favour of or against any proposition or matter brought before the House of Representatives or any committee; or
- (d) assaults, interferes with, molests, resists or obstructs any officer of the House of Representatives while in the execution of his duty or while coming to, being within or going from the precincts of the House of

- Representatives or such committee is sitting; or
- (f) presents to the House of Representatives or a committee any false, untrue, fabricated or falsified paper, book, record or document with intent to deceive the House of Representatives or such committee; or
- (g) fails without reasonable excuse, the proof whereof shall be upon him to appear before a committee after having been summoned to do so under the Standing Orders; or
- (h) refuses to be examined before, or to answer any question put by, a committee, or to produce any paper, book, record or other document which he has been required to produce under the Standing Orders, unless such question or paper, book, record or other document is not, in the opinion of the Chairman, material to the subject of the enquiry of the committee or such refusal would be allowed by a court of law; or
- (i) before a committee, knowingly gives a false answer otherwise than on oath to any question material to the subject of the enquiry of the committee which may be put to him during the course of his examination; or
- (j) attempts wrongfully to interfere with or influence a witness in any proceeding before a committee either before or after such witness has given evidence, in connection with such evidence; or

- (k) prints or publishes any libel, or publishes either by words spoken or by writing any false, scandalous or defamatory matter, reflecting on the character or proceedings of the House of Representatives or which tends to bring the House or Representatives into odium, contempt, or ridicule:

Provided that nothing in this paragraph shall apply to a fair and accurate report of the proceedings of the House of Representatives published in any newspaper; or

- (l) does any act which obstructs or impedes the House of Representatives or any committee in the performance of its functions, or which obstructs or impedes any Member or officer of the House of Representatives in the discharge of his duty; or
- (m) abstracts any record or other document from the custody of the Clerk, or falsifies or improperly alters any records of or documents presented to the House of Representatives or any committee;

shall be guilty of an offence and shall, on summary conviction, be liable to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.

11. Every officer of the House of Representatives shall, for the purposes of this Act and of the application of the provisions

of the criminal law, have all the powers and enjoy all the privileges of a constable.

12. No prosecution for an offence under this Act shall be instituted except with the written sanction of the Attorney-General.

13. (1) No Member shall demand or ask or accept or receive either directly or indirectly any bribe, fee, compensation, gift or reward for or in respect of or in connection with the promotion of or opposition to any bill, resolution, matter or thing submitted or intended to be submitted for the consideration of the House of Representatives or any committee.

(2) Any person acting in contravention of this section shall be liable to a penalty of five hundred pounds and, in addition, shall forfeit the amount of the value of the bribe, fee, compensation, gift, or reward, accepted or received by him.

14. (1) The Attorney-General may sue for and recover any penalty incurred or sum forfeited by any person under this Act as though such penalty or sum were a debt to the Crown; and no persons other than the Attorney-General shall sue for or recover any such penalty or sum.

(2) Any such penalty or sum shall, when recovered, be credited to the general revenue of The Gambia.

PART V - Miscellaneous

15. Subject to the provisions of this Act, a copy of the Journals of the Commons House of Parliament of the United Kingdom of Great Britain and Northern Ireland printed or purporting to be printed by the order or by the printer of the Commons House aforesaid shall be received as prima facie evidence without proof of its being such copy upon any enquiry touching the privileges, immunities and powers of the House of Representatives or any Member.

16. Upon any enquiry touching the privileges, immunities and powers of the House of Representatives or any Member, any copy of the journals printed or purporting to be printed by the Government Printer shall be admitted as evidence of such journals in all courts and places without any proof being given that such copy was so printed.

17. Any person who shall print or cause to be printed a copy of any Act now or hereafter in force, or copy of any report, papers, minutes or votes and proceedings of the House of Representatives as purported to have been printed by the Government Printers or by or under the authority of the House of Representatives or by the Speaker, and the same is not so printed, or shall tender in evidence any such copy as purporting to be so printed knowing that the same was not so printed, shall be guilty of an offence and shall be liable upon conviction upon information in the name of and signed by the Attorney-General to imprisonment

for a term not exceeding three years.

18. Any person, being a defendant in any civil or criminal proceedings for or on account or in respect of the publication by such person or by his servant, by order or under the authority of the House of Representatives, of any reports, papers, minutes, votes or proceedings, may, on giving to the plaintiff or prosecutor, as the case may be, twenty-four hours' written notice of his intention, bring before the court in which such civil or criminal proceedings are being held a certificate under the hand of the Speaker stating that the reports, papers, minutes, votes or proceedings in respect whereof such civil or criminal proceedings have been instituted were published by such person or by his servant by order or under the authority of the House of Representatives together with an affidavit verifying such certificate, and such court shall thereupon immediately stay such civil or criminal proceedings and the same and every process issued therein shall be deemed to be finally determined.

19. In any civil or criminal proceedings instituted for publishing any extract from or abstract of any report, paper, minutes, votes or proceedings referred to in section 17 of this Act, if the court or jury, as the case may be, be satisfied that such extract or abstract was published bona fide and without malice, judgment or verdict, as the case may be, shall be entered for the defendant or accused.

20. The powers of the speaker under this Act shall be supple-

mentary to any powers conferred on him by the Constitution or the Standing Orders.

21. Neither the Speaker nor any officer of the House of Representatives shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act.

22. Notwithstanding anything to the contrary, no process issued by any court in the exercise of its civil jurisdiction shall be served or executed within the precincts of the House of Representatives while the House of Representatives is sitting or through the Speaker, the Clerk or any officer of the House of Representatives.

APPENDIX III

CHAPTER 92

The House of Representatives (Witnesses' Oaths) Act

An Act for enabling any select committee of the House of Representatives to administer oaths to witnesses.

1. This Act may be cited as the House of Representatives (Witnesses' Oaths) Act.

2. In this Act---

"Committee" means any select committee of the House of Representatives.

3. (1) Any Committee may administer an oath to any witness examined before such committee.

(2) Any person examined as aforesaid who wilfully gives false evidence shall be guilty of perjury and liable to be prosecuted and punished accordingly.

(3) Where any witness to be examined under this Act conscientiously objects to take an oath, he may make his solemn affirmation and declaration in the words following:--

"I A.B., do solemnly, sincerely, and truly affirm and declare that the taking of any oath is according to my religious belief unlawful, (or that I have no religious belief) and I do also solemnly, sincerely, and truly affirm and declare," etc.:

any solemn affirmation and declaration so made shall be of the same force and effect, and shall entail the same consequences as an oath taken in the usual form.

(4) Any oath or affirmation under this Act may be administered by such person or persons as may from time to time be empowered for that purpose by any Standing Order of the House of Representatives.

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