



IMPLEMENTING THE PRESIDENTIAL (TRANSITION) ACT: LESSONS, CHALLENGES AND THE WAY FORWARD

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Abstract

The post-2012 election period presented the first test for implementing major aspects of the *Presidential (Transition) Act, 2012* (Act 845). This paper undertakes a preliminary assessment of how the law has been implemented. The approach taken involves an evaluation of what has worked well, a review of what has not and a consideration of policy alternatives. The findings drawn from the assessment provide encouraging evidence of the law being put into practice. However, several challenges have emerged. To address the issues which have transpired, policy reform proposals are outlined to fine-tune the transition process and enhance the law's effective implementation. Overall, the Transition Act remains integral to good governance in Ghana and its full implementation will close a chapter in the country's dismal history of democratic transitions. We urge policymakers to act on the proposals set out in this paper in order to unlock the full potential of the law.

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ABOUT US

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1. Introduction

Ghana's reputation as a model African democracy owes much to its ability to change governments through the ballot box. It is, then, somewhat ironic that the changes in government through the democratic process have exposed serious shortcomings in the country's governance institutional framework.¹ In fact Ghana's record on political transitions is not a proud one. Due to a history of coup d'états, the country did not have any experience in handling democratic transitions until 2001 - the first time in Ghana's history when power was transferred from one democratically elected President to another through the electoral process. The second was in 2009. The transition related stories of administrative lapses, forced evictions and ad hoc car seizures, among others, have been well rehearsed and need no restating here. On the whole, past transitions were characterised by confrontation instead of cooperation, which in turn led to intense interparty hostility and a polarised political environment.

As a response to the past transition challenges, the IEA, in collaboration with the Ghana Political Parties Programme (GPPP), began work in 2007 to prepare a multi-partisan framework of ground rules and regulations to govern future transitions.² It is important to emphasise that there was cross-party consensus that reforming the transition process in Ghana - for it to be credible and effective - required that it should have a statutory underpinning. The IEA/GPPP Transition Bill was passed by Parliament on 16 March 2012 and signed into law on 31 May 2012 as the *Presidential (Transition) Act, 2012* (Act 845). This piece of legislation draws on practical lessons from Ghana's previous transitions.

The first time the Transition Act was implemented, following a general election, was during the 2013 transition and several challenges have since emerged. The primary focus of this paper is to undertake a preliminary assessment of how the Transition Act has been implemented. The approach taken is to evaluate what has worked well, consider what has not and set out policy proposals on how to enhance its effective implementation and ensure value for money in the management of state assets. Such a review, it is envisaged, will help strengthen our transition process and, importantly, governance in Ghana. The next section provides a brief overview of the key aspects of the Transition Act in order to put the discussion of implementation in its proper context.

¹ Since the return to multiparty democracy in 1993, Ghana has held successive free and fair elections which have resulted in two changes of government.

² The GPPP is an inter-party group comprising representatives of the political parties with representation in Parliament. The IEA facilitates the GPPP.

2. Overview

The primary objective of the Presidential (Transition) Act is to provide a framework for managing the political transfer of power from an out-going democratically elected President to an incoming President. But its benefits transcend regime change. This is evident in its key attributes of accountability, institutional clarity and a structured time frame for managing the transition process.

2.1 Accountability

Accountability remains the centrepiece of the Presidential (Transition) Act. In this respect, the law makes provision for periodic stocktaking and an inventory of executive assets. This requirement covers state assets in both the official and private residences of senior public officers including the President, Vice President and Ministers of State. The Transition law also stipulates that handing-over notes covering a broad range of public offices are to be submitted to the Administrator-General not later than 30 days before a presidential election. This provision will engender good recording-keeping and provide new leadership in key government institutions with essential background knowledge to undertake their functions.

2.2 Institutional clarity

In terms of institutional clarity, a new body established under the law – the Presidential Estates Unit (PEU) is charged with maintaining and keeping the inventory of executive assets. The Unit is headed by an Administrator-General who is granted the same terms and conditions of service as a Justice of the Court of Appeal. This enshrines in statute the independence and security of tenure for the Administrator-General. Broadly, the Administrator-General has the role of facilitating the transition process.

The law also details key officials who should comprise the Transition Team. In fact, as the Transition Team works by consensus, the law, importantly, provides an orderly process for resolving transition related disagreements. This is through a three-member Advisory Council comprising the Speaker of Parliament as chairperson; one eminent citizen appointed by the incumbent President and another eminent citizen appointed by the person elected as President.

2.3 Structured time frame

The Transition Act also specifies a structured time frame for the Transition Team to be formed - within 24 hours after the declaration of the presidential election results. Clear timelines are also set for outgoing Ministers to vacate their official accommodation – within three months after the presidential inauguration. Finally, the law also attempts to improve the timing of presidential inaugurations. Over the course of the Fourth

Republic, Parliament has been sworn in on the same day as the President with only a short interval separating the two events. This has led to a catalogue of lapses in protocol, delays and logistical challenges relating to the presidential inauguration. It is in this context that the law makes the requirement that the election of the Speaker together with the swearing-in of Parliamentarians be conducted two days before the dissolution of Parliament - but with the aforementioned taking office on 7 January. Thus 7 January is solely for the presidential inauguration.

3. Implementation: Lessons and Challenges

3.1 Administrator-General

An important aspect of implementing the Transition Act came on 9 November 2012 with the announcement that President John Mahama had appointed Mr. Joseph Issachar as the Administrator-General of the PEU. This appointment is significant given that Mr. Issachar's extensive experience in public service, which culminated as head of Ghana's Civil Service, is well suited for this important role.

3.2 Transition Team

The post-2012 election period presented the first test for implementing major aspects of the Transition law. It is important to emphasise that executive level transition occurs even with the re-election of an incumbent. The law makes provision for this under Section 1 (3) of Act 845. Thus President Mahama duly followed the provisions of the law and appointed a Transition Team after he was declared President-elect. However, the 22 member team the President appointed could be considered as sizeable, as this was not a transition from one democratically elected President to another. Indeed, in the case when an incumbent is re-elected Act 845 simply states that the President shall designate members of the Transition Team - with no set limit.

3.3 Advisory Council

President Mahama also appointed an Advisory Council (the three-member conflict resolution body) for the transition. This may not have been necessary. It is this author's considered opinion that as there was only one Transition Team chairperson (as opposed to co-chairs in the case of an incoming and an outgoing administration) the sole chair could have ruled on conflicts.

3.4 Handing-over notes

Handing-over notes covering key public offices are crucial for continuity and effective operation of government business especially when a change in leadership occurs. It is in this view that section 6 (4) of the Transition law stipulates that handing-over notes covering key public offices including the Presidency, government Ministries, Departments and Agencies "shall be presented to the Administrator-General not later than 30 days before the date of the presidential election". In the Transition under review, there was a breach of this provision. The call for handing-over notes came late - on 12 December 2012. Further, a press release issued by the Transition Team stated that the relevant government appointees had been directed to submit their handing-over notes to the Chief of Staff by 1 January 2013 for onward transmission to the Administrator-General (GNA, 20 December 2012). The cut-off date announced by the Transi-

tion Team was 53 days past the deadline set by Act 845. The late appointment of the Administrator-General may have had a role, but the Transition law was already on the statute book so handing-over notes should have been prepared well ahead of time to ensure compliance with the law.

3.5 Swearing-in of Parliament

There was initially disagreement with regards to implementing section 11 of the Presidential (Transition) Act, which covers the election of the Speaker and swearing-in of a new Parliament. The argument was that the Transition Act was inconsistent with the Constitution. Article 113 (1) of the 1992 Constitution provides that “...Parliament shall continue for four years from the date of its first sitting and shall then stand dissolved.” In the 2013 transition scenario, this implied that Parliament stood dissolved only after midnight on 7 January 2013.³ The Transition Act, however, states that a new Parliament must be sworn in two days before dissolution but assume office on 7 January. The argument was that if the swearing-in went ahead, as per Act 845, then two Parliaments would have been in existence, a scenario which was considered unconstitutional. In view of these disagreements, Parliament was sworn in at the earliest opportunity – shortly after midnight on 7 January 2013. The midnight swearing-in, nonetheless, posed its own set of challenges as the timing was not ideal.

Several other directives from the Presidency and Transition Team were issued with reference to Act 845. For example, the Transition Team reminded Ministers and political appointees occupying government accommodation that, in accordance with the Transition law, they had up to three months after the presidential inauguration to vacate their accommodation. Overall, in spite of the issues raised above, the 2013 Transition was orderly and much of this could be attributed to the framework provided by Act 845. Indeed, the 2013 presidential inauguration was one of the finest in Ghana’s history. The Transition Team and its sub-committees deserve commendation. All the same, it is worth noting that there are key aspects of the law that remain to be tested and some of these will only come into force when a transfer of power from one elected president to another occurs.

³ The Fifth Parliament’s first sitting was on 7 January 2009.

4. Way forward: Reform proposals

In order to address the implementation challenges which have transpired, and fine-tune Ghana's transition process, this section sets out six policy reform proposals. These range from providing clarity to Act 845; making recommendations to ensure efficiency savings during transitions and proposals to obtain value for money in the administration of state assets. The case is also put forward for introducing subsidiary legislation to cover issues such as enforcement powers that will unlock the full potential of the transition reforms already in place.

4.1 Cap Transition Team appointments

The lessons drawn from the implementation of the law to date suggests that there is scope for accruing efficiency savings on transition costs. In this respect, there is a need for a cap on the number of individuals appointed to a Transition Team owing to the cost of honoraria on the public purse. The full expense of the 2013 was not publicly available at the time of writing this paper, but evidence from the 2009 transition suggests that honoraria for members of a Transition Team and its sub-committees account for more than half of transition expenses. The figures indicate that for the 2009 transition there was a total of 151 individuals on the Transition Team and its 10 sub-committees. Out of a total GH¢361,924.41 spent on that year's transition, GH¢208,800 was paid as honoraria to the 151 individuals (Parliamentary Debates, 17 June 2009)⁴. The honoraria amount represents 57 percent of that transition's expenditure. Indeed, for the public, the cost of the transition was one of the more eyebrow raising elements relating to the change of government which led to a barrage of public criticism. Given that Ghana faces mounting economic challenges, which have resulted in national belt-tightening in key sectors and basic infrastructure shortfalls, it will be prudent to show austerity in this area of public spending.

As noted above, in the case where an incumbent is re-elected, Act 845 states that the President shall designate members of the Transition Team. The 22 member Transition Team in 2013 is almost identical to the number of individuals specified in the Transition Act if a transfer of power occurs. In the case when an incumbent is re-elected, a statutory cap of about 12 appointees could help limit the cost relating to Transition Team appointees.

⁴ The Memorandum to the Presidential (Transition) Bill, 2010 indicates that there were 10 sub-committees for the 2009 Transition. The Finance Minister's statement in Parliament, noted above, is what stated that the cost incurred was attributed to the Transition Team and its 7 sub-committees. The available evidence indicates that 10 sub-committees is the correct number.

Further, while section 4(2) of Act 845 provides a cap for sub-committee membership (not more than five persons) there is no limit on the number of sub-committees which may be formed in addition to the three statutory sub-committees required under Act 845⁵. Section 4 (d) of the law leaves the establishment of additional sub-committees to the discretion of the Transition Team. To check the cost of transitions, there is a strong case for also imposing a limit on sub-committees that may be formed to a maximum of five.

The PEU, working together with the Head of the Civil Service, could design a scheme whereby a team of senior civil servants from key ministries are seconded to support the work of the Transition Team - if necessary. This will surely provide much needed expertise and also limit the need for extra appointees on the Transition Team and its subcommittees.

4.2 Clarity on the establishment of an Advisory Council

The Advisory Council is a valuable aspect of the Transition Act with its role clearly defined as a conflict resolution body. This is spelt out in the Memorandum to the *Presidential (Transition) Bill, 2010*. The Council becomes relevant when Transition Team co-chairs, in the case of an incoming and an outgoing administration, fail to find common ground on core issues relating to the transition. On the other hand, when an incumbent is retained in office the sole Transition chairperson can rule on disagreements within the Team when they arise. This author proposes that Act 845 should be amended to nullify the establishment of an Advisory Council when an incumbent is re-elected. In addition to providing clarity to this part of the legislation, the proposal will also prevent the recurrence of the 2013 transition experience and overall save the nation from the potential cost of allowances paid to the Council.

4.3 Swearing-in of Parliament

As noted above, the early swearing-in of Parliament under section 11 of Act 845 has been deemed unconstitutional. But the legality of the swearing-in issue was carefully examined during the consideration stage of the Presidential (Transition) Bill by Parliament's Committee on Constitutional, Legal and Parliamentary Affairs. It is, then, surprising that the same Parliament, which debated and passed Act 845 deemed a section it approved as unconstitutional. Further, the same administration which enacted the legislation has also cited legal opinion which views section 11 as unconstitutional. Given this backdrop it is, perhaps, unsurprising that there exists a palpable sense of

⁵ The three sub-committees specified in Act 845 are the Government machinery, Inauguration and Presidency sub-committees.

hesitation among some political leaders on the unconstitutionality issue. A settled view of this matter is required. Swearing-in Parliament in the early hours of 7 January (which is deemed constitutional) certainly contributed to the smooth presidential inauguration of 2013. But the midnight sitting of Parliament poses its own logistical and practical difficulties and a plausible alternative is required. The proposed approach to settling this issue is, first, to consider the school of thought of a Supreme Court interpretation of Article 113 vis-à-vis section 11 of Act 845. In the event of the Court ruling that Act 845 is unconstitutional, the alternative step will be the touted option of a constitutional amendment which will enable the next Parliament to be sworn in on 5 January 2017. This option will require dissolving the current Parliament two days short of its four-year term.

4.4 Enforcement powers for Administrator-General

Although the Transition Act confers a range of duties on the Administrator-General's office, it does not empower the office to deal with possible breaches. For the Transition Act to be effective, powers that can strengthen the hand of the Administrator-General in carrying out the statutory duties conferred on that office remain crucial. For example, the Administrator-General needs to be empowered to surcharge public officials for missing or damaged state assets; measures such as imposing penalties in the scenario whereby public officials fail to leave their state accommodation at the specified time also needs to be outlined. This author proposes that subsidiary legislation should be promptly considered to address these issues.

4.5 Reporting to Parliament

It is in the public interest to impose a statutory requirement for the Administrator-General to submit an annual report to Parliament within a set time frame, such as 'not later than six months after the end of each financial year'. The annual report should provide an update on the national register of executive assets; timelines of inventories taken; cost of maintaining the assets portfolio, etc.⁶ Indeed, given that the cost of government is an urgent public policy issue that reverberates in the minds of most Ghanaians, the Transition Act can be tightened to ensure value for money. For example, effective management and maintenance of the large portfolio of executive assets, which the Administrator-General and PEU will oversee, could accrue huge savings to the nation. Overall, this approach will promote transparency in the management of state assets and provide a periodic opportunity to evaluate and debate value for money in the management of the executive estate.

⁶ Security concerns may require concealing assets such as 'safe houses' from the national register section in the proposed annual report. Using code names, without specifying location, would be a useful approach in such an instance.

4.6 Addressing potential legal technicalities

Section 1 (3) of Act 845 states: “where an incumbent President is re-elected for a second term, the President shall designate members of the Transition Team.” The case of President Mahama, who assumed office as President in July 2012 upon the death of President John Atta Mills is evidence of a scenario whereby an “incumbent” who wins a general election may not necessarily have been elected for a “second term”. To avoid any potential issues such as legal challenges relating to strict adherence of this section, it is important to reflect the Mahama scenario in the law. One possible approach could be tweaking the first part of section 1(3) to simply state “where the incumbent is elected” - with the reference to second term deleted.⁷ Alternatively, another sub-section could be added to section 1 to provide for the Mahama scenario where an incumbent is elected for a first term.

Finally, it is important to reiterate that if the transition process is to be effective, changing the current general election date of 7 December is essential. This is due to the potentially short transition time frame in the event of a presidential election runoff (Ghana’s presidential inauguration is constitutionally set for 7 January)⁸. Indeed, resolving this issue is a work in progress, as the *White Paper on the Report of the Constitution Review Commission* has accepted recommendations for the presidential elections to be held on 7 November. This will allow for an ample transition period in the event of a presidential runoff poll.

⁷ The word “re-elected” should also be avoided as that similarly implies that the incumbent was previously elected.

⁸ Only a brief transition period preceded the change in government in both 2001 and 2009. For the 2001 transition, the Joint Transition Team was inaugurated on 1 January 2001 - four days after the runoff election which President John Kufuor won. For the 2009 transition, the Joint Team met for the first time on 6 January 2009 - three days after the declaration of the late President John Atta Mills as the winner of the runoff.

5. Conclusion

This paper set out to assess the implementation of the Presidential (Transition) Act. The lessons drawn from the evaluation undertaken provide encouraging evidence of implementation. All the same, several challenges and issues of timely compliance have transpired in the course of putting the law into practice. Further, the paper identified scope to limit the cost of transitions as well as improve value for money in the management of state assets. In this regard, policy reform proposals to address the gaps and challenges which have emerged are outlined. The proposals include a cap on Transition Team appointments in cases when an incumbent is re-elected; measures to ensure efficiency savings during transitions and recommendations for subsidiary legislation that will provide the Administrator-General with enforcement powers. A proposal is also put forward to settle the disagreement relating to the swearing-in of Parliament prior to 7 January, which is the constitutionally set date for presidential inaugurations.

The Transition Act remains integral to good governance in Ghana and is a clear example of how a challenge has been transformed into an opportunity to implement much needed institutional reforms. The law will not remove all the challenges relating to the democratic transfer of power. However, it provides an opportunity for Ghana to close a chapter on its dismal history of democratic transitions. Indeed, the framework the law provides to guide the transfer of power guarantees a departure from the past acrimonious transition process. There is cause for much optimism given the unanimous cross-party support for the law. In charting the way forward, we urge policymakers to act on the proposals set out in this paper in order to unlock the full potential of the Presidential (Transition) Act.

References

Ghana News Agency (GNA). 12 December 2012. 'President Appoints Transition Team'. Available at: <http://www.ghana.gov.gh/index.php/news/general-news/18462-president-appoints-transition-team> [Accessed 21 March 2013].

Ghana News Agency (GNA). 20 December 2012. 'Appointees to Hand Over Official Four-Wheel Vehicles'. Available at: <http://www.ghana.gov.gh/index.php/news/general-news/18657-appointees-to-hand-over-official-four-wheel-vehicles-> [Accessed 22 December, 2012].

Joy FM. 9 November 2012. 'President Appoints Administrator-General of the Presidential Estates Unit'. Available at: <http://edition.myjoyonline.com/pages/news/201211/97003.php> [Accessed 22 December 2012].

Joy FM. 12 December 2012. 'Veep Directs Ministers to Prepare Handing over Notes'. Available at: <http://edition.myjoyonline.com/pages/news/201212/98587.php> [Accessed 13 December 2012].

Ofori-Mensah, M. 2011. 'Ghana's Presidential Transition Bill: A timely opportunity for institutional reform'. IEA Governance Newsletter, Vol. 17 No.1, pp. 1-8.

Parliamentary Debates. 17 June 2009.

Presidential (Transition) Act, 2012 (Act 845)

Presidential (Transition) Bill, 2010

Republic of Ghana. 1992. Constitution of the Republic of Ghana, 1992. Tema: Ghana Publishing.

Republic of Ghana. 2012. White Paper on the Report of the Constitution Review Commission of Inquiry. W.P. 1/2012. Accra: Assembly Press.



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