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## MAKING CONSTITUTIONS IN THE GAMBIA

*David Perfect\**

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### 1 Introduction

This chapter places the other chapters in a longer-term context by reviewing constitution-making in The Gambia from 1946, when the first constitution in the then British colony was enacted, to the drawing up of a new constitution to replace the 1997 Constitution. This process remains ongoing at time of writing in February 2021.

Previous research has either examined constitution-making during the colonial period and the First Republic (1965-1994), or compared the 1970 and 1997 Constitutions, but no single source has previously considered both the colonial and the post-independence Constitutions, including the 2020 Draft Constitution.<sup>1</sup> This analysis also draws on new evidence which was not discussed in any of the earlier sources. It should be emphasised that the focus of the chapter is on the constitution-making process; while the main features of each constitution and the response to them of key political actors are described, the chapter does not seek to provide an overall comparison of their strengths and weaknesses.

Section 2 of the paper examines the five constitutions drawn up between 1946 and 1962. Section 3 considers the Constitution which came into force at independence in February 1965. Section 4 discusses the First Republic Constitution introduced after the second republic referendum in April 1970. Section 5 focuses on the current Gambian Constitution

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1 For analyses of earlier Constitutions, see especially A Hughes & D Perfect *A political history of The Gambia, 1816-1994* (2006) 45-53, 108-33, 175-76; EJ Ceesay *The military and 'democratisation' in The Gambia: 1994-2003* (2006) 157-60; A Saine *The paradox of third-wave democratization in Africa: The Gambia under AFPRC-APRC rule, 1994-2008* (2009) 28-29; OAS Jammeh *The constitutional law of The Gambia: 1965-2010* (2011); A Jeng 'From hope to despair: Travails of constitutional law making in Gambia's Second Republic' in A Saine et al *State and society in The Gambia since independence: 1965-2012* (2013) 113-50; D Perfect *Historical dictionary of The Gambia* (2016) 97-101.

which came into force in January 1997. Section 6 examines the work of the 2018-20 Constitutional Review Commission, which culminated in the publication of a Draft Constitution in March 2020, discusses why the Constitution failed to achieve the required majority in the National Assembly that September and summarises developments up to February 2021. Section 7 presents brief overall conclusions.

## 2 Colonial Constitutions: 1946-1962

### 2.1 1946 Constitution

In 1821, five years after Captain Alexander Grant had purchased Banjul Island and begun the construction of Bathurst, the Crown Colony of the Gambia was established. The Governor of Sierra Leone was responsible for its administration until 1843, when the Gambia became a separate colony under its first Governor, Henry Seagram. However, in 1866, the Gambia lost its separate status. It now formed part of the British West African Settlements and its Governor was replaced by an Administrator reporting to the Governor of Sierra Leone. It was not until 1888 that the administrative link between the Gambia and Sierra Leone was severed for the final time and as late as 1901 that George Denton was promoted to be the first Gambian Governor since 1866.<sup>2</sup>

When the Gambia became a separate colony in 1843, an Executive Council and a Legislative Council were formed to help the Governor to make decisions. The latter could pass laws and ordinances, but only if they had previously been proposed by the Governor, and the Secretary of State for the Colonies could disallow them. Except for a brief period during the 1890s, the Executive Council in the Gambia contained official members only until 1947. In contrast, the Legislative Council always contained at least one unofficial member, appointed by the Governor. The first African member, JD Richards, a leading merchant, was appointed in 1883 and by 1940, there were three African unofficial members, Sir Samuel Forster, W Davidson Carrol and Sheikh Omar Fye, but none had been directly elected.<sup>3</sup> In the other three British West African colonies, Africans had been granted 'the franchise', that is, the right directly to elect members

2 Perfect (n 1) 3-7, 119.

3 Hughes & Perfect (n 1) 45-49. James Topp served as an unofficial member of the Executive Council between 1890 and 1896. Carrol, Forster and Fye are profiled in Perfect (n 1 above) 76, 154-155, 161-162+; and in H Ceesay *Patriots: Profiles of eminent Gambians* (2015) 36-44, 87-93, 127-134. See also A Sarr 'Sir Samuel Forster 1873-1940' in JC Senghor (ed) *Profiles of Gambian political leaders in the decolonisation era* (2017) 18-46.

to the Legislative Council, in the 1920s.<sup>4</sup> In contrast, the Colonial Office had refused to grant 'the franchise' to the Gambia. It feared that EF Small, a newspaper editor and trade union and political leader, who was considered a 'link subversive', a phrase coined to describe individuals who were thought 'to spread Bolshevik propaganda in the colonies', would win a direct election.<sup>5</sup> In fact, if Small did flirt with Communism, it was only briefly, and it is likely that he was more interested in making use of the benefits that external contacts could bring.<sup>6</sup>

The situation changed in February 1943, when Governor HRR Blood formally proposed to the Secretary of the State for the Colonies, Lord Stanley, that one member of the Legislative Council should be directly elected. Whereas constitutional reform elsewhere in British West Africa in the 1940s occurred at least in part because of popular pressure, this was not the case in the Gambia. Blood in fact emphasised to the Colonial Office that he was keen to make concessions before there was any real pressure to do so. Stanley accepted the proposal in October 1943 and that December Blood appointed a small, advisory, Franchise Committee to examine the electoral basis of the proposed constitution. It had six members, three African and three European, and was chaired by a European civil servant, AR Clark. The three African members included Small, who had been elected indirectly to the Legislative Council in 1941 by the members of the Bathurst Advisory Town Council after Governor WT Southorn (Blood's predecessor) had instructed the official members to abstain in the ballot. He had then been nominated to serve on the Franchise Committee by the other unofficial members of the Legislative Council.<sup>7</sup>

The Committee recommended universal suffrage for any British subject or native of the Protectorate (namely, the rural areas) resident in Bathurst (the capital, now Banjul) aged 25 or over, while persons who were literate in English or Arabic should have the vote at 21. Candidates were required to be aged at least 25, be able to read, write and speak

4 Franchise was granted to Nigeria in 1922, Sierra Leone in 1924 and the Gold Coast in 1925. See TN Tamuno *Nigeria and elective representation 1923-1947* (1966) 18-32; JA Langley *Pan-Africanism and nationalism in West Africa, 1900-1945: A study in ideology and social classes* (1973); AJG Wyse *HC Bankole-Bright and politics in colonial Sierra Leone, 1919-1958* (1990) 47-56.

5 Hughes & Perfect (n 1) 86-106. On Small, see D Perfect 'Edward Francis Small 1890-1958' in Senghor (n 3) 47-91; Ceesay (n 3) 108-114.

6 Perfect (n 5) 76-79 assesses the evidence.

7 Hughes & Perfect (n 1) 49, 108-109. The Franchise Committee's members are listed in Gambia Government *Report of the Committee on the Legislative Council franchise* (1944) located in Colonial Office file (CO) 87/256/1. Small's election is discussed in Perfect (n 5) 82.

English, and not be in receipt of a public salary (this excluded civil servants). By a majority vote and against the wishes of three European members, the Committee supported Small's proposal that there should be two separate constituencies, one for Bathurst and one for the surrounding area of Kombo St Mary, each of which should elect one member. Not all these proposals were eventually accepted, indicating the limited power of the Franchise Committee; Blood insisted on a single joint constituency for both Bathurst and Kombo St Mary, while the Colonial Office (which disliked the idea of universal suffrage) required the voting age to be raised to 25.<sup>8</sup>

Although agreed to in principle in 1944, the new Constitution was not finalised until November 1946. While the Colonial Office blamed the delay on legal problems, a lack of staff, and the fact that too many constitutions required revising at the same time, the lack of popular pressure for reform was clearly also a factor.<sup>9</sup>

The first Legislative Council election finally took place in November 1947 after Blood had left the colony. The further delay was because, unlike Blood, his successor, Andrew Wright, wished to appoint a number of Africans to the Executive Council for the first time. Wright had also persuaded the Colonial Office that the number of unofficial members on the Legislative Council should be increased to seven. This ensured that there would be an unofficial majority and meant that temporarily the Gambia was ahead of Sierra Leone where there was no unofficial majority until 1951.<sup>10</sup>

The 1947 election was won by Small, defeating Fye and three other candidates; he was subsequently appointed to the Legislative Council for a three-year term of office.<sup>11</sup> Small, together with an Anglican deacon, JC Faye, and a Protectorate Chief, Seyfu Tamba Jammeh, was also appointed to the Executive Council.<sup>12</sup>

8 Hughes & Perfect (n 1) 109. See also CO 87/256/1 Blood to Stanley, 28 February 1944; 11 May 1944.

9 Hughes & Perfect (n 1) 113.

10 Hughes & Perfect (n 1) 46-50; Blood had argued in 1942 that there were no suitable candidates. On Sierra Leone, see JR Cartwright *Politics in Sierra Leone 1947-67* (1970) 43-44.

11 Hughes & Perfect (n 1) 113-116; Perfect (n 5) 85-88.

12 Hughes & Perfect (n 1) 46. On Faye, see JC Senghor *The very reverend JC Faye: His life and times* (2014); Perfect (n 1) 145-146. On Jammeh, see Perfect (n 1) 227; Ceesay (n 3) 115-126.

## 2.2 1950 Constitution

Prior to the second Legislative Council election due in November 1950, Wright's successor, Percy Wyn Harris, proposed to the Secretary of State for the Colonies in May 1950 that a new constitution should be drawn up. The number of elected members of the Legislative Council should rise from one to three, two of whom should be elected in a single two-member constituency in Bathurst and the third in Kombo St Mary. In addition, a Gambian should be appointed as Vice-President of the Council. The reform initiative seems to have been taken by the Governor without much popular pressure; indeed, Wyn Harris claimed that the changes 'will go a long way if not further than the aspirations which have been expressed publicly on constitutional reform'.<sup>13</sup>

The rise in the number of elected members was indeed a step forward constitutionally, while the separation of Bathurst and Kombo St Mary was in line with the 1944 Franchise Committee's recommendations. However, Wyn Harris also argued that each voter in Bathurst should only be given one vote. His intention was in part to protect minority interests, but his main aim was to prevent the development of 'a party system of Government in the Gambia' which he strongly opposed. The Colonial Office had concerns about this novel approach to constitutional reform, but formally accepted Wyn Harris's proposals in September 1950. This was too late for the changes to be put in place by November and the elections had to be postponed until October 1951, much to Wyn Harris' irritation. The Governor also proposed significant changes to the composition of the Executive Council with a fourth unofficial member being added and two of the four being appointed as 'members of the government'. They would be permitted to tender advice to the Governor on a range of issues but would not receive specific ministerial portfolios and would be expected to support the government over major issues or resign. These proposals were accepted by the Secretary of State for the Colonies in August 1951.<sup>14</sup>

The new Constitution met with a mixed reception in Bathurst and was strongly criticised by Faye, who had established the Gambia's first political party, the Gambia Democratic Party (GDP), in February 1951. In his campaign, Faye made great play of the fact that in effect each voter only possessed half a vote; he also criticised the limited powers granted to the 'members of the government'. Faye's attacks on the constitution certainly helped him top the poll in Bathurst, with the leader of the Gambia Muslim Congress (GMC), IM Garba-Jahumpa, a Muslim schoolteacher

13 CO 87/266/2 Wyn Harris to Griffiths, 18 May 1950.

14 Hughes & Perfect (n 1) 116-117.

and former trade union leader, who had been an unsuccessful candidate in 1947, also this time being elected. Henry Madi, a Lebanese businessman, headed the separate poll in Kombo St Mary. All were appointed to the Legislative Council for three-year terms.<sup>15</sup>

### 2.3 1954 Constitution

The third Legislative Council election was due to take place by October 1954. By early 1952, Wyn Harris, who remained vehemently opposed to a ministerial system of government, partly because of a lack of qualified Gambians outside the civil service and partly on grounds of cost, was convinced that the Gambia, unlike Nigeria or the Gold Coast, should not be allowed to progress towards eventual independence. Instead, like other 'Island' and 'City' states, it should maintain a permanent link with the United Kingdom and be administered locally by a state council. Recognising that some Gambians would be disappointed if the colony did not follow the usual path towards self-government, Wyn Harris considered that a new constitution was required. He therefore established a Consultative Committee of 34 prominent citizens (all bar two, Africans) in April 1953 to draw up proposals for a new constitution. In consultation with Garba-Jahumpa and Madi, but not with Faye who was in Accra at the time, Wyn-Harris selected the members from a long list of names submitted to him. The process thus differed from that adopted in 1944 by Blood, who had simply chosen the Franchise Committee members. The Consultative Committee contained the three current unofficial members of the Legislative Council and three former unofficial members in Small, Ousman Jeng, who had served as the Muslim Member of the council between 1922 and 1932, and CL Page, the British-born manager of the United Africa Company. Many of the rest were either current or retired civil servants and five were women. There was no formal Protectorate representation, but the four Protectorate members of the Legislative Council attended the first two meetings as observers. Three officials, including the Colonial Secretary, acted as consultants.<sup>16</sup>

Although, according to Wyn-Harris, Faye had stated in advance that he would 'tacitly' accept the Governor's selection, he strongly criticised

15 Hughes & Perfect (n 1) 117-122; Senghor (n 12) 84-88. On Garba-Jahumpa and Madi, see Perfect (n 1) 184-185, 280; Ceesay (n 3) 183-187, 212-218.

16 Hughes & Perfect (n 1) 43; 122-123; the Committee's members are listed as an enclosure to CO 554/250, Wyn-Harris to Lyttleton, 22 May 1953. On Jeng and Page, see Perfect (n 1) 241-242, 427; Ceesay (n 3) 63-71. Wyn Harris officially added a hyphen to his surname in 1953.

the selection of so many civil servants since they 'were colonial in their mentalities and outlooks and moderate in their recommendations'.<sup>17</sup>

After meeting six times in May 1953 and considering memoranda submitted by the GMC and GDP, the Committee presented its report to Wyn-Harris on 28 May. It recommended that unofficial representation on the Legislative Council should be increased to 16, with direct elections for three members in Bathurst and one in Kombo St Mary. Ten unofficials should be indirectly elected, three by the Conference of Protectorate Chiefs, four by a Divisional Electoral Conference and the other three by the previously elected councillors from a pool of nominated candidates. Two unofficial members should be appointed. The three Bathurst members should be elected in a single constituency, with each voter having only one vote; Wyn-Harris argued that this would allow the Muslim, Protestant and Roman Catholic segments of Bathurst society each to elect one candidate. The Consultative Committee also called for the concession of an unofficial majority on the Executive Council, with at least two of the six unofficial members being called ministers and given responsibility for specific departments. Wyn-Harris accepted most of these recommendations. However, the Colonial Office modified the proposals about ministers and insisted that they should be required to work with advisory committees. Since these would be dominated by civil servants, the power of the ministers was significantly reduced.<sup>18</sup>

These changes to the Consultative Committee's proposals played an important, but not decisive, role in the third Legislative Council election in October 1954. The election was won by PS N'Jie (Njie), a Catholic lawyer who had established the United Party (UP) earlier that year. Faye, who was again more critical of the new constitution than his rivals, and Garba-Jahumpa were the other successful candidates in Bathurst, with Madi retaining his seat in Kombo St Mary. They were appointed for five-year terms, Garba-Jahumpa having persuaded Wyn-Harris to extend the life of the constitution to bring the Gambia into line with Sierra Leone and remove 'the upset of an election' every three years.<sup>19</sup>

## 2.4 1959 Constitution

By 1958, pressure for constitutional change in the Gambia was increasing, fuelled by developments elsewhere in West Africa, notably the Gold

17 Hughes & Perfect (n 1) 122; Senghor (n 12) 100.

18 Hughes & Perfect (n 1) 122-123.

19 Hughes & Perfect (n 1) 123-127; CO 554/251, Wyn-Harris to Gorell Barnes, 14 November 1953. On Njie, see H Ceesay *Founding father, PS Njie: A moral biography*



Coast's achievement of independence as Ghana in March 1957. The UP and GDP drew up broadly similar proposals for constitutional reform in 1957, with both calling for direct elections to an enlarged legislative assembly throughout the Colony and the Protectorate. However, no progress was made before Wyn-Harris left the Gambia in April 1958. His successor, Edward Windley, was much more willing to listen to Gambian proposals for constitutional reform.

Windley's approach to drawing up a new constitution was very different from that of his predecessors. Rather than appointing a single Franchise Committee or Consultative Committee as Blood and Wyn-Harris had done, Windley convened a series of constitutional conferences at Brikama (October 1958), Georgetown (January 1959), and Bathurst (March 1959) to discuss the issue. Political parties, shunned by Wyn-Harris, were now at the centre of events with each party sending delegates to the conferences. The Protectorate was also much more involved in the process than previously, albeit through its chiefs rather than the rural population as a whole.

The Bathurst Conference recommended the establishment of a new House of Representatives to replace the Legislative Council, consisting of 34 elected and nominated members, of whom 19 should be directly elected by universal suffrage (seven in the Colony and 12 in the Protectorate). Members of parliament (MPs) should be paid, and no geographical restrictions should be placed on the selection of candidates. There should also be an enlarged Executive Council with an increased number of ministers under a Chief Minister, while the unpopular advisory committees would be abolished; thus, ministers would be fully responsible for their departments.

Not all these recommendations were accepted either by Windley or the Colonial Office in the new constitution formally drawn up in September 1959. The key changes from the March proposals were that: the appointment of a Chief Minister was permitted, not required; as requested by the chiefs, candidates in Protectorate constituencies must either have been born in the Protectorate, or be on its electoral register, or be recognised as being from Protectorate families; and MPs should receive allowances only and not salaries. There should also be fewer ministers (up to six, rather than nine). Reaction to the new constitution was mixed; it was welcomed by the UP, whereas the GDP and GMC formed a



Committee of Citizens to oppose it and there was a demonstration against the Secretary of State for the Colonies, Alan Lennox-Boyd, in June 1959.<sup>20</sup>

The first election to the new House of Representatives took place in May 1960, using the Gambia's unique 'drum and marble' method, which was carefully, and successfully, designed to prevent multiple voting. Since candidates were not required to declare their party allegiance before polling day and many chose not to do so, the final results are disputed. What is clear that the People's Progressive Party (PPP), a new party launched as recently as February 1959 and led by David (later Sir Dawda) K Jawara, the colony's Principal Veterinary Officer, won most seats. It defeated the UP and the Democratic Congress Alliance (DCA), a merger of the GDP and the GMC, but did not gain an overall majority.<sup>21</sup> Windley therefore appointed representatives of the PPP, UP and DCA, as well as the Protectorate Chiefs, to the Executive Council. He did not appoint a Chief Minister immediately, but in March 1961 selected PS N'Jie for the position, since he considered that he would be able to command a majority of all the MPs, including the eight chiefs. This led Jawara, the second PPP minister, Sheriff Sisay, and the DCA's only minister, AB N'Jie (Njie), to resign from the Executive Council.<sup>22</sup>

## 2.5 1962 Constitution

The Executive Council now contained three UP MPs, two Independents, both of whom were drawing closer to the UP, and one chief. Since the majority party in the House, the PPP, was no longer represented on the Executive Council, Windley was forced to initiate further constitutional discussions. Two further conferences were convened in Bathurst in May 1961 and in London in July 1961; each was attended by representatives of the political parties, as well as some by some independents. At the London Conference, it was agreed that a new constitution should be drawn up and come into operation after a new election, to take place in May 1962. This significantly reduced the powers of the Governor, who was now required to act on the advice of the Executive Council in all areas of internal affairs except security and the public service. The composition of the

20 Hughes & Perfect (n 1) 128-133.

21 On the election and the 'drum and marble' method, see Hughes & Perfect (n 1) 137-146; Perfect (n 1) 125. They suggest that the PPP won nine seats; the UP five; the DCA one; and that four Independent candidates were also successful. On Jawara, see Perfect (n 1) 237-241; Ceesay (n 3) 247-260; and Jawara's autobiography, DK Jawara *Kairaba* (2009).

22 Hughes & Perfect (n 1) 148-149; Jawara (n 21 above) 217-218. AB N'Jie appears to have resigned reluctantly, having been requested to do so by Windley because he was unacceptable to the UP.

Executive Council was also revised; its membership now consisted of the Governor, the Deputy Governor, and eight ministers. The composition of the House of Representatives also changed significantly. The number of elected members was increased to 32 with 25 seats being allocated to the Protectorate and seven to the Colony; the representation of the Protectorate chiefs was reduced to four. The leader of the majority party in the House would be appointed Premier by the Governor and would then advise the latter on the appointment of other ministers. The UP welcomed the new constitution, whereas the PPP and the DCA, in particular, wished faster progress to independence.<sup>23</sup>

The 1962 election was one of the most hotly contested in Gambian history. It was won by the PPP which gained 18 seats, with its new electoral ally, the DCA, taking one; the UP won 13 seats. The slow pace of constitutional reform had some impact on the results, benefitting the PPP/DCA at the expense of the UP. After the election, Jawara was made Premier and appointed his first cabinet. Meanwhile, a number of election petitions were put forward by the UP and after the first eight had been dismissed by the Supreme Court, a ninth in Sabach Sanjal, Lower River Division (LRD), was upheld. This judgment called into question the legality of the whole election, particularly after the West African Court of Appeal ruled in April 1963 that the electoral registers in LRD were invalid; however, in May 1963, the Secretary of State for the Colonies, Duncan Sandys, announced that the registers would be validated retrospectively, therefore allowing progress towards full internal self-government. On 4 October 1963, the Gambia achieved internal self-government with Jawara as Prime Minister.<sup>24</sup>

### 3 1965 Independence Constitution

Two weeks after Jawara's appointment, a United Nations' team of experts led by HJ van Mook arrived in Bathurst to consider the Gambia's constitutional future. Its report, which was submitted to the Gambian government in March 1964, proposed three options: political and economic union through the complete integration of the Gambia into an enlarged Senegal, the option favoured by the Senegalese government; a loose Senegambia federation between the Gambia and Senegal, preferred by Jawara and the PPP; and a compromise 'association', which would permit a more leisurely progression towards closer union. The proposals were discussed by the Gambian and Senegalese governments in May and

23 Hughes & Perfect (n 1) 52, 149-153; Jawara (n 21) 221-223.

24 Hughes & Perfect (n 1) 150-157; Jawara (n 21) 221-233; JC Senghor *The politics of Senegambian integration 1958-1994* (2008) 129-134.

June 1964 with various proposals being rejected by one or the other and so the Van Mook Report's third option was eventually followed.<sup>25</sup>

Despite the vain efforts of PS N'Jie to persuade the British government that another election was required before independence, a new constitutional conference was convened in London in July 1964. This was attended by representatives of the three current political parties, the PPP, the UP and the Gambia Congress Party (GCP) led by Garba-Jahumpa, alongside various colonial officials.<sup>26</sup> After ten sessions, the terms of a new constitution were approved, with Sandys announcing at the last session on 30 July 1964 that The Gambia would become independent on 18 February 1965. The new constitution would then come into force under the Gambia Independence Act. Under its provisions, Queen Elizabeth II would remain as head of state, with a Governor General serving as her local representative, but responsible to the Gambian government, while the government would be headed by an elected Prime Minister assisted by a cabinet. Like the Sierra Leone constitution of 1961, the monarchical form of government was protected under an 'entrenched' provision of the constitution. Entrenched clauses could only be amended if supported by two-thirds of the elected MPs and subsequently confirmed by a two-thirds majority in a referendum.<sup>27</sup>

## **4 1970 First Republican Constitution**

Only two months after independence, in April 1965, Jawara informed the Governor General, Sir John Paul, that he was contemplating replacing the monarchy with a republic on the first anniversary of independence in February 1966. The decision was approved by the cabinet in May and the Republic Bill, which had in fact been drafted by Paul, put to the House of Representatives on 1 June. As stated in the constitution, two-thirds of elected MPs were required to support the bill for it to go forward. Given the PPP's dominance of the House of Representatives following a series of defections from the UP to the PPP since the 1962 election, this was easily achieved, with the Bill passing both its second and third readings on 9 November 1965. The next stage was to organise a national referendum

25 Hughes & Perfect (n 1) 258-259; Perfect (n 1) 389; Jawara (n 21) 301.

26 Hughes & Perfect (n 1) 155-158; Ceesay (n 19) 105-107. The GCP was founded in 1962 after breaking away from the DCA.

27 Hughes & Perfect (n 1) 44. On the conference, see also Jawara (n 21) 242-244; the Conference Report is available at <https://www.lawhubgambia.com/> (accessed 4 July 2022).

with the PPP government requiring a two-thirds majority of those voting to win.<sup>28</sup>

#### 4.1 1965 Referendum

The UP had made clear its opposition to the Republic Bill from June and campaigned hard against the referendum; the UP was supported by the main trade union, the Gambia Workers' Union, various discontented former chiefs, and sundry influential individuals, including Faye. The PPP was overconfident and campaigned ineffectively, with many voters in the rural areas not bothering to turn out to vote (the overall turnout was only 61 per cent, lower than in the 1962 election). Nevertheless, it was still a surprise when the government failed very narrowly by 758 votes to achieve the required two-thirds majority. Some ministers urged Jawara to ignore the result and impose a republic unilaterally, but he refused to do so, and The Gambia was to remain a constitutional monarchy for another five years.<sup>29</sup>

#### 4.2 1970 Referendum

In May 1969, clearly with Jawara's prior approval and probably his actual instigation, the PPP's National Executive passed a resolution calling on the government to hold a referendum for the introduction of a Republican Constitution before the next general election due in 1972. On 18 June, Jawara informed the House of Representatives of his intention to do so. The Republic Bill, which was probably largely drafted by the Attorney General, ML Saho, but without UP input after PS N'Jie had refused a request from Jawara to be involved in its drafting, was duly published in November 1969. It was approved by parliament, which had a strong PPP majority, in December.<sup>30</sup>

The Bill laid down that the Queen would be replaced by a President as head of state and government, with full executive powers, and the posts of Governor General and Prime Minister abolished. The President would be indirectly elected by an electoral college of existing MPs, although the Constitution provided for the President to be directly elected by universal

28 Hughes & Perfect (n 1) 160-162; 425 (n 3) for Paul's confirmation of his role. See also PPP *The voice of the people: the story of the PPP 1959-1989* (1992) 80-82.

29 Hughes & Perfect (n 1) 162-163. See also Ceesay (n 19) 115-116; PPP (n 28) 82-85. Although the vote was not broken down by constituency, it is likely that the 'no' vote was particularly high in Bathurst and in rural areas which had backed the UP in 1962.

30 Hughes & Perfect (n 1) 175-176; Jawara (n 21) 271-273; PPP (n 28) 86-87. See also Foreign & Commonwealth Office (FCO) 65/32, Sullivan to Middleton, 12 June 1969; FCO 65/596, MB Collins to AJ Collins, 3 January 1970.

suffrage as indeed happened from 1982. The new President would have no seat in the House of Representatives, but parliament would retain a powerful political role, not least because all cabinet members, including the new post of Vice President, were required to be elected or nominated MPs. The Constitution also created the structures to share powers between the executive, legislature and judiciary with an independent Judicial Service Commission and Public Service Commission responsible for discipline and promotion in the public service. Presidential candidates must be aged at least 30 (there was no maximum age limit) and no presidential term limits were imposed.<sup>31</sup>

As in 1965, a referendum, which was held between 20 and 23 April 1970, was required to approve the new constitution. The opposition to the constitution was led once again by the UP. It expressed particular concerns that since 1968 the Attorney General had also been the Minister of Justice with a seat in the cabinet, but its opposition was largely motivated by PS N’Jie’s intemperate hostility to Jawara.<sup>32</sup> It acted this time in conjunction with the People’s Progressive Alliance (PPA), a breakaway party from the PPP founded in 1968 whose leaders included a former Minister of Finance, Sheriff Sisay. Compared with 1965, the UP was in a state of terminal decline, while the PPA’s initial hopes of successfully challenging the PPP had reduced and it was much harder than in 1965 for dissident chiefs to stir up opposition to the Bill. The PPP was also determined to avoid the mistakes of 1965 and ensured that eligible rural voters were granted voters’ cards. It also campaigned much more effectively than in 1965, thus helping to ensure a very high turnout of 90 per cent. Despite the Governor General, Sir Farimang Singhateh, opposing it, the referendum was won comfortably by the PPP, with 70.5 per cent of those voting, and 25 out of 32 constituencies, supporting it. In six of the seven constituencies which had a UP MP in 1970, there was a ‘no’ majority; in the seventh, Jimara, the ‘yes’ majority was one. The only other constituency in which there was

31 On the Constitution, see especially Jammeh (n 1) 38-44; HB Jallow *Journey for justice* (2012) 327-335. See also Jawara (n 21) 271-273. The Vice President had to be an elected member. The Constitution is available at <https://www.lawhubgambia.com/> (accessed 4 July 2022).

32 Collins (n 30). See also FCO 65/32, Thatcher to Thomas, 3 June 1969, enclosing N’Jie to Thatcher, 29 May 1969.

a 'no' majority was Niamina, whose MP was Sisay.<sup>33</sup> On 24 April, Jawara took the oath of office as The Gambia's first President.

### 4.3 Functioning of the 1970 Constitution

The 1970 Constitution remained in place until the overthrow of the PPP government in July 1994. During this 24-year period, there were relatively few constitutional amendments apart from the introduction of direct elections to the presidency in 1982.<sup>34</sup> Unquestionably, the greatest challenge to the Constitution occurred in July 1981 when the government was temporarily overthrown by a coup while Jawara was out of the country. The coup was led by Kukoi Samba Sanyang and a small group of civilian revolutionaries, who had joined forces with members of the paramilitary Gambia Field Force.<sup>35</sup> The coup was eventually quashed by Senegalese forces and Jawara restored to power on 2 August. A state of emergency, which was to remain in place until 1984, was imposed and the Constitution's judicial processes were then put to the test in a series of treason trials. Conducted by senior lawyers from other Commonwealth countries, these trials were scrupulously fair, resulted in a number of acquittals, including of the leader of the opposition, Sheriff Dikka, and led to relatively few death sentences being imposed, all but one of which was subsequently commuted.<sup>36</sup>

Five presidential elections were held under the First Republic. Jawara was elected indirectly by the PPP-dominated House of Representatives in 1972 and 1977. After direct elections were introduced, he won again in 1982, 1987 and 1992. He defeated Sheriff Dikka, a former PPP Vice President, who had founded the National Convention Party (NCP) in 1975, in 1982; Dikka and another former PPP Vice President, Assan Musa Camara, who had founded the Gambia People's Party (GPP) in 1986, in 1987; and four other candidates, Dikka, Camara, Lamin Bojang of the People's Democratic Party and Sidia Jatta of the People's Democratic Organisation for Independence and Socialism (PDOIS), in 1992. Meanwhile, the PPP easily won all five elections to the House of Representatives between 1972 and 1992, taking 25 out of 36 seats in

33 Hughes & Perfect (n 1) 172-176; Jawara (n 21) 244; 273-274; Sullivan (n 30). Perfect (n 1) 397-398 on Singhatch. Results by constituency are in Hughes & Perfect (n 1) 345-346.

34 Jallow (n 31) 329-332 lists the amendments, noting these were 'limited'. Jammeh (n 1) 44, makes a similar point.

35 Hughes & Perfect (n 1) 210-220; Jawara (n 21) 308-326; Jallow (n 31) 104-128.

36 Jammeh (n 1) 45-49; Jallow (n 31) 107-128. Only Mustapha Danso, who had been condemned to death for murder in 1980, was executed; see Perfect (n 1) 112.

1992; the NCP won 6 seats, the GPP 2 and three Independents were also successful.<sup>37</sup>

## 5 1997 Second Republican Constitution

On 22 July 1994, four junior officers in the Gambia National Army (GNA), Lieutenant Yahya Jammeh, and three second lieutenants, Sadibou Hydara, Sana Sabally and Edward Singhateh, organised a successful, bloodless, coup against the PPP government. They claimed to be acting in the national interest to replace a corrupt and undemocratic government, but evidently other factors also lay behind their action, including personal ambition and resentment toward the large Nigerian military training mission, responsible for training the new GNA. As the most senior of the four, Jammeh was appointed as chairman of the Armed Forces Provisional Ruling Council (AFPRC) on 23 July, with the other three men assuming roles within the AFPRC. Another lieutenant, Yankuba Touray, was added to the AFPRC later that evening. Following the coup, political parties were banned and a number of ministers in the former government were arrested, the House of Representatives was abolished, and the 1970 Constitution suspended before being formally dissolved by Decree 30 of April 1995.<sup>38</sup>

### 5.1 National Consultative Committee

Three months after the coup, in October 1994, Jammeh announced a four-year transitional timetable at a rally in Independence Stadium to celebrate the AFPRC's first 100 days in office. This decision was widely criticised by the European Union, the United States, and by individuals and organisations within The Gambia. In the face of this criticism, Jammeh stated a month later that he would set up a National Consultative Committee (NCC) to review this timetable and perhaps shorten the period before civilian rule resumed.<sup>39</sup>

37 Hughes & Perfect (n 1) 177-250; D Perfect & A Hughes 'Gambian electoral politics: 1960-2012' in Saine et al (n 1) 85-95.

38 The numerous sources on the coup include Z Yeebo *State of fear in paradise: The military coup in The Gambia and its implications for democracy* (1995); Ceesay (n 1) 81-109; Hughes & Perfect (n 1) 280-90; S Sarr *Coup d'etat by the Gambia National Army* (2007); Jawara (n 21) 379-388. See also Jallow (n 31) 616-617; 'Decree no 30 comes into force' *Weekend Observer* 7-9 April 1995. New information has more recently emerged from Sabally's evidence to the Truth, Reconciliation and Reparations Commission (TRRC). See K Jeffang 'Sana Sabally links the July 1994 coup to discontent in the army' *The Chronicle* 24 April 2019. On the AFPRC leaders, see Perfect (n 1) 207, 228-231; 368-369, 397, 419.

39 'Four-years timetable is reasonable, *Lt Jammeh*' *Gambia Weekly* 4 November 1994; Ceesay (n 1) 150-51; Yeebo (n 38) 101-105.



The NCC was formally established on 13 December 1994. It had 23 members (including a Secretary) with Dr Lenrie Peters, a prominent Gambian surgeon and poet, being appointed as its Chairman.<sup>40</sup> Other members included Michael Cleary, who had served as the Roman Catholic Bishop of Banjul since 1985, who represented the Gambia Christian Council (GCC);<sup>41</sup> one of The Gambia's best known journalists, Deyda Hydara, who represented the Gambia Press Union and was to be murdered in 2004 almost certainly on Jammeh's orders;<sup>42</sup> a leading private practice lawyer, Sourahata Semega Janneh, who represented the Gambia Bar Association; Rachel Palmer, a retired school teacher who had participated in the constitutional talks in 1959; Pa Modou Faal, the leader of the main trade union organisation, the Gambia Workers' Confederation; Amie Joof-Cole, who represented the National Women's Council; three youth leaders, and no less than five chiefs. Notably, no former MPs or prominent members of any of the banned political parties were appointed. The selection process of NCC members remains unclear. Peters himself was unsure whether he owed his appointment to the AFPRC or to Fafa M'Bai, who had been appointed Attorney General in August, and was certainly involved in the process. No individuals were formally nominated as candidates by any organisation.<sup>43</sup>

The AFPRC intended the NCC's work to be completed quickly. Under its terms of reference, it was required to submit its report within 21 days.<sup>44</sup> This was clearly unrealistic even though the NCC, under Peters' energetic leadership, quickly organised meetings throughout The Gambia to gauge public opinion, with different commissioners being allocated to different areas. Progress was not always smooth, and the suspicion remained that the AFPRC expected the NCC simply to endorse the four-year transition period without protest.<sup>45</sup> Sadibou Hydara, the Minister of the Interior,

40 National Consultative Committee (NCC) *Report of the National Consultative Committee on the Armed Forces Provisional Ruling Council's programme of rectification and timetable for transition to democratic constitutional rule in The Gambia* (1995) Annex II. On Peters, see Perfect (n 1) 343.

41 On Cleary and the GCC, see MT Frederiks *We have toiled all night: Christianity in The Gambia 1456-2000* (2003) 347-349, 377-387.

42 On Hydara, see Perfect (n 1) 205-206. In evidence to the TRRC in July 2019, Lieutenant Malick Jatta, who admitted he was part of the team that carried out the murder, made it clear that Jammeh had given the orders to assassinate Hydara. See K Jeffang 'Deyda Hydara murdered in cold blood: Confession of an assassin' *The Chronicle* 22 July 2019.

43 'Good, old, Lenrie Peters: Surgeon, novelist, poet' *The Independent*, 2 February 2001 (interview with Peters). M'Bai stated in an interview with the BBC that he had been instrumental in setting up the NCC. See 'The power dynamics within the AFPRC' *Foroyaa* 3 February 1995. On M'Bai, see Perfect (n 1) 289-290.

44 NCC (n 40) Annex I.

45 Yeebo (n 38) 107.

stated at a public meeting in Brikama that some members of the NCC were corrupt, a statement which infuriated Peters. Moreover, the military Commissioner of the Upper River Division, Captain Musa FK Baldeh, who considered that Faal was trying to stir up opposition to the four-year transition period, stopped a meeting in Basse and even seized the NCC's tape recordings.<sup>46</sup>

On 27 January 1995, three weeks later than originally envisaged, the NCC submitted its report to the AFPRC, concluding that most Gambians clearly welcomed the change of regime. Its recommendations included the establishment in February 1995 of a Constitutional Review Commission, to review the 1970 Constitution within six months, and a National Electoral Commission by August 1995. In addition, it recommended the government should set up a Constituent Assembly in February 1996 and promulgate the new constitution, after its adoption by the Assembly, by the end of April 1996; lift the ban on political activities in March 1996; and hold general and presidential elections in June 1996. The swearing in of the head of state and the inauguration of the Second Republic National Assembly was scheduled for July 1996, thus reducing the four-year transition period to two years. The NCC also discussed whether the AFPRC should stand down and be replaced by an interim government but concluded 'that the matter be left to the discretion of the AFPRC within the framework of the recommended timetable of the NCC'.<sup>47</sup> Although the NCC's report was generally welcomed by First Republic opposition political leaders, Jawara criticised the two-year transition period to civilian rule as too long. He argued that the NCC had been manipulated by the AFPRC, a charge strenuously denied by Peters.<sup>48</sup>

On 3 February, Jammeh broadcast to the nation over Radio Gambia that the AFPRC and the cabinet had accepted the NCC's recommendations.<sup>49</sup> But by then, the overall political context had changed dramatically. On 27 January, the day the report was presented to Jammeh, two AFPRC

46 See MM Secka 'Commissioner explains why NCC URD team was recalled' *Gambia Daily* 23 December 1994; and the retrospective articles by S Touray 'AFPRC sets up Consultative Committee, has it succumbed to pressure?' *Foroyaa* 2 November 2009; 'National Consultative Committee starts nation-wide consultations' *Foroyaa* 6 November 2009; 'AFPRC spokesperson hard on NCC members, sending mixed signals to the populace' *Foroyaa* 9 November 2009. *Foroyaa* 'The power dynamics' (n 43) suggests that some NCC members may have denounced the coup, which could account for Hydara's allegations of corruption.

47 NCC (n 40) Conclusions & Recommendations; Annex VII (Timetable).

48 S Touray 'Ousted Sir Dawda Jawara denounces the NCC report' *Foroyaa* 15 May 2010; 'Former opposition leaders applaud NCC report as NCP leader reserves opinion Dr Peter's advise (sic) to Sir Dawda' *Foroyaa* 18 May 2010.

49 H Sallah 'Letter to the chairman of the AFPRC' *Foroyaa* 19 April 1995.

leaders, Sabally and Hydara, were accused of threatening to kill Jammeh in order to seize power and detained. Hydara died in prison in June 1995 before he could be brought to trial, while Sabally was sentenced to a nine-year prison sentence in September 1995 and only released in January 2004; almost certainly both men were tortured in prison.<sup>50</sup>

Whether Sabally and Hydara had really planned to seize power, or whether Jammeh acted first to eliminate two potential rivals, is disputed. Certainly, there were tensions between Jammeh and the other two men. Sabally, for example, had unilaterally decided to construct a mosque at Gambisara in Upper River Division against the wishes of Jammeh and the village elders (who he also publicly humiliated).<sup>51</sup> Moreover, both Hydara and Sabally, the AFPRC vice-president, 'gave the impression that they hated the NCC and anybody who dared talk about a transition to civilian rule'.<sup>52</sup> After the two men had been arrested, an AFPRC radio broadcast and press release claimed that the submission of the NCC's report and its recommendation to reduce the transitional timetable to two years had led to their attempt to overthrow Jammeh.<sup>53</sup> In his evidence to the Truth, Reconciliation and Reparations Commission (TRRC) in April 2019, Sabally stated that, far from wishing to retain a longer transition period, he and Hydara had wanted the military to step down from power after six months. However, their prior behaviour towards the NCC casts considerable doubt on this assertion.<sup>54</sup>

## 5.2 1995 Constitutional Review Commission

The Constitutional Review Commission (CRC 1995) was established by the AFPRC on 31 March 1995 under Decree 33 of 1995 to take forward the work of the NCC with its members being officially sworn in on 20 April. Its remit was to review the 1970 Constitution; hold nationwide consultations; receive submissions from all levels of society; and then draft a new constitution to come into force after the return to civilian rule.<sup>55</sup>

50 Yeebo (n 38) 108-112; Perfect (n 1) 207, 369. In evidence to the TRRC, Sabally described the torture inflicted on both men in detail and named their torturers. See Y Jallow 'Sanna Sabally gives graphic details of torture and murder' *Foroyaa* 26 April 2019.

51 M Janson *Islam, youth, and modernity in the Gambia: The Tablighi Jama'* at (2014) 84; Perfect (n 1) 369.

52 Yeebo (n 38) 109.

53 Ceesay (n 1) 153; Yeebo (n 38) 110-112.

54 Jallow (n 50).

55 L Mendy & AF Sagnia 'CRC sworn-in, inaugurated' *Gambia Daily* 21 April 1995.

CRC 1995 had fewer members than the NCC and while it again remains unclear how they were selected, there is no evidence that there was a formal nomination process. Chaired by a Ghanaian High Court Judge, Justice Gilbert Mensah Quaye, who had been seconded to The Gambia, it had ten members in total. Some were well-known figures such as Bishop Tilewa Johnson, the Anglican Bishop of Gambia and Gabriel J Roberts, a former director of education and a noted Gambian playwright who was subsequently to serve as the first chairman of the Provisional Independent Electoral Commission (PIEC) established in December 1995. Other members included a Chief, Seyfo Bakary Dembo Santang Bojang of Kombo Central, and the head of the Independence Drive Mosque in Banjul, Alhaji Makumba Jaye. Haddy C Roche, a state counsel, acted as Secretary, but was not technically a member. Those excluded included all former MPs; a number of the civil society organisations such as the National Women's Council which had been involved in the NCC; and The Gambia Bar Association (GBA).<sup>56</sup> The selection did not meet with universal approval as some members, notably Roberts, were thought to be antagonistic to the PPP government and thus liable to support the AFPRC's position.<sup>57</sup>

The Commission commenced public sittings in Banjul on 24 April and began its national consultations in early May. It was perhaps less active than the NCC in engaging directly with the population and Quaye certainly expressed disappointment about the poor public response to its public sittings.<sup>58</sup> Nevertheless, over the next few months, it received a large number of submissions, some of which were extremely detailed and published in local newspapers.<sup>59</sup> Initially required to submit its report to the AFPRC government within three months, it was granted a three-month extension by the government in August. At the same time, Paul Fifoot, a retired former deputy legal adviser in the Foreign and

56 CB Jallow 'Over US\$32m is needed' *Daily Observer* 11 April 1995, lists the membership in full; see also AY Jallow 'Lawyer Ousainou Darboe DID NOT draft the 1997 Constitution as being circulated on social media' *Gambiana* 27 June 2019. BM Gaye 'Constitution (sic) Review Commission decree amended' *New Citizen* 21 April 1995, notes that Roche was not a full member. On Roberts and the PIEC, see Perfect (n 1) 210, 360-361.

57 Ceesay (n 1) 151-155. See also Roberts' 1995 speech to the Gambia College reported in C Kebbeh 'Gambia College graduation: July 22 coup was realization of peoples (sic) wishes – Gabriel Roberts' *New Citizen* 24 March 1995.

58 'CRC chairman expresses disappointment' *Daily Observer* 26 April 1995.

59 See, for example, PM Faal 'The next Republican Constitution as foreseen by the Gambia Workers' Confederation' *Daily Observer* 26 April, 10 July 1995; 'Recommendations of the Gambia Bar Association on the 2nd Republican Constitution' *Daily Observer* 22, 26 June 1995; WE Hydera-Colley 'Recommendations to the Constitutional Review Commission' *Daily Observer* 27, 28, 29 June 1995.

Commonwealth Office, was brought in to help draft the constitution.<sup>60</sup> The Commission finally handed over its report to the government on 20 November 1995, with Quaye stating at the handing over ceremony that it had ‘enjoyed full independence. We didn’t have any interference from any quarter whatsoever’.<sup>61</sup>

The full report of CRC 1995 was apparently never published, although its main recommendations were certainly widely known in Banjul. In March 1996, the Draft Constitution was finally published by the government, and it soon became clear that some key recommendations had been rejected. The GBA had argued strongly that the president must be at least 40 years of age (and under 70), compared to the 30-year age minimum in the 1970 Constitution. Since this proposal would have prevented Jammeh, who was 31 at the time of the 1996 presidential election, taking part, it was not surprisingly rejected by the AFPRC government.<sup>62</sup> There was also a widespread view that a president should serve a maximum of two five-year terms. There had been no term limits in the 1970 Constitution and the AFPRC had been critical of Jawara remaining in office for so long; nevertheless, this proposal too was rejected.<sup>63</sup>

### 5.3 1997 Second Republican Constitution

Jeng notes that new constitution contained Transitional and Consequential Provisions (TCP) that emphasised ‘the inviolability of fundamental rights and freedoms’ and also unequivocally required the separation of powers between the different arms of government.<sup>64</sup> Constitutional provisions guaranteed human rights and freedoms to all, prohibited arbitrary arrest and detention and provided for freedom of speech, including in the media. Supervisory institutions and structures were put in place to ensure the protection of constitutional rights. These were to be enforced not only by the judiciary, but also through the establishment of an Office of the

60 ‘High Commissioner Wilde reacts’ *Daily Observer* 23 August 1995.

61 ‘Here and there’ *Gambia Daily* 1 December 1995.

62 C Ceesay ‘Presidential candidates must not be below 40’ *Weekend Observer* 2-4 June 1995; *Daily Observer* ‘Recommendations of the Gambia Bar Association’ (n 59). Roberts confirmed that Jammeh had amended this CRC recommendation; see Ceesay (n 1) 158.

63 ‘Next president should only rule for two five-year terms’ *Daily Observer* 27 April 1995. In July 1996, the PPP criticised the rejection of both recommendations. See PPP ‘Declaration of the People’s Progressive Party (PPP) on the transition back to democracy in The Gambia’ cited in Jawara (n 21) 465; Jeng (n 1) 132-133.

64 Jeng (n 1) 121-123. The current version of the constitution, containing all amendments made up to 2018, is available at <https://www.lawhubgambia.com/1997-constitution> (accessed 4 July 2022).

Ombudsman to handle complaints against the administration and the creation of the National Council for Civic Education to educate the public on their rights and entitlements.<sup>65</sup> These were positive features of the new Constitution, as was the reduction of the voting age from 21 to 18, but they were countered by negative ones, notably the reintroduction in August 1995 by Decree 52 of the death penalty, which had been abolished in 1993; the maintenance as a source of Gambian law all decrees passed by the AFPRC since 1994, many of which had severely restricted civil liberties; and various indemnity clauses which effectively protected ministers, military personnel and other AFPRC appointees from prosecution for their actions since July 1994.<sup>66</sup> The 1997 Constitution also disqualified from the presidency those who had been 'compulsorily retired, terminated or dismissed' from public office, or were found liable by a commission of inquiry of 'misconduct', 'negligence', 'corruption' or 'improper behaviour'. This effectively ruled out many former PPP members. The Constitution also established a National Assembly to replace the dissolved House of Representatives; this initially had 45 elected members (NAMs). In complete contrast to the 1970 Constitution, which had required cabinet ministers to be members of the House of Representatives, the 1997 Constitution excluded NAMs from cabinet positions.<sup>67</sup>

Saine argues that the 1997 Constitution was 'a slight improvement' over the 1970 Constitution despite its 'many flaws', while Hassan Jallow, who had been the Attorney General in the PP government, argued that the new Constitution 'made some significant advances in governance', while also having 'undesirable' features. In contrast, Jeng concludes that it was 'a constitutional tragedy, the substitution of hope with despair!' while Sowe and Nabaneh consider that it 'lacks legitimacy with Gambians seeing it as an artefact of the Jammeh government'.<sup>68</sup>

## 5.4 Referendum on the Constitution

Although the NCC had recommended that the Draft Constitution be considered by a constituent assembly, which would have allowed amendments to be made, the AFPRC government instead organised a referendum in which voters were given the straight choice of either

65 Jeng (n 1) 124-129; S Nabaneh 'The Republic of The Gambia: Introductory note' (2017). The PPP welcomed the creation of the Office of the Ombudsman, which had been planned before 1994; see Jallow (n 31) 342-345; PPP (n 63) 470-471.

66 Ceesay (n 1) 158-159; Jeng (n 1) 137-144; PPP (n 63) 471-472.

67 PPP (n 63) 465-468.

68 Jeng (n 1) 146; Saine (n 1) 28; Jallow (n 31) 337-338; G Sowe & S Nabaneh 'The Gambia: The state of liberal democracy' *The Standard* 31 July 2018.



accepting or rejecting the entire Constitution. This was held on 8 August 1996 under the direction of the PIEC. Since the ban on all existing political parties and the prohibition of all political activities imposed in August 1994 remained in force, no overt campaigning against the referendum was possible, whereas the pro-government July 22nd Movement had effectively been engaged in political activity since its foundation in July 1995.<sup>69</sup>

The PPP called for the electorate to reject the referendum. However, most Gambians seem to have heeded the warning expressed by Bishop Johnson, the vice chairman of the PIEC, that to do so would delay the return of civilian rule and decided that 'diluted military rule was better than continued undiluted military rule'.<sup>70</sup> While the turnout of 86.9 per cent was lower than in 1970, it was higher than in 1965, and exceeded 80 per cent in all except one of the 41 constituencies (Janjanbureh) and the Constitution was approved by 70.4 per cent of those who voted. Moreover, in all except five constituencies, Lower Baddibu, Central Baddibu, Jarra West, Kiang East and Kiang West, the majority of the electorate voted in favour of the referendum.<sup>71</sup> On 16 January 1997, the new Constitution formally came into force.<sup>72</sup>

Following the referendum, the ban on some, but not all, existing political parties was lifted and others were permitted to register before the first presidential election in the Second Republic took place in September 1996. The election, which was far from free and fair, was won by Jammeh as the candidate of a new party, the Alliance for Patriotic Reorientation and Construction (APRC). He defeated three opposition candidates, ANM Ousainou Darboe of the United Democratic Party (UDP), Hamat Bah of the National Reconciliation Party (NRP) and Sidia Jatta (PDOIS). Jammeh headed the ballot in 36 out of 45 constituencies and Darboe in nine, including all five in which the majority of voters had rejected the

69 Ceesay (n 1) 155-156. On the July 22 Movement, see Perfect (n 1) 252.

70 PPP (n 63) 472-473; 'Any attempt to reject the constitution delays return to civilian rule' *The Point* 6 May 1996; Ceesay (n 1) 156.

71 Detailed results are in *Gambia Daily* 12 August 1996. The referendum constituencies differ slightly from those used in the presidential election held in September 1996 when there were 45 constituencies. A comparison of the total registered number of voters in the referendum and the presidential election shows that the referendum results for Basse, Tumana and Jimara were presented as a single figure for Fulladu East; those for Upper Fulladu West and Lower Fulladu West were combined in Fulladu West; and those for Sabach Sanjal and Illiassa were combined in Upper Baddibu.

72 Jammeh (n 1) 73 note 151, discusses whether the Constitution came into operation in October 1996 or January 1997 as Yahya Jammeh performed two swearing-in ceremonies and concludes that it was the latter date.



referendum in the previous month.<sup>73</sup> Jammeh was to win subsequent presidential elections on behalf of the APRC in 2001, 2006 and 2011, with ever increasing majorities. While this was partly due to electoral fraud, Jammeh's cause was considerably strengthened by opposition disunity, notably in 2006. The APRC also won National Assembly elections in 2002, 2007 and 2012.<sup>74</sup>

## 6 2020 Draft Constitution

The fifth presidential election under the Second Republic took place in December 2016. In advance of the polls, most commentators assumed that Jammeh would win again even though, unlike in previous presidential elections, all except one of the political parties, The Gambia Democratic Congress (GDC) had managed to unite behind a single Coalition candidate, Adama Barrow. Barrow had been Acting Treasurer of the UDP but resigned from the party just before the election and stood as an Independent since under the election rules, a candidate could not stand for two different parties. In fact, Jammeh, was most unexpectedly defeated by Barrow, who gained 43.3 per cent of the vote, defeating Jammeh (39.6 per cent) and Mama Kandeh of the GDC (17.1 per cent). Jammeh at first accepted the results, but changed his mind a week later, thus triggering a major political crisis which lasted until Jammeh finally left The Gambia on 21 January 2017.<sup>75</sup> Barrow, who had already been sworn in as President at the Gambian Embassy in Dakar, finally returned to The Gambia on 26 January and appointed his first Cabinet on 1 February, adding further ministers in March and April. His first Cabinet included the leaders of five Coalition parties and a prominent member of a sixth, but the PDOIS was not represented.<sup>76</sup>

Prior to the 2016 election, Barrow had endorsed a Memorandum of Agreement between the Coalition parties that he would serve for three years only as a transitional President before stepping down; he would

73 Perfect & Hughes (n 37) 97. In Upper Baddibu, Darboe polled more votes than Jammeh in Illiassa, but fewer than his rival in Sabach Sanjal. He also outpolled Jammeh in Bakau, Central Baddibu and Jarra East, where the 'yes' majority in the referendum had been comparatively small. See Perfect (n 1) 45-46, 112-113, 236-237 on Bah, Darboe and Jatta.

74 Perfect & Hughes (n 37) 95-106 summarise all these elections.

75 N Hultin et al 'Autocracy, migration, and The Gambia's "unprecedented" 2016 election' (2017) 116 *African Affairs* 321; D Perfect 'The Gambian 2016 presidential election and its aftermath' (2017) 106 *The Round Table* 323. The results shown are the revised ones announced by the Independent Electoral Commission following an initial miscount.

76 Perfect (n 75) 329-330; L Jahateh & K Jawo 'Barrow swears in new cabinet, one coalition party missing' *The Point* 2 February 2017.

also not contest the next election.<sup>77</sup> However, over the next three years, he gradually consolidated his power as the Coalition began to fragment. Coalition parties had opposed each other directly as early as the April 2017 National Assembly election.<sup>78</sup> The leaders of the Gambia Moral Congress, Mai A Fatty, and the Gambia Party for Democracy and Progress, Henry Gomez, were dismissed from the Cabinet in November 2017 and July 2018 respectively.<sup>79</sup> In the most dramatic development, Barrow sacked all three UDP ministers, Ousainou Darboe (the Vice-President), Amadou Sanneh and Lamin N Dibba in March 2019, with Darboe later claiming that this was because they had refused to endorse Barrow as a presidential candidate for a second term.<sup>80</sup> This meant that by 2020, only three political parties were now represented in the Cabinet, the NRP, the PPP and the ineffective NCP.<sup>81</sup>

## 6.1 2018 Constitutional Review Commission

The 1997 Constitution had been subject to many amendments since 2001, which had been passed by the National Assembly in accordance with section 226 of the Constitution rather than being introduced by the Supreme Court.<sup>82</sup> Indeed, when the National Assembly had amended an entrenched clause in 2001 to state that The Gambia was a secular republic, without seeking the endorsement of the population in a referendum as was required, the Supreme Court had rejected the change.<sup>83</sup> While many of the amendments were routine, one important one in 2003 meant that to win a presidential election, a candidate only had to gain the most votes and no longer achieve 50 per cent of the vote, thereby eliminating the need

77 M Dwyer & I Ceesay 'The Gambia's president said he'd step down after three years. Will he?' (2019) *African Arguments* 12 December 2019.

78 Perfect (n 75) 332.

79 K Jeffang 'Government tight-lipped over minister's sacking' *Foroyaa* 13 November 2017; O Bah 'Ex-ministers speak' *The Standard* 2 July 2018. Fatty was deployed to the diplomatic service, while Henry Gomez was appointed as a Special Adviser to Barrow. On the two men, see Perfect (n 1) 144, 188.

80 L Njie 'Barrow sacks Darboe, Sanneh, Dibba' *The Fatu Network* 15 March 2019; O Bah 'Darboe reveals why Barrow sacked them' *The Standard* 29 December 2020.

81 The NCP had been reconstituted prior to the 2016 election, but was now in internal disarray. See Perfect (n 75) 324-325; O Bah 'NCP reconciles to avoid deregistration' *The Standard* 8 July 2020.

82 Jammeh (n 1) 366-367 lists the amendments up to 2007; later amendments are noted at <https://www.lawhubgambia.com/1997-constitution> (accessed 4 July 2022).

83 Constitutional Review Commission (CRC) *Report of the Constitutional Review Commission on the Draft Constitution for the Third Republic of The Gambia* (2020) 44-45.

for a run-off election. This measure was designed to strength President Jammeh's position.<sup>84</sup>

The 1997 Constitution had, however, clearly failed in its critical task of preventing the widespread and sometimes horrific abuses of human rights perpetrated under Jammeh. Barrow therefore had promised in his 2016 election campaign that the government would appoint 'competent persons to work in consultation with the Law Reform Commission to provide guidance' on how to draw up a new constitution.<sup>85</sup> In May 2017, a National Stakeholders Conference on Justice and Human Rights called for the preparation of a new constitution since there were too many flaws in the 1997 Constitution for it to be amended.<sup>86</sup> This argument was accepted by the Coalition government and in July, the Attorney General and Minister of Justice, Ba Tambahou, announced that a Third Republic Constitution would be drawn up. He added that it was proposed that a new Constitutional Review Commission (CRC) would be established with members 'drawn from a cross-section of the Gambian political, religious, civil society, youth, women, professional and other communities'. The CRC would be mandated to consult with the Gambian population including, in a departure from previous practice, with the Gambian diaspora. Following these consultations, it would be required to draw up a report and a new constitution, which as in 1996, would then be put to a referendum.<sup>87</sup>

The Constitutional Review Commission Bill was approved by the cabinet in November 2017, passed by the National Assembly on 13 December, even though at least one NAM, Suwaibou Touray of the PDOIS, argued that it was possible simply to reform and not replace the existing constitution, and assented to by Barrow in January 2018.<sup>88</sup> The Act laid down that the CRC was responsible for drafting a new constitution and preparing a subsequent report and was required to complete its work within 18 months of its formal establishment on 4 June 2018. It also stated that the CRC should comprise a Chairperson (a Chief Justice or

84 Saine (n 1) 118.

85 Perfect (n 75) 330.

86 CRC (n 83) 24.

87 K Jeffang 'Gambia to enter Third-Republic with new constitution' *Foroyaa* 21 July 2017.

88 CRC (n 83) 24; KAF Touray 'At the National Assembly: Debate on the Constitutional Review Commission Bill' *Foroyaa* 12 December 2017. *Foroyaa* 'Should there be a Constitutional Review Commission or a new Constitution Drafting Commission?' 13 December 2017. The Act is available at <http://197.231.128.20/crc/wp-content/uploads/2015/12/CONSTITUTIONAL-REVIEW-COMMISSION-ACT-2017-519.pdf> (accessed 4 July 2022).

a judge of the superior courts to be nominated by the Chief Justice); a Vice Chairperson (a legal practitioner of not less than 10 years standing nominated by the Minister of Justice); and nine other members nominated by the President. That Barrow was responsible for nominating as many as nine members resulted in some criticism. In fact, the selection of members was more participatory than it previously been. Barrow had invited four organisations, the Gambia Bar Association, The Association of Non-Governmental Organisations in The Gambia, the Gambia Press Union and the National Youth Council to nominate up to three individuals each and his selection was made from these nominees.<sup>89</sup>

On 22 May 2018, the appointment of Justice Cherno S Jallow as Chairperson was announced. One of the most experienced Gambian lawyers, Jallow had spent most of his career in the Caribbean, having been appointed Attorney General of the British Virgin Islands in 1999.<sup>90</sup> Three legal practitioners in private practice were selected, including Hawa Sisay-Sabally (Vice Chairperson), who had served briefly as Attorney General under President Jammeh before becoming a prominent human rights lawyer. Other members included Gaye Sowe, the Executive Director of the Institute for Human Rights and Development in Africa based in Banjul; Dr Melville George, a former Director of Health Services; and Amie Joof-Cole, who had also served on the 1994 NCC.<sup>91</sup>

The CRC's report states that 'it used a highly participatory and consultative approach to solicit the views and opinions of Gambians' about the issues they wished the new constitution to address.<sup>92</sup> This claim was justified, given the very impressive scale of the CRC's methodological approach which far exceeded that of the 1995 CRC. The CRC conducted 106 public consultations in The Gambia; consulted with Gambians in the diaspora in nine countries; held face-to-face meetings with key stakeholders, including government departments and civil society organisations; organised no fewer than 263 focus group discussions with women and with young, disabled and older people; conducted 874 face-to-face interviews; developed an online Public Participation Platform to

89 E-mail from G Sowe on 15 May 2019. See also LJ Darbo 'The Constitutional Review Commission is unlawfully constituted: A response to Madi Jobarteh' *Freedom Newspaper* 29 June 2018.

90 KAF Touray 'Justice Cherno Jallow designated Constitutional Review Commission chairman' *Foroyaa* 23 May 2018.

91 For profiles, see [https://en.wikipedia.org/wiki/Hawa\\_Sisay-Sabally](https://en.wikipedia.org/wiki/Hawa_Sisay-Sabally); <https://www.ihrda.org/about-us/staff-2/>; <http://www.horizonstrustgambia.org/mgeorge.php>; <http://networks.comminit.com/user/23722> (accessed 4 July 2022). The full list of members is in CRC (n 83) 25.

92 CRC (n 83) 30.

allow greater input, especially from young people; conducted an extensive household survey; and carried out research on key themes.<sup>93</sup>

The CRC's proposed Draft Constitution was published on 15 November 2019 and after a further period of consultation, the revised draft was published on 30 March 2020.<sup>94</sup> The key feature of the Constitution was that, for the first time, no President would be permitted to serve more than two five-year terms whether consecutive or not. As the CRC noted, the public consultations in The Gambia revealed 'near unanimity that no person should serve in the Office of President beyond 10 years of 2 five-year terms'.<sup>95</sup> Crucially this meant that Barrow could only serve one more term since he would already have served one term by the time of the 2021 presidential election. Other new features included that a candidate was required to gain an absolute majority of all votes cast in the presidential election, making it likely that a run-off election would be required, and that any President must have a university degree.<sup>96</sup> Limits were placed on the power of executive by requiring the National Assembly to approve ministerial appointments (except the Vice President). The number of National Assembly members was increased to 69; 53 NAMs would be elected from single member constituencies; 14 women would be elected in a separate ballot, two for each administrative area; and the national federation representing persons with disabilities would elect two of their members. The government also lost its right under previous constitutions to nominate a NAM.<sup>97</sup> For the first time, Gambians living in the diaspora would be permitted to vote in both presidential and parliamentary elections, although proposals for a separate diaspora constituency were rejected.<sup>98</sup> A National Human Rights Commission and Anti-Corruption Commission were also provided for in the Constitution for the first time.<sup>99</sup>

The Draft Constitution required approval first by three-quarters of the 56 National Assembly Members and then by three-quarters of the population in a national referendum, with a minimum 50 per cent turnout.<sup>100</sup> Independent survey evidence revealed that there was strong

93 CRC (n 83) 30-38, analyses the responses on this issue.

94 CRC *Proposed Draft Constitution of the Republic of The Gambia* (2019); *Draft Constitution* (2020).

95 CRC (n 83) 95.

96 CRC (n 83) 91-95, discusses presidential election issues.

97 CRC (n 94) *Draft Constitution* Schedule 3. See also CRC (n 83) 104-109.

98 CRC (n 83) 79-80, 174-175.

99 CRC (n 83) 131-134.

100 CRC (n 83) 167.

public support for the provisions of the New Constitution.<sup>101</sup> However, it was also clear that President Barrow and his cabinet disliked key provisions, notably the fact that Barrow's term of office from 2017 would be counted as his first term under the new Constitution. As noted, during the 2016 campaign, Barrow had stated that he would serve only for three years as a transitional candidate, but in December 2019, he announced that he would register his own political party, the National People's Party (NPP) and stand again as a presidential candidate in 2021.<sup>102</sup> The government had also reacted harshly to protests organised by Three Years Jotna ('Three Years is Up') in December 2019 and January 2020, which had demanded that he resign by 19 January 2020.<sup>103</sup>

When the Draft Constitution was introduced into the National Assembly on 14 September 2020, these underlying tensions soon surfaced during the debates. On 22 September, the matter was put to the vote: while the majority of NAMs (31) voted yes, 23 voted against (one was absent, and one position was vacant due to the death of Demba Sowe of the GDC. All 23 current UDP members voted for the Constitution as did the four PDOIS members and two of the three nominated members. The GDC split, with two of its remaining NAMs voting yes and two no. The five APRC and five NRP members all voted no, as did all nine Independents. Eight of these had been elected for the UDP in 2017 but had been expelled from the party in November 2019. One of the two PPP NAMs (the other was absent) and the third nominated member voted no.<sup>104</sup>

The outcome shocked many commentators. It was denounced by the UDP and GDC, as well as by the Gambia Moral Congress, which had no representation in the National Assembly, but welcomed by the APRC and the Gambia Action Party (which also had no NAMs).<sup>105</sup> The government's half-hearted attempts to promote the Constitution and its

101 SM Jaw 'The Gambia: Why MPs just shot down the popular new draft constitution' (2020) *African Arguments* 24 September 2020.

102 Y Jobe 'Barrow to register party in December' *The Point* 10 December 2019; L Fadera 'Gambia: Barrow registers new political party to seek re-election' *Africa Feeds* 1 January 2020.

103 'Street protest' (2020) 56 *Africa Research Bulletin: Political, Social and Cultural Series (ARB)* 22546; 'The Gambia: "Three Years is Up"' (2020) 57 *ARB* 22589.

104 L Sanyang 'National Assembly rejects the draft constitution' *The Watch Gambia* 22 September 2020, lists the NAMs who voted for and against the Act. Sanyang that Sidia Jatta of PDOIS was absent from the chamber and was not allowed to vote on his return, but it appears that his vote was counted as a 'yes'. See also M Ceesay 'UDP expels 8 NAMs' *The Standard* 15 November 2019.

105 O Bah 'Parties clash over rejection of draft constitution' *The Standard* 23 September 2020.

possible collusion with the APRC to ensure its defeat were also criticised.<sup>106</sup> In December 2020, Halifa Sallah of the PDOIs tried to resurrect the Draft Constitution Bill in the National Assembly, but this attempt was rejected by the Speaker of the National Assembly.<sup>107</sup>

At the government's request, the former Nigerian President, Goodluck Jonathan, organised mediation talks in December 2020 between the political parties and the government, but these were not attended by all parties (the PDOIS did not participate). These appeared to have resolved most of the disputed issues between the parties, except for the crucial one of whether Barrow's current term should be counted as his first term of office or not. Jonathan made a second attempt in February 2021 but at time of writing, it is unclear whether this will succeed.<sup>108</sup>

If Jonathan's mediation fails to find a solution to the problem, one possibility would be to retain the 1997 Constitution and seek to amend it to include the progressive clauses of the Draft 2020 Constitution. Another would be for the CRC to reconvene and either draw up a new constitution or to amend the existing one to meet the objections of its critics within the government and National Assembly.<sup>109</sup> In either case, approval by three-quarters of NAMS and three-quarters of the population in a referendum would be required. Thus, at the end of February 2021, only ten months before the next presidential election is due, the future of the Draft Constitution remains in the balance.

## 7 Conclusions

The Gambia has now experienced more than 70 years of constitution-making. The process has not been continuous, with constitutional changes occurring more frequently between the mid-1940s and the mid-1960s than thereafter. Different methods have been adopted to select members, some more participative than others. Some Constitutions have proved more effective than others in defending human rights, with the 1970 Constitution doing so to a much greater extent than the 1997 one.

106 O Bah 'APRC denies conniving with Barrow over rejection of draft constitution' *The Standard* 1 October 2020; A Manneh 'Justice minister denies "conspiracy" to defeat draft constitution' *The Standard* 1 October 2020.

107 O Bah 'Halifa vows to persuade NAMS to rescind decision on draft constitution' *The Standard* 17 December 2020.

108 'Jonathan arrives to help national dialogue on constitution' *The Standard* 18 December 2020; O Bah 'Goodluck to meet politicians on retroactivity of Barrow's 1st term' *The Standard* 16 February 2021.

109 S Nabaneh 'Why The Gambia's quest for a new constitution came unstuck – And what next' (2020) *The Conversation* 6 October 2020.



The extent of consultation with public opinion has also varied considerably, with the process adopted by the most recent Constitutional Review Commission clearly being far more rigorous and consultative than any earlier ones. Government responses to draft constitutions have varied and sometimes important provisions have been dropped. It remains to be seen whether the key element of the 2020 Draft Constitution that President Barrow's current term of office be counted as his first term, will survive. If it does not, it is by no means certain that the revised Constitution will be passed by the required majority in the National Assembly. Even if it is, it is also quite possible that as in 1965, it will not receive the required three-quarters majority in the subsequent referendum. This in turn would have very significant political consequences for the 2021 presidential election.

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