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FROM A ‘CRUSADE TO ROOT OUT HOMOSEXUALITY LIKE MALARIA’ TO A ‘NON-ISSUE’: THE ABSENCE OF SEXUAL MINORITY LAWFARE IN THE GAMBIA

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1 Introduction

Following 22 years of dictatorship, The Gambia is currently undergoing a transition from Jammeh’s autocratic rule to a fully-fledged democracy. Former President Jammeh ruled The Gambia until he was forced into exile in early 2017, following the disputed presidential election on 1 December 2016.¹ Jammeh’s rule saw ample violation of human rights, including leading the crusade against lesbian, gay, bisexual, and transgender (LGBT) persons. This was mainly seen through legal changes in which Jammeh weaponised the law and his vociferous public utterances.

Information on the status of sexual and gender orientation and sexual behaviour is sparse in The Gambia. Sexual minorities, specifically lesbians, gays, bisexuals, and transgender people (LGBT) in The Gambia keep their orientation hidden from their families and the public. Those in the ‘open’ are primarily found in the urban area, while openly identifying queer persons live in the diaspora.² Given the increasing risk of HIV and other sexually transmitted infections (STIs), men who have sex with men (MSM) have been identified as a vulnerable group.³ However, most MSM in The Gambia identify as heterosexual rather than as gay.

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1 S Nabaneh ‘The Gambia’ in R Albert et al *I-CONnect-Clough Center 2020 Global Review of Constitutional Law* (2021) 293.

2 No information could be found regarding the situation of LGBT persons in the rural areas of The Gambia. See also K Mason et al ‘Stigma, human rights violations, health care access, and disclosure among men who have sex with men in The Gambia’ (2015) 7 *Journal of Human Rights Practice* 139.

3 ‘An integrated bio-behavioral survey of most at risk populations (MARPS) including female sex workers (FSW) and men who have sex with men in The Gambia’ (2012). Draft report on file with author. See also K Mason et al ‘A cross-sectional analysis of population demographics, HIV knowledge and risk behaviors, and prevalence and associations of HIV among men who have sex with men in The Gambia’ (2013) 29 *AIDS Research and Human Retroviruses* 1547.

The Gambia is a culturally and religiously conservative country.⁴ Recent public opinion polling in The Gambia finds a low degree of social tolerance towards members of the LGBT community. Afrobarometer data from 2018 show that 96 per cent of Gambians reported they would strongly dislike having a homosexual as a neighbour.⁵ This negative attitude or perception of LGBT people is prevalent despite a majority of Gambians not having ever had any contact with them openly.

Due to religious conservatism and deeply patriarchal beliefs concerning sex, marriage, and family values, intertwined with politics, homosexuality has been portrayed as foreign or 'unAfrican' in many African countries, including The Gambia.⁶ However, scholars have argued that different sexual identities, contrary to just heterosexuality as the norm, have traditionally existed and continue to exist in the contemporary context. For example, Isatou Touray (former Vice President of The Gambia) noted that:⁷

In The Gambia, lesbianism is taboo, and many people do not believe that it exists. It is not recognised by society and is seen as an unacceptable social relationship. It is referred to as the practice of an alien culture by those who are psychologically and spiritually lost. Lesbian relationships do, however, exist among women in The Gambia, but are kept secret for fear of social rejection. Lesbianism in The Gambia has a historical association with families with powerful women.

Despite this historical context that lesbian relations were largely tolerated, the patriarchal nature of Gambian society curtails women's freedom, including expression of or desire for same-sex relationships. In Gambian society, notions of marriage, motherhood, and femininity are highly placed considerations.⁸ As a result, advocacy and health interventions have

4 It is 96 per cent Muslim, with an economically influential Christian minority. Traditional religious practices also coexist with both Islam and Christianity.

5 Afrobarometer 'Afrobarometer Round 7: Survey in The Gambia' (2018) 61.

6 See MJ Tswanarising 'Global gayness: The 'unAfrican' argument, Western gay media imagery, local responses and gay culture in Botswana' (2003) 15 *Culture, Health, & Sexuality: An International Journal for Research, Intervention and Care* 88.

7 I Touray 'Sexuality and women's sexual rights in The Gambia' (2006) 37 *Institute of Development Studies (IDS) Bulletin* 82.

8 S Nabaneh 'The Gambia's political transition to democracy: Is abortion reform possible?' (2019) 21 *Health and Human Rights Journal* 170. See also S Chant & I Touray 'Women and gender in The Gambia: Problems, progress and prospects' in A Saine, E Ceesay & E Sall (eds) *State and society in The Gambia since independence 1965- 2012* (2012) 434

generally focused on MSM as target populations for HIV programmes.⁹ Issues particular to lesbian and bisexual women have mainly been ignored and elsewhere. As Amina Mama notes 'lesbianism hardly enters public discussion'.¹⁰

Queer lawfare, the strategic use of rights and law by different types of actors to advance or restrict LGBTI rights, has been limited in its application in The Gambia. Under the Jammeh regime, homophobia was deployed as an issue of political contestation with an evident active threat to the rights of LGBT persons. Under the new government, there is a shift to latent homophobia. Despite these very different environments, the use of rights, law, and the courts has not necessarily been used for advancing sexual minorities advocacy or movement-building, which is non-existent in The Gambia. I argue that there has not been substantive litigation or lawfare in The Gambia because of several challenges, including the socio-cultural and religious attitudes and practices, conservative legal culture, lack of reforms in the judiciary, lack of transformative constitutional framework, and general fear of prosecution.

This chapter uses primary and secondary data to account for The Gambia's trajectory of politicisation of homophobia, also referred to as state-sponsored homophobia and its impact on the LGBT community and its ability to mobilise. Primary data was generated through qualitative semi-structured interviews conducted with seven members of the LGBT community and civil society activists. Due to the sensitive nature of the data, all participants have been anonymised. Secondary sources of data include published and unpublished materials on LGBT. I searched, identified, compiled, and analysed existing information by both global and local organisations. This also included media analysis of debates about homosexuality in traditional media, blogs, and social media accounts, including Facebook and Twitter.

Issues of sexual orientation and gender identity remain primarily unrepresented in academic writings in The Gambia. Therefore, this chapter assesses the legal framework for same-sex relations with a focus on developments over time through legal changes and the impact of broader political and societal dynamics on pro or anti-queer lawfare. The chapter is divided into six sections, with section two focusing on the existing criminalising laws and persecution of LGBT persons. There are two distinct periods in the chapter. First, the very repressive authoritarian period and then a more democratic post-transition, contemporary period.

9 See Mason et al (n 2) 139-152.

10 A Mama *Women's studies and studies of women in Africa during the 1990's* (1996) 39.

Thus, in section three, I provide an overview of the state's strategic use of law during the Jammeh regime. I argue that homophobia and intolerance of sexual diversity are a by-product of Jammeh's anti-gay rhetoric that served as a diverting tool during his 22 years of autocratic rule. Section four addresses the state of affairs in 'New Gambia' after the end of the dictatorship. This is followed by section five, which addresses both visible and covert perspectives of pro or anti-queer activism. Section six concludes the chapter.

2 Legal context

The Gambia, like many African states, has criminalised consenting sexual activities between persons of the same sex based on colonial legacy of anti-sodomy law.¹¹ Like most other former British colonies in Africa, The Gambia's criminal law is predominantly derived from English criminal law. The Criminal Code and Criminal Procedure Code in The Gambia were enacted by Acts 25 and 26 of 1933 respectively, modelled after Kenya's 1930 Penal Code.¹² A vast body of English laws not only survived in an independent Gambia, but continue to evolve by way of amendments, or judicial interpretation.

Chapter XV of The Gambia Criminal Code deals with offences against morality. While substantial changes have not been made to the Criminal Code overall, since its adoption, it has undergone 30 amendments between 1937 and 2015. For example, while several provisions, including rape have been repealed through the enactment of the Sexual Offences Act 2013,¹³ the rest of the offences in the chapter have not been repealed or amended, and consequently 'sodomy' or 'unnatural offences' remain as provided in the Criminal Code.¹⁴

While The Gambia does not have a standalone enacted anti-homosexuality law, similar to former British colonies, the Criminal Code

11 Criminal Code Act 25 of 1933. See P Semugoma, S Nemande & SD Baral 'The irony of homophobia in Africa' (2012) 380 *The Lancet* 312-314.

12 Nabaneh (n 8) 170. See also HF Morris 'A history of the adoption of codes of criminal law and procedure in British Colonial Africa, 1876-1935' (1974) 18 *Journal of African Law* 6.

13 Act 15 of 2013. These include rape (section 121), punishment for rape (section 122), attempted rape (section 123), indecent assault on females (section 126), defilement of girls under 18 (section 127), defilement of idiots and imbeciles (section 128) and procuring the defilement of woman by threats or fraud or administering drugs (section 130).

14 Nabaneh (n 8) 170. See also S Nabaneh 'The impact of the African Charter and the Maputo Protocol in The Gambia' in VO Ayeni (ed) *The impact of the African Charter and Maputo Protocol in selected African states* (2016) 82.

criminalises ‘carnal knowledge of any person against the order of nature’ (amended to cover lesbians in 2005).¹⁵ Section 144, in practice, categorises acts of homosexuality as ‘unnatural offences’¹⁶ and levies punishment of 14 years’ imprisonment. According to section 145 of the Act, a person who attempts to commit any of the offences specified in section 144 commits a felony and is liable on conviction to imprisonment for a term of seven years. Section 147 criminalises ‘gross indecency’ committed in public or private between males punishable by up to five years in prison. This section was amended in 2014 to include females. Section 147(2) reads:

A female person who, whether in public or private, commits an act of gross indecency with another female person, or procures another female person to commit an act of gross indecency with her, or attempts to procure the commission of any such act by any female person with herself or with another female person, whether in public or private, commits a felony and is liable on conviction to imprisonment for a term of five years.

The Act also further categorises an act of gross indecency to mean any homosexual act.¹⁷ Through the National Assembly enactment of the Criminal Code (Amendment) Act in 2014,¹⁸ aggravated homosexuality was introduced. Section 144A provides as follows:¹⁹

- (1) A person commits the offence of aggravated homosexuality where the –
- (a) person against whom the offence is committed is below the age of eighteen years;
- (b) offender is a person living with HIV/AIDS;
- (c) offender is a parent or guardian of the person against whom the offence is committed;
- (d) offender is a person in authority over the person against whom the offence is committed;

15 Act 3 of 2005. African countries such as Zambia also expanded the scope in the same year.

16 Sec 144(2) states ‘carnal knowledge of any person against the order of nature includes [...] (c) committing any other homosexual act with the person’.

17 Sec 147(3) of the Criminal Code.

18 Act 11 of 2014 <https://www.refworld.org/docid/54759cd04.html> (accessed 5 June 2022). Former president Jammeh assented to the Act on 9 October 2014 contrary to recommendations from the Universal Periodic Review (UPR) that happened at the same time. See Human Rights Council ‘Report of the Working Group on the Universal Periodic Review: Gambia’ A/HRC/43/6 (2020).

19 The provision is taken literally verbatim from Uganda’s Anti-Homosexuality Act, which was overturned by Uganda’s Constitutional Court in August 2014 on technical grounds. See generally S Gloppen & L Rakner ‘LGBT rights in Africa’ in C Ashford & A Maine (eds) *Research handbook on gender, sexuality and the law* (2020)

- (e) victim of the offence is a person with disability;
 - (f) offender is a serial offender; or
 - (g) offender applies, administers or causes to be administered by any man or woman, any drug, matter or substance with intent to stupefy or overpower him or her, so as to enable any person to have un-lawful carnal connection with any person of the same sex.
- (2) A person who commits the offence of aggravated homosexuality is liable on conviction to imprisonment for life.

The wording of this provision is vague and can result in abuse by authorities as it could be used to arrest or detain any person perceived to be gay or lesbian.²⁰

Gender expression is also criminalised under ‘cross-dressing’ as provided in section 167 (rogues and vagabonds) of the Criminal Code (Amendment) Act, 2014. It provides that any male person who ‘dresses or is attired in the fashion of a woman’ in a public place shall be deemed a ‘rogue and vagabond’ and is guilty of a misdemeanour and subject to up to five years’ imprisonment, a fine of 20 000 Gambian dalasis (approximately USD 400), or both. The prohibition of ‘cross dressing’ is a violation of the right to freedom of expression as guaranteed under section 25 of the Constitution of The Gambia.

These laws exist within a constitutional framework that guarantees fundamental human rights as provided in the 1997 Constitution.²¹ The Gambia has also ratified major international human rights laws including the African Charter on Human and Peoples’ Rights,²² the International Covenant on Civil and Political Rights²³ and the International Covenant on Economic, Social and Cultural Rights.²⁴

20 Amnesty International: Public statement ‘Gambia: Principal Act raises serious human rights concerns’ (2013) <https://www.refworld.org/docid/51934a4c4.html> (accessed 24 June 2019).

21 These include the right to life (sec 18), the right to personal liberty (sec 19), protection from inhuman treatment (sec 21), the right to privacy (sec 23), freedom of speech, conscience, assembly, association, and movement (sec 25).

22 OAU, African Charter on Human and Peoples’ Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

23 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol 999, p 171.

24 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993, p 3.

3 The emergent politics of state-sponsored homophobia under the Jammeh regime

Sexual minority groups faced discrimination and marginalisation in The Gambia under the previous regime.²⁵ Jammeh spearheaded this with his anti-gay rhetoric to further his political cause, portraying himself as a Pan Africanist fighting against Western imperialism and anti-donor tirade.

In 2008, Jammeh gave an ultimatum to homosexuals, and other criminals, to leave The Gambia or face serious consequences if caught.²⁶ He described homosexual conduct as a criminal practice and told the police to arrest persons practicing homosexual activity and close motels and hotels that accommodated them. A year later, in another speech before the National Assembly in March 2009, Jammeh called homosexual conduct 'strange behaviour that even God will not tolerate'.²⁷ In a 2009 speech to army officers, Jammeh announced that he wanted a professional army free of gays and saboteurs. Jammeh stated:²⁸

We will not encourage lesbianism and homosexuality in the military. It is a taboo in our armed forces. I will sack any soldier suspected of being a gay, or lesbian in The Gambia. We need no gays in our armed forces.

Arrests and harassment of LGBT persons were all too frequent in The Gambia during Jammeh's regime.²⁹ In 2009, a 79-year-old man from the Netherlands was found guilty of gross indecency with several Gambian men. A court in Banjul sentenced Frank Boers to pay 100 000 Gambian dalasis (approximately USD 2 500) in lieu of a two-year prison sentence. He was arrested at the city's international airport on 23 December 2008 when officials found him in possession of nude pictures of himself and some Gambian men and other pornographic materials.³⁰

25 United Nations General Assembly Human Rights Council 'Report of the Working Group on the Universal Periodic Review Gambia' A/HRC/14/6 (2010).

26 'Gambia: President tells gays to leave the country' *Daily Observer* 19 May 2008 <http://www.wluml.org/node/4656> (accessed 20 November 2019).

27 United States Department of State '2010 Country Reports on Human Rights Practices – The Gambia' (2011) <https://www.refworld.org/docid/4da56d7fa5.html> (accessed 30 November 2019).

28 'Jammeh threatens to sack gay and lesbian soldiers in Gambia' *Freedom Newspaper* 7 December 2009.

29 United Nations General Assembly Human Rights Council (n 25).

30 T Grew 'Dutchman fined for gay "indecency" in Gambia' *Pink News* 6 January 2009 <https://www.pinknews.co.uk/2009/01/06/dutchman-fined-for-gay-indecency-in-gambia/> (accessed 20 November 2019).

A significant crackdown involving the arrest and detention of alleged LGBT persons occurred on 6 April 2012, when police arrested two women and 18 men and charged them with ‘attempt to commit unnatural offences’ and ‘conspiracy to commit a felony’.³¹ They were found cross dressing at a dance ceremony for tourists at the village of Kololi. The prosecution had argued as evidence of ‘unnatural acts’ that some of the men were found wearing women’s clothing. They were detained for two weeks even though they had pleaded not guilty to the charges when they were arraigned before the Kanifing Magistrates’ Court.³² The case was later dismissed for lack of sufficient evidence against the accused persons.³³ However, their photos were published in newspapers along with their names despite the charges getting eventually dropped.

In response to the cross-dressing case, Jammeh, during the opening of the legislative year in 2012, condemned the practice of homosexuality stressing that no form of aid would make him accept or tolerate homosexuality in the country. He noted the following:³⁴

If you are to give us aid for men and men or for women and women to marry, leave it; we don’t need your aid because, as long as I am the President of The Gambia, you will never see that happen in this country.

Jammeh reiterated that The Gambia will never be colonised or enslaved twice and that, under his leadership, he will never bow down to international pressure to allow what he referred to as ungodly practices in the name of human rights. He noted that ‘one thing we will never compromise, for whatever reason, is the integrity of our culture, our dignity and our sovereignty’.³⁵ In essence, his anti-gay stance was to protect cultural identity noting that:

[A]s a member of the international community, we would abide by the international conventions that we have signed, but as a country, we will pass

31 C Stewart ‘Dancing in Gambia: 18 gays, 2 lesbians face felony charges’ *76Crimes* 20 April 2012 <https://76crimes.com/2012/04/20/dancing-in-gambia-18-gays-2-lesbians-face-felony-charges/> ((accessed 2 December 2019).

32 United States Department of State Bureau of Democracy, Human Rights and Labor *Country Reports on Human Rights Practices in The Gambia* (2012).

33 As above.

34 L Darboe ‘Jammeh condemns homosexual practices, as he opens 2012 legislative year’ *The Point* 23 April 2013 <http://thepoint.gm/africa/gambia/article/jammeh-condemns-homosexual-practices-as-he-opens-2012-legislative-year> (accessed 20 November 2019).

35 As above.

legislation that will preserve our culture, our humanity, our dignity and our identity as Africans, West Africans and Gambians.³⁶

In March 2013, in a televised statement, he went on to say:³⁷

Homosexuality is anti-god, anti-human, and anti-civilization. Homosexuals are not welcome in The Gambia. If we catch you, you will regret why you are born. I have buffalos from South Africa and Brazil, and they never date each other.

Jammeh also stated he was undeterred by threats of the United Kingdom and the United States Governments to cut aid to countries, which persecute LGBT people, saying defiantly: 'We are ready to eat grass, but we will not compromise on this. Allowing homosexuality means allowing satanic rights. We will not allow gays here'.³⁸

During his infamous speech at the 68th Session of the UN General Assembly in 2013, Jammeh stated:³⁹

We know for a fact that all living things need to reproduce for posterity. They become extinct when they can no longer reproduce. Therefore, you will agree with me that any person promoting the end of human reproduction must be promoting human extinction. Could this be called promoting the end of human reproduction when you advocate for a definitive end to human reproduction and procreation? Those who promote homosexuality want to put an end to human existence, it is becoming an epidemic and we Muslims and Africans will fight to end this behaviour. We want a brighter future for humanity and the continuous existence of humanity on this planet, therefore, we will never tolerate any agenda that clearly calls for human extinction.

On 18 February 2014, Jammeh in a speech on state television to mark the 49th anniversary of The Gambia's independence stated that his government 'will fight these vermin called homosexuals or gays the same way we are fighting malaria-causing mosquitoes; if not more aggressively'.⁴⁰ Jammeh's

36 As above.

37 'Gambia's president says no gays allowed; if caught, "will regret being born"' *LGBTQNation* 30 March 2013 <https://www.lgbtqnation.com/2013/03/gambias-president-says-no-gays-allowed-if-caught-will-regret-being-born/> (accessed 20 November 2019).

38 As above.

39 Statement by the President of the Republic of The Gambia at the 68th Session of the UN General Assembly (2013).

40 'Gambia's Jammeh calls gays "vermin", says to fight like mosquitoes' *Reuters* 18 February 2014 <https://uk.reuters.com/article/us-gambia-homosexuality/gambias->

statement was a response to the threats by donor countries, including the European Union (EU), to stop aid to his government if it passes anti-gay laws. He further noted that ‘we will therefore not accept any friendship, aid or any other gesture that is conditional on accepting homosexuals or LGBT as they are now baptised by the powers that promote them’.⁴¹ He further stated that The Gambia would not spare any homosexual and that no diplomatic immunity would be respected for any diplomat found guilty or accused of being a homosexual.⁴² Adding that, ‘as far as I am concerned, LGBT can only stand for Leprosy, Gonorrhoea, Bacteria and Tuberculosis; all of which are detrimental to human existence’.⁴³ The next day, United States’ Former Secretary of State John Kerry condemned President Jammeh’s comments, calling on the international community to send a clear signal that statements of this nature are unacceptable and have no place in the public dialogue.⁴⁴ In a May 2014 speech in Basse, Jammeh stated, ‘some people go to the west and claim they are gays and that their lives are at risk in The Gambia, in order for them to be granted a stay in Europe. If I catch them, I will kill them’.⁴⁵

These blatant statements set the stage for enacting the anti-gay law in October 2014. In November 2014, the National Intelligence Agency (NIA) arrested eight people including a 17-year-old boy and three women on suspicion of homosexual activities, following a security operation targeting persons suspected of being involved in illegal activity.⁴⁶ The arrested individuals were allegedly subjected to torture and ill-treatment to intimidate them to confess to their so called ‘crimes’ and to reveal information about other individuals perceived to be gay or lesbian. The NIA has been known to use torture methods such as beatings, sensory

jammeh-calls-gays-vermin-says-to-fight-like-mosquitoes-idUKBREA1H1S820140218 (accessed 10 November 2019).

41 “‘Gays are vermin,” says Gambia president Yahya Jammeh’ *Euronews* 19 February 2014 <https://www.euronews.com/2014/02/19/gays-are-vermin-says-gambia-president-yahya-jammeh> (accessed 10 November 2019).

42 As above.

43 As above.

44 A Alman ‘John Kerry denounces Yahya Jammeh’s “unacceptable” Anti-LGBT comments’ *HuffPost* 19 February 2014 https://www.huffpost.com/entry/john-kerry-yahya-jammeh_n_4819310 (accessed 19 November 2019).

45 H Brown ‘Gambian President threatens gay asylum seekers: “If I catch them, I will kill them”’ *Think Progress* 16 May 2014 <http://thinkprogress.org/world/2014/05/16/3438789/gambian-president-threatens-gay-asylum-seekers-if-i-catchthem-i-will-kill-them/> (accessed 1 December 2019).

46 Amnesty International ‘Gambia must stop wave of homophobic arrests and torture’ 18 November 2014 <https://www.amnesty.org/en/latest/news/2014/11/gambia-must-stop-wave-homophobic-arrests-and-torture/> (accessed 2 December 2019).

deprivation and the threat of rape.⁴⁷ Amnesty International also reported that the ‘detainees were told that if they did not “confess,” a device would [be] forced into their anus or vagina to “test” their sexual orientation’.⁴⁸ Former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez during his 2015 mission to The Gambia, noted that there were ‘accounts of severe and routine torture of those charged with “aggravated homosexuality”’.⁴⁹

While the three ladies were released, three of the detainees, AS, MS and MLB, appeared before a magistrates’ court in 2014 charged under the ‘aggravated homosexuality’ amendment Act, but the case was later transferred to the Banjul High Court.⁵⁰ In July 2015, the Court acquitted and discharged the accused persons on the basis that the prosecution failed to prove their case as the witnesses did not present sufficient evidence that the accused had committed the acts of which they were accused.⁵¹

Given the repressive regime, there was not much Gambian-based outcry on this development. For example, Josh Scheinert noted the lack of pro-active resistance from the Gambian people given that there was no protest to President Jammeh’s opposition to LGBT rights in 2014 and that still few were willing to speak out.⁵² Political leaders were mainly silent except for a few. For example, the then minority leader, Samba Jallow, of the National Reconciliation Party (NRP) noted that although he did not condone homosexuality, he voted against the latest bill and one other lawmaker as it did not amount to a ‘treasonable offense’.⁵³ The then leader of the Peoples’ Progressive Party (PPP), Omar Jallow (OJ), was also visibly voicing his objection to Jammeh in 2014. He noted that although he did not support homosexuality, he was against the ‘life sentence law against the gay people [which] is wrong and it should be repealed immediately

47 See also Human Rights Council ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez: Mission to The Gambia’ A/HRC/28/68/Add.4 (16 March 2015) paras 30-32.

48 Amnesty International (n 46).

49 Human Rights Council (n 47) para 24.

50 B Samateh ‘Arrested “homosexuals” arraigned, remanded’ *The Point* 30 December 2014. H Ceasay ‘Alleged homosexuals deny any wrongdoing’ *The Point* 10 February 2015.

51 R Jadaama ‘Gambia: Court acquits two men charged with homosexuality’ *Foroyaa Newspaper* 2 August 2015.

52 J Scheinert ‘No truth for Gambia’s queer people’ *Mail & Guardian* 15 March 2019 <https://mg.co.za/article/2019-03-15-00-no-truth-for-gambias-queer-people> (accessed 2 December 2019).

53 J Rush ‘Gambia passes bill imposing life sentences for “aggravated homosexuality” - which includes having AIDS or being HIV positive’ *Mailonline* 9 September 2014.

[noting that] gays should have their rights respected as human beings'. He acknowledged that 'lesbianism and homosexuality are as old as the human race and nobody in the world can eradicate it'. He further noted that the 'whole issue about gays is to divert people's attention from pressing issues, particularly about the serious failures and deficiencies of the Jammeh regime'.⁵⁴ In response, Seedy Njie, a member of Jammeh's party, the Alliance for Patriotic Reorientation and Construction (APRC) shared in an interview that OJ was misleading the Gambian people and that he was 'out to advocate, support and call for an end to the world and the extinction of human[ity]'.⁵⁵

In response to the anti-gay law and Jammeh's dismal human rights records, the EU eventually cut aid by blocking 13 million euros.⁵⁶ In turn, Jammeh sought funds from other countries in the Middle East including Qatar and Kuwait, where homosexuality is outlawed.⁵⁷ In response to the aid cut, Jammeh told a crowd in Farafenni in 2015:⁵⁸

If you do it [in The Gambia] I will slit your throat – if you are a man and want to marry another man in this country and we catch you, no one will ever set eyes on you again, and no white person can do anything about it.

His declaration that 'no white person' can save Gambian gays was not only a direct response to the EU but also advancing the argument that sexual minority rights were a western imposed idea and neo-colonialist export to re-colonise Africa. A sentiment shared by other anti-gay African leaders, including the President of Uganda, Museveni.⁵⁹ Not surprisingly, Jammeh

54 'Gambia must repeal anti-gay law immediately, argues OJ' *Standard* 12 December 2014 <https://standard.gm/gambia-news/gambia-must-repeal-anti-gay-law-immediately-argues-oj/> (accessed 5 May 2022).

55 'Seedy Njie tackles OJ over pro-gay comments' *Standard* 16 December 2014 <https://standard.gm/gambia-news/seedy-njie-tackles-oj-over-pro-gay-comments/> (accessed 5 May 2022).

56 'EU cuts aid to Gambia over human rights concerns' *Euractiv* 10 December 2014 <https://www.euractiv.com/section/development-policy/news/eu-cuts-aid-to-gambia-over-human-rights-concerns/> (accessed 17 November 2019).

57 M Hussain 'Middle East funds Gambia as EU cuts aid over human rights concerns' *Reuters* 10 December 2014 <https://www.reuters.com/article/us-gambia-rights-donors/middle-east-funds-gambia-as-eu-cuts-aid-over-human-rights-concerns-idUSKBN0JO19520141210> (accessed 17 November 2019).

58 K Ruble 'Gambian President says he will slit gay men's throats in public speech' *Vice News* 11 May 2015 <https://news.vice.com/article/gambian-president-says-he-will-slit-gay-mens-throats-in-public-speech> (accessed 1 December 2019).

59 'President Museveni's full speech at signing of Anti-Homosexuality Bill' *Daily Monitor* (24 February 2014) <https://www.monitor.co.ug/News/National/Museveni-s-Anti-Homosexuality-speech/688334-2219956-4xafil/index.html> (accessed 10 June 2022).

led thousands of Gambians on 9 December 2015 on a march through the capital Banjul denouncing the EU for withdrawing foreign aid over the country's new anti-gay law.⁶⁰ A petition against homosexuality was read on behalf of protesters by the then permanent secretary at the Ministry of Lands and Regional Government, Saihou Sanyang. OJ in reacting to the anti-gay protest, alleged that it was a 'gathering funded and supported by the government in order to promote the agenda of Yahya Jammeh and not the Gambian people'.⁶¹

There were further reports of LGBT persons fleeing to neighbouring countries due to fear of arrest.⁶² A Gambian woman who identifies as a lesbian arrested on suspicion of homosexuality in September 2014 noted:⁶³

The first time I was arrested was in mid-September [2014]. I was in my house, then some policemen came in. They were talking to my girlfriend. They asked her if we can follow them, but she told them, for what reason? They said, 'You guys are lesbians'.

The crackdown on homosexuality resulted in state-sponsored homophobia, one in which former President Jammeh was highly vocal in denouncing same sex relations, which set the tone for a climate of intolerance and fuelled strong societal discrimination against LGBT individuals. As documented in the highlighted public statements by Jammeh and other political leaders, this often led to persecution and violence against sexual minorities.

What motivated Jammeh's anti-gay vitriol? It is contended that Jammeh's very hostile remarks over time were a tactic in deflecting from his failure in governing and also served as a political tool of manipulation to further his dictatorial rule and power. He played on and magnified

See also H McEwen 'Suspect sexualities: Contextualizing rumours of homosexuality within colonial histories of population control' (2019) 11 *Critical African Studies* 266.

- 60 T Senzee 'Thousands of Gambians attend antigay rally' *Advocate* 12 December 2014.
- 61 'Gambia must repeal anti-gay law immediately, argues OJ' *Standard* 12 December 2014 <https://standard.gm/gambia-news/gambia-must-repeal-anti-gay-law-immediately-argues-oj/> (accessed 5 May 2022).
- 62 United States Department of State 'Gambia: Country report on human rights practices for 2016' (2017) 27 <https://www.state.gov/reports/2016-country-reports-on-human-rights-practices/the-gambia/> (accessed 25 November 2019).
- 63 Interview with a Gambian woman who identifies as a lesbian by Human Rights Watch (30 April 2015) as cited in See Human Rights Watch 'State of fear: Arbitrary arrests, torture, and killings' (16 September 2015) 49 <https://www.hrw.org/report/2015/09/16/state-fear/arbitrary-arrests-torture-and-killings> (accessed 1 December 2019).

homophobia in the country, while painting himself as the lead defender of Gambian cultural and religious values.⁶⁴ His anti-colonial rhetoric, evident in his withdrawal of the country from the Commonwealth in 2013,⁶⁵ is rooted in colonial and postcolonial politics. This is also similar to his challenge against ‘foreign’ and globalised AIDS programming when he announced in early 2007 that he can ‘cure’ AIDS based on herbal, Islamic and traditional medicine.⁶⁶ The condemnation from Western donor countries played right into his unrelentless resolve of rejecting the imposition of homosexuality by the West and gaslighting his bold resistance to present-day colonialism.

The language of political leadership was full of venom for LGBT persons. The neo-patrimonial nature of the Gambian state has led to legitimising homophobia, which has also been centred on reciprocal networks between religious and traditional political leaders. Within the traditional and religious community, there is a high incidence of politicisation or partisanship, which sways them toward the various political leaders, but more so toward the incumbent. By virtue of the political dispensation in terms of the laws and institutions, especially in local governance, where social and cultural structures meet with politics, the political system takes prominence. As a result, the Executive’s influence, in particular the President, has over the traditional and religious leadership is immense. The religious leadership is represented mainly by the Supreme Islamic Council of The Gambia and The Gambia Christian Council even though some sects and clerics do not belong to any of these groups such as the Ahmadiyya Muslim Jama’at. The traditional leadership is also a legal structure represented by the National Council of Seyfolu,⁶⁷ comprising all the chiefs in the country. It is a highly politicised body simply because chiefs are directly appointed by and serve at the pleasure of the President. Therefore, the major concern of this group is their security of tenure, hence, this is always prioritised and generally informs their overall actions. That notwithstanding, traditional, and religious leaders still hold significant influence on the population despite the colossal credibility gap they still suffer emanating from their involvement with, and control by Jammeh.⁶⁸

64 See A Saine *Culture and customs of Gambia* (2012).

65 J Butty ‘Gambia withdraws from Commonwealth’ *VOA News* 3 October 2013.

66 See R Cassidy & M Leach ‘Science, politics, and the presidential AIDS “cure”’ (2009) 108 *African Affairs* 559.

67 See sec 131A of the 1997 Constitution and Local Government Act, Cap 33.01.

68 See generally, M Darboe ‘Gambia: When Imams opposed “the leader of the people of faith”’ *Justiceinfo* 27 January 2020 <https://www.justiceinfo.net/en/43670-gambia-when-imams-opposed-the-leader-of-the-people-of-faith.html> (accessed 15 April 2022).

Culture, tradition, and religious norms are used to discriminate and exclude LGBT persons from society.⁶⁹ Religion, customs and traditions play a very important role in the lives of Gambians, thus religious and traditional leaders have strong influence over their followers. For instance, the then president of the Supreme Islamic Council, Alhagie Momodou Lamin Touray, condemned homosexuality stating that Islamic law sanctions death on persons in intimate same-sex relationships.⁷⁰

4 Democratisation process: The new government's attitude

While former President Jammeh promulgated anti-LGBT laws, the current government has largely been silent on its position regarding the rights of LGBT persons. In 2018, Barrow dismissed homosexuality as a 'non-issue' in The Gambia.⁷¹ Barrow further noted that his government would not prosecute LGBT persons.⁷² His response was measured and starkly contrasted with Jammeh's hate speeches. In an article 'One year after Jammeh: Is Barrow's gov't keeping its promises?' it was noted:⁷³

So far, there seems to be no gender-specific discrimination on the government's agenda. There are no reported incidents of state-perpetrated online abuse or attacks on the basis of gender or sexuality. This government may have a softer stance on sexual diversity.

In 2018, Human Rights Watch noted the following:⁷⁴

The human rights climate in Gambia improved dramatically as the new president, Adama Barrow, and his government took steps to reverse former President Yahya Jammeh's legacy of authoritarian and abusive rule ... President Barrow's government has promised not to prosecute same-sex couples for consensual sexual acts, which sharply contrasted with Jammeh's hate-filled rhetoric toward lesbian, gay, bisexual, and transgender (LGBT)

69 J Rehman & E Polymenopoulou 'Is green a part of the rainbow? Sharia, homosexuality and LGBT rights in the Muslim world' (2013) 37 *Fordham International Law Journal* 6.

70 B Samateh 'GSIC President preaches against homosexuality' *The Point* 15 December 2014.

71 Freedom House 'Freedom in the World 2019: The Gambia (2019) <https://freedomhouse.org/report/freedom-world/2019/gambia> (accessed 15 November 2019).

72 USSD 'Country report on human rights practices 2018 – Gambia' (13 March 2019).

73 'One year after Jammeh' *Jollofnews* 3 December 2017.

74 Human Rights Watch 'World Report 2018: Gambia – Events of 2017' (2018) <https://www.hrw.org/world-report/2018/country-chapters/gambia> (accessed 15 November 2019).

persons. However, the government has not repealed laws that criminalise same-sex conduct, including an October 2014 law that imposes sentences of up to life in prison for ‘aggravated homosexuality’ offenses.

When the new Barrow government took office in 2017, Ousainou Darboe who was then the Minister of Foreign Affairs, hinted at the potential repeal of the relevant sections in the Criminal Code. He stated that:

Homosexuality was perhaps something Jammeh imagined in order to bamboozle the clerics that were surrounding him ... He used gay as a propaganda tool in order for him to continue to repress people.⁷⁵

He went on to say that ‘aggravated homosexuality was a distraction, and it should be taken out of the laws’. This position has since shifted as the current general position of government as well as other political actors has been that the issue of homosexuality is not a priority. To illustrate, in the 2019 national report submitted by Gambia for the 34th Universal Periodic Review stated: ‘LGBTQ is not largely accepted in The Gambia and the Government does not plan to decriminalize it’.⁷⁶

On 17 May 2020, while making the International Day Against Homophobia, Transphobia and Biphobia, the EU delegation in The Gambia shared pro-LGBTI statements. In response to this, Darboe himself changed his previous position noting that ‘homosexuality cannot be decriminalised in this country ... No matter what’.⁷⁷ Government spokesman Ebrima Sankareh further denied claims of government plans to soften homosexuality laws in exchange for financial aid, noting that government had guided ‘has no plans to either decriminalise or even entertain a review of laws on homosexuality’.⁷⁸ This stance is aligned with the notion of linking homosexuality to development agendas, which have persisted from the Jammeh era. In essence, countering the argument that through the instrument of international aid, the Barrow government will not be forced to recognise the equality of LGBT people.

75 Human Rights Watch ‘Political leaders in The Gambia support repeal of anti-LGBTQ Law’ 18 May 2017 <https://www.hrc.org/news/political-leaders-in-the-gambia-support-repeal-of-anti-lgbtq-law> [accessed 10 May 2022].

76 National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/250/00/PDF/G1925000.pdf?OpenElement> (accessed 11 July 2022).

77 ‘The Gambia denies plan to decriminalise homosexuality’ *Agence France Presse* 23 June 2020.

78 As above.

Despite the shift from active to latent threat in the new regime, the continued existence of these laws violates the fundamental human rights of the LGBT community, and the lives of these persons and their defenders remain under threat.⁷⁹ The continued criminalisation of same-sex relations means that the arbitrary arrest, detention, and prosecution of LGBT persons are possible.

In October 2019, I interviewed seven LGBT persons, the majority of whom were non-gay-identified, though behaviourally bisexual men who do not publicly disclose and were aged 21 years and older. I focused on their experiences of human rights violations, knowledge, attitudes and behaviours, and sexual history.⁸⁰ For this group, only one person reported that they disclosed their same-sex practice status to a family member. Two of them have family members that knew about their same-sex sexual practices, and four of them noted that none of their family members knows their sexual orientation. The non-disclosure to family or close community members is due to rejection, possible loss of their jobs, stigma, and harsh treatment from society. Several of them described how they were regularly harassed by people based on their sexual orientation, and they still face homophobia, stigma, and harassment. Some noted that law enforcement has come to their rescue in several instances when there was a 'witch-hunt' by the community. The consequences include pervasive fear, which drives them underground, including accessing healthcare.

During a 2019 closed-door consultation organised by OHCHR to prepare a stakeholder report for The Gambia's third UPR, LGBT persons described the continuous stigma, harassment and arrest they face by the police. Participants reported incidents where police have arrived in their houses and arrested them on suspicion of engaging in homosexual behaviours.⁸¹ Amnesty International also observed that LGBT persons continued to suffer discrimination and threats from both state and non-state actors in The Gambia.⁸² For example, religious and traditional groups constitute the major organised opponents of same sex relations in

79 See generally, AS Patterson *Africa and the global health governance: Domestic politics and international structures* (2018) 63.

80 Given time constraints, limited resources and access to the community, the author used the chain referral system of snowball sampling and participants were only based in the urban area.

81 Women in Liberation and Leadership, Fajara (The Gambia); African Men for Sexual Health and Rights, Johannesburg (South Africa) & Sexual Rights Initiative, Geneva (Switzerland) 'Universal Periodic Review of The Gambia: Joint submission' (November 2019) para 5.

82 Amnesty International 'Gambia 2017/2018' (2018) <https://www.amnesty.org/en/countries/africa/gambia/report-gambia/> (accessed 11 July 2022).

The Gambia. People draw inspirations from their spiritual leaders be it in Islam or Christianity. Religious and traditional leaders on a consistent basis preach against homosexuality by deploying major discourses, including the rhetoric that the acceptance of homosexuality will sound the death knell for Islam and their culture.⁸³ It was reported that in January 2019, during a radio talk show on Al-Falaah radio, the presenter revealed the secret locations of safe houses for LGBT persons in The Gambia. The host of the programme asked the listeners to attack the places and destroy them.⁸⁴ This also points to the important role that media can play in serving as a platform for hate speech, misinformation and reinforcing homophobia.

With the peaceful transition that began in January 2017 after 22 years under an authoritarian regime, the new government of The Gambia, headed by President Barrow is undertaking measures to restore good governance, rebuild public confidence in key institutions, and uphold human rights.⁸⁵ These measures are twofold: first dealing with past human rights violations and abuses; and second, ensuring that the governance architecture upholds the highest standards of respect for human rights, the rule of law and justice. To this end, 2018 saw the operationalisation of the transitional justice mechanisms: the Truth, Reconciliation and Reparations Commission (TRRC), Constitutional Review Commission (CRC) and National Human Rights Commission (NHRC) with the goal of consolidating democracy and aligning governance architecture with regional and international human rights standards.⁸⁶ Thus, a critical question that arises within the consolidation of democracy is whether the transitional justice process provides a space to have conversations and chart better legislative protections on issues such as sexual minority rights.⁸⁷

83 'Gambian's criminalization of homosexuality is inhumane and un-Islamic' *Muslims for Progressive Values* 1 December 2014 <https://www.prlog.org/12401139-gambians-criminalization-of-homosexuality-is-inhumane-and-un-islamic.html> (accessed 2 December 2019).

84 *Women in Liberation and Leadership*, Fajara (The Gambia); *African Men for Sexual Health and Rights*, Johannesburg (South Africa) & *Sexual Rights Initiative*, Geneva (Switzerland) (n 83) para 14.

85 Nabaneh (n 8) 174.

86 G Sowe & S Nabaneh 'The Gambia: The state of liberal democracy' in R Albert et al *The I-CONnect-Clough Center 2017 Global Review of Constitutional Law* (2018) 99.

87 See Nabaneh & Sowe (n 86) 107-111.

5 The transitional justice mechanisms

Following the enactment of the Truth, Reconciliation and Reparations Commission (TRRC), Act 2017,⁸⁸ the Commission was formally launched on 15 October 2018. The TRRC Act was established to create a historical record of the nature, causes, and extent of violations and abuses of human rights committed during the period July 1994 to January 2017.⁸⁹ The Commission's mandate includes initiating and coordinating investigations into violations and abuses of human rights; the identity of persons or institutions involved in such violations; identifying the victims; and determining what evidence might have been destroyed to conceal such violations.⁹⁰ The hearings, which began on 7 January 2019, served as an initial first step towards securing justice, truth, and reparations in The Gambia.⁹¹

There was an expectation that the persecution of the LGBT persons under the Jammeh regime would be a theme the Commission would investigate. However, this did not happen. In one of the sittings of the TRRC, reference was made to how the conditions of detention, particularly the overcrowding in the prisons, have resulted in same-sex activity thereby promoting homosexuality.⁹² Some of the TRRC Commissioners were visibly upset about same-sex relations and referred to homosexuality as a 'shameless and very low activity.'⁹³

The TRRC worked for more than two years and submitted its final report with findings and recommendations to President Barrow on 25 November 2021. A month later, the government through the Ministry of Justice made the report public on 24 December 2021. As per the

88 Truth, Reconciliation and Reparations Commission (TRRC) Act 9 of 2017 <https://www.lawhubgambia.com/truth-reconciliation-reparations-commission> (accessed 8 October 2019).

89 Section 13 of the TRRC Act.

90 Section 14 of the TRRC Act.

91 'TRRC hearings begins today' *The Point* 7 January 2019.

92 Sanna Sabally, a key member of a once feared military leadership, Armed Forces Provisional Ruling Council (AFPRC) during his testimony before the Commission in April 2019 shared how he experienced forms of torture to him including waterboarding, castration and enforced homosexual behaviour at the state central prisons at Mile 2. See YouTube 'Sanna B Sabally TRRC sittings' https://www.youtube.com/results?search_query=sanna+sabally+trrc (accessed 11 July 2022).

93 'TRRC sitting' *EyeTVAfrica* 22 January 2019 <https://www.youtube.com/watch?v=rLk3GmqkDRI> (accessed 11 July 2022). This statement during a line of questioning by Bishop James Yaw Allen Odico on the occurrence of homosexual acts despite the overcrowding of the Mile 2 prison can be from 54 minutes of the video.

TRRC Act, the government had six months to issue a White Paper.⁹⁴ The civil society shadow report contained recommendations in relation to decriminalisation of homosexuality and intensifying efforts to support and protect vulnerable social groups and communities such as LGBT persons.⁹⁵

During the drafting of the now rejected 2020 Draft Constitution, the Constitutional Review Commission (CRC) received submissions against the inclusion of LGBT persons as part of the definition of minority groups.⁹⁶ In particular, they pointed out that it was against ‘Gambian culture, tradition, values, and norms’.⁹⁷ In addition, the debate was also over the non-inclusion of the word, ‘secular’ in the Draft Constitution. On the one hand, the pro-secularism camp has argued that the exclusion of the term would make The Gambia somewhat of an Islamic State, with the majority of decisions favouring Muslims. On the other hand, the anti-secularism camp argued that inclusion of the term would mean acceptance of same-sex relations and the inability to practice Islam as it should be practiced.⁹⁸ This thinking is aligned to general assumptions of human rights that ‘imply sexual permissiveness and secularism’, resulting in ‘Africans employ[ing] culture and religion in attempts to externalize homosexuality’.⁹⁹ This suspicion brought together political and religious actors on the premise that the word ‘secular’ would open the floodgates to special human rights for LGBT persons. As a result, while the word ‘secular’ eventually does not appear in the 2020 Draft Constitution, section 1(1) declares The Gambia as a sovereign republic and also prohibits both the president and National Assembly from establishing any religion as a state religion.¹⁰⁰

94 ‘Gambia: Truth and Reconciliation report must lead to justice and reparations for victims’ *Amnesty International* 25 November 2021 <https://www.amnesty.org/en/latest/news/2021/11/gambia-truth-and-reconciliation-report-must-lead-to-justice-and-reparations-for-victims/> (accessed 5 May 2022).

95 WILL ‘TRRC Shadow Report: Perspectives of women, girls and marginalized communities on sexual and gender based violence’ (2022).

96 Constitutional Review Commission (CRC) Final Report (30 March 2020).

97 CRC Final Report (n 96) para 276.

98 ‘Gambia Supreme Islamic Council (GSIC): Response to the Draft Constitution’ *Gainako* 19 December 2019 <https://gainako.com/gambia-supreme-islamic-council-gsic-response-to-the-draft-constitution/> (accessed 10 April 2022). See also SM Jaw & T Isbell ‘All in This Together? Social Tensions in the Post-Jammeh Gambia’ *Afrobarometer* dispatch 404 (2020) 1

99 K Kaoma ‘The Vatican anti-gender theory and sexual politics: An African response’ (2016) 6 *Religion and Gender* 287.

100 See secs 88(5)(b) and 153 (1)(b) of the 2020 Draft Constitution respectively.

The Barrow government has also engaged with UN organisations and other treaty monitoring bodies who have brought recommendations in the context of sexual minorities.

6 Engagements and recommendations from treaty monitoring bodies

Human rights treaty monitoring bodies have been putting pressure on The Gambia to decriminalise same-sex relations. The Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁰¹ in 2015 noted its concern over the acts of incitement and hatred directed against lesbians and bisexual women as well as arbitrary detention of women perceived to be part of the community.¹⁰² Thus, called on the state to repeal the provisions of the Criminal Code on ‘unnatural offences’ and ‘aggravated homosexuality’.¹⁰³

In July 2018, the Human Rights Committee reviewed The Gambia’s implementation of the International Covenant on Civil and Political Rights (ICCPR). The Gambia submitted a report in response to the list of issues *in lieu* of its second periodic report.¹⁰⁴ The Gambian delegation was made up of representatives from various government ministries, including the Ministry of Justice and the Office of the President. The country’s delegation stated that the government had no immediate plans to reverse or change the law though the law was not enforced. The delegation noted the following:¹⁰⁵

The issue of LGBT is not considered to be a problem in The Gambia because even though it is criminalised the LGBT community are not subjected to any form of discrimination and harassment. At this point of our nation’s history, the Gambian people have not accepted homosexuality as a lifestyle and so the

101 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol 1249, p 13.

102 CEDAW, Concluding observations on the combined fourth and fifth periodic reports of The Gambia, 28 July 2015, UN Doc CEDAW/C/GMB/CO/4-5 (2015) para 44.

103 CEDAW (n 102) para 45.

104 Human Rights Council ‘Replies of The Gambia to the list of issues’ CCPR/C/GMB/Q/2/Add.1 (12 June 2018). See also, Human Rights Committee ‘List of issues in the absence of the second periodic report of The Gambia’ CCPR/C/GMB/Q/2 (1 December 2017).

105 HRC (n 104) para 140.

government as the representative of the people does not plan to decriminalise the practice of homosexuality.

The Human Rights Committee in its ‘Concluding observations on The Gambia in the absence of its second periodic report’ made observations relating to non-discrimination noting the ‘absence of comprehensive anti-discrimination legislation in the State party’.¹⁰⁶ It also observed that:

[C]onsensual same-sex relationships are criminalized in the State party and that lesbian, gay, bisexual, transgender and intersex persons reportedly continue to be subject to arbitrary arrest and violence.

It recommended the following:¹⁰⁷

The State party should adopt anti-discrimination legislation which (a) provides full and effective protection against discrimination in all spheres, including the private sphere, and prohibits direct, indirect and multiple discrimination; (b) contains a comprehensive list of grounds for discrimination in line with the Covenant, including sexual orientation and gender identity; and (c) provides for access to effective and appropriate remedies for victims of discrimination. It should also decriminalize same sex relationships between consenting adults and take measures to change societal perception of lesbian, gay, bisexual, transgender and intersex persons and protect them from arbitrary arrests and violence.

In addition, the Universal Periodic Review (UPR) also provided a unique opportunity to assess states’ compliance with their international obligations related to the rights of LGBTI persons.¹⁰⁸ The Gambia has undergone three review cycles in February 2010, October 2014, and November 2019 respectively. In the first cycle, The Gambia rejected all the recommendations on decriminalisation of homosexuality and taking action to combat violence based on sexual orientation and gender identity.¹⁰⁹ During the second UPR cycle in 2015, The Gambia

106 Human Rights Committee ‘Concluding observations on The Gambia in the absence of its second periodic report’ CCPR/C/GMB/CO/2 (30 August 2018) para 11.

107 HRC (n 106) para 12.

108 See UN Office of the High Commissioner for Human Rights ‘UN Human Rights Council: Universal Periodic Review’ <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> (accessed 10 December 2019). See also the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) ‘SOGIESC UPR advocacy tool: A guide for defenders working on sexual orientation, gender identity and expression and sex characteristics’ (2017) https://ilga.org/downloads/SOGIESC_UPR_Advocacy_Toolkit.pdf (accessed 10 December 2019).

109 See Human Rights Council ‘Report of the Working Group on the Universal Periodic

received 12 recommendations relating to criminalisation of same-sex sexual orientation and gender identity and expression. It noted all the recommendations related to protection of LGBT persons in The Gambia but have not implemented the recommendations.¹¹⁰

In its national report on the third review in 2019, the current government, in terms of status of implementation on previous recommendations relating to sexual minority issues and same-sex relationships, noted that homosexuality is not accepted in the country, hence, the government does not plan on decriminalising it.¹¹¹ In its first complementary report to the Human Rights Council, the National Human Rights Commission (NHRC) made submissions to the Working Group on the UPR relating to human rights of specific categories of people, namely women, children, persons with disabilities and LGB persons. The NHRC is a permanent, independent body with a mandate to promote and protect human rights and fundamental freedoms in The Gambia, investigate human rights violations and provide redress and remedial actions to victims.¹¹² The Commission recommended the decriminalisation of same-sex relationships between consenting adults.¹¹³

During the UPR process, there was particular focus on the situation of LGBT persons in the country. For instance, Belgium's advance question focused on whether the government intends to decriminalise same-sex relationships between consenting adults in the future. It further enquired on whether the government of The Gambia intends to take measures to change societal perception LGBTI persons and protect them from arbitrary arrests and violence.¹¹⁴

Twelve countries' recommendations, which were 'noted' by The Gambia broadly focused on adopting comprehensive anti-discrimination legislation, repealing all legislation that criminalises same-sex activities,

Review – Gambia,' A/HRC/14/6 (24 March 2010) (Recommendations 100.4, 100.5, 100.6, 100.7, 100.8, 100.9, 100.10, 100.11, 100.12, 100.13 and 100.14).

110 See Human Rights Council 'Report of the Working Group on the Universal Periodic Review-Gambia-Addendum' A/HRC/28/6/Add.1 (24 March 2015) (Recommendations 109.49-109.56)

111 Human Rights Council 'Universal Periodic Review 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Gambia' A/HRC/WG.6/34/GMB/1 (22 August 2019) para 39.

112 Sowe & Nabaneh (n 83) 97-101.

113 National Human Rights Commission 'Report on state of compliance with international minimum standards of human rights by The Gambia under the universal periodic review mechanism, third cycle' (2019) 8.

114 UPR Advance questions to The Gambia (Second batch) 2.

and guaranteeing the investigation and punishment of all acts of violence against LGBT persons.¹¹⁵

While merely noting recommendations is a good step, it does not go so far as to signify the state's political commitment to protecting the human rights of sexual minorities in the country. A proposal was made during the review process of the criminal code to decriminalise same-sex activity. However, this was not accepted by the Ministry of Justice. Sections 129 and 130 of the Draft Criminal Offences Bill 2019 on unnatural offences makes it a misdemeanour and is liable on conviction to imprisonment for a term of two years. The section on cross dressing has been removed. While this is a welcomed move, the National Assembly should substantially revise the proposed new criminal code to meet international human rights standards.

7 Civil society organising in The Gambia

Activists who advocated for sexual minority rights and the LGBT community or defended such individuals were under constant threat and persecution under the former regime. In fact, people who are very critical of the LGBT situation in The Gambia, only openly condemn LGBT issues if they were not residing in The Gambia. For example, the majority of information related to issues of LGBT in The Gambia is published on international platforms and not by traditional media platforms or social media within The Gambia.

Before 2014, programming targeted at MSM was mostly around addressing their vulnerability to HIV, which NGOs and UNAID did. This did not necessarily have any substantive opening for organising around MSM issues because of the political and legal regime. Although most activists may support gay rights, many engage in self-censored activism because of fear of retaliation or arrest. This has resulted in dissent being suppressed and any open support for the recognition of rights for all persons, including homosexuals, will be uncharitably condemned and was certain to be left with no other choice but to deny their sexual orientation and play safe. Defenders of sexual minority rights risk their personal safety and a 'life sentence' of harassment and intimidation from state and non-state actors.

115 These included: 7.1 (Iceland); 7.5 (Myanmar); 7.6 (Netherlands); 7.7 (Spain); 7.8 (Argentina); 7.9 (Australia); 7.10 (Canada); 7.11 (Chile); 7.12 (Croatia); 7.13 (France); 7.14 (Germany); and 7.15 (Italy). See Human Rights Council Working Group on the Universal Periodic Review 'Draft report of the Working Group on the Universal Periodic Review' A/HRC/WG.6/34/L.3 (7 November 2019) 13-14.

Based on the legal, political, and sociocultural contexts, persons belonging to the LGBT community, human rights defenders, allies, and those perceived to be part of the community are at risk of having their rights violated. The continued criminalisation of same-sex relations means that the arrest, detention, and prosecution of LGBT persons remain a possibility. On 5 April 2022, a man was brought before the High Court in Banjul and charged with aggravated homosexuality. The prosecution alleged that he unlawfully had carnal knowledge of a 12-year-old boy through the anus. The case was subsequently transferred to the Kanifing Magistrates' Court. The case is currently ongoing.¹¹⁶

As noted earlier, anti-LGBT rhetoric by the former president, prior to his ousting from power in December 2016, played on and has magnified existing societal homophobia. The resultant effects are that there is no pro-LGBT movement in The Gambia.¹¹⁷ The majority of mainstream human rights organisations do not address sexual minority issues. Being openly pro-LGBT has social repercussions.¹¹⁸ Given the risks involved, including arbitrary detention and arrest, social stigma, and violence, there are no formally registered public organisations. Hence, lawfare is not entrenched as a strategy for the community. Although informal support groups provide safe spaces when individuals are rejected by their family, experience violence, or lose housing or employment due to their sexual orientation. This underground community exists and has been able to tap into the resources of human rights activists that are usually present during the sessions of the African Commission on Human Rights and other international organisations in providing safe passage to safe countries.

There have not been any court-centred strategies aimed at advancing LGBT rights. For example, a test case has not been brought before the courts about the registration of queer organisations, or constitutional infringement such as freedom of association as guaranteed in the 1997 Constitution. This is mainly due to the existing conservative legal and judicial culture that does not encourage effective advocacy around substantive 'hot-button' rights issues, such as sexual minority rights. Though attempts have been made at constitution-making, more substantive rights promulgation has not been achieved yet. Thus, the current constitutional framework does not allow for a rights revolution.

116 B Asemota 'Man charged with homosexuality' *Gambia News* 6 April 2022.

117 US Department of State '2014 Country Reports on Human Rights Practices – The Gambia' <https://www.refworld.org/docid/559bd53328.html> (accessed 11 July 2022).

118 University of Pennsylvania 'Preliminary working report presented to the International Development and Law Organization' (2019) 63.

Recently, there has been little traction in activism and using rights contestation spaces as a joint report was submitted during the UPR review, which documented violations faced by the LGBT community.

While there may not be significant visible queer lawfare to advance the rights of LGBT persons in The Gambia, this is a small step towards raising public awareness of the situation of LGBT persons. This also indicates the broader need for human rights organisations in The Gambia to engage in queer advocacy as an intersecting issue and part of broader social issues to tackle. Independent institutions such as the NHRC, as mentioned above, has also made recommendations for the decriminalisation of same-sex relationships between consenting adults. However, it remains puzzling that LGBT groups remain largely unable to organise even online or in conjunction with allies as they could ideally register as sexual and reproductive health organisations. Years of authoritarian rule have consequently left the LGBT community with entrenched fear of government and societal discrimination and stigma. It has been six years since the end of Jammeh's rule, and it will take time for the community to deal with its past and present vulnerabilities.

8 Conclusion

The Gambia's law on 'aggravated homosexuality' is similar to other laws across the African continent. The rhetoric surrounding sexuality and gender diversity has increasingly been politicised in The Gambia. The vitriolic responses to same-sex relationships culminated in state-sponsored homophobia rooted in Jammeh's relentless campaign to maintain autocratic rule. During his 22 years of (mis)rule, state oppression of LGBT persons was very systematic, backed by broader societal discrimination and silencing. Although the current government under the Barrow administration has taken a softer stance, homosexuality remains illegal. The continued politicisation, criminalisation and strong societal discrimination negatively impact the LGBT communities. This is evident in their inability to mobilise publicly and engage in legal activism.

While there was hope that the end of dictatorship will serve as a catalyst that 'produce[s] radical turning points in collective action',¹¹⁹ this has not necessarily resulted in the proliferation of opportunities for marginalised groups, including LGBT persons to express themselves and mobilise. While the situation under Jammeh and Barrow are starkly different, as illustrated above, it has not led to the embracement of diversity. The

119 A Morris 'Reflections on social movement theory: Criticisms and proposals' (2000) 29 *Contemporary Sociology* 452.

transformative political change has not spurred social change in favour of LGBT persons in The Gambia.

On the way forward on the legal front in protecting the rights of sexual minorities in The Gambia, there is a need to ‘publicly’ speak up for the LGBT community. Madi Jobarteh, The Gambia country representative for the Westminster Foundation for Democracy (WFD), reiterated that this would be a very ‘significant decision given the cultural setting and people’s perception and understanding of LGBT issues’.¹²⁰ This will have implications for LGBT rights and legal activism in The Gambia.

As part of the new democratic dispensation, the platform should be provided for the country to replace a culture of impunity with accountability with regard to the plight of LGBT persons. More studies, however, are needed to understand what lawfare strategies may enhance the protection and rights of LGBT people in The Gambia.

120 As cited in Scheinert (n 52).

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