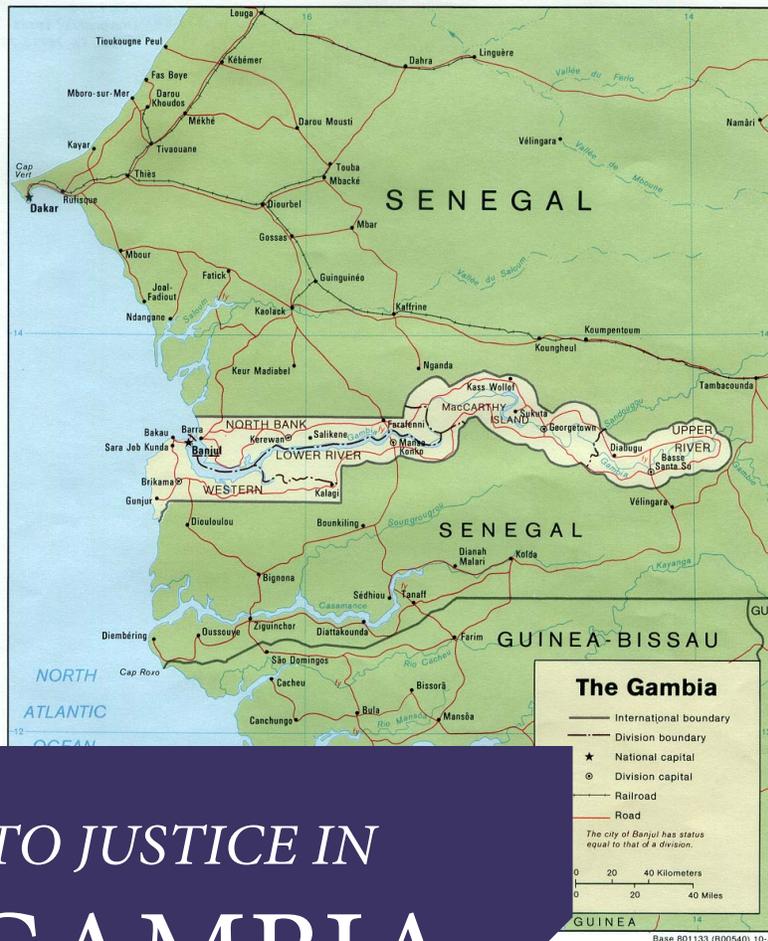


University of Pennsylvania Law School



ACCESS TO JUSTICE IN THE GAMBIA

Preliminary Working Report Presented to
the International Development and Law Organization

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Of course, the authors could not have analyzed The Gambia's transition from dictatorship to democracy without the involvement of the Gambian people themselves. As The Gambia's story shows, a dictatorship is not created overnight; it is the product of a gradual decline in respect for democratic norms. The willingness of the people highlighted in this report to discuss their painful memories of the past and their visions for a New Gambia was as inspirational as it was helpful. Their optimism in the aftermath of a decades-long struggle with a murderous political regime demonstrates the power of hope and its capacity to survive against all odds. May their courage and commitment to a more just world encourage readers to take their own steps to promote international human rights at a time when opposition to them grows at a concerning pace.

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Methodology

This working report is based on an independent-fact-finding-investigation conducted by six University of Pennsylvania Law Students—Brendan Holman, Kunal Kanodia, Abraham Moussako, Ryan Plesh, Fatoumata Waggeh, and Meroua Zouai—from August 24, 2019 to August 31, 2019, including background research conducted at the University weeks before the fieldwork.

The delegation of law students conducted interviews with 14 members of civil society, including journalists, attorneys, human rights defenders, activists, academics, civil servants, security agents, and government officials. The students also consulted with and were supervised by Penn Law Dean of International Programs Rangita de Silva de Alwis, who is also Special Advisor to the Executive Director of UN Women.

Interviews were conducted free of charge, in-person and over the phone in English, with some of the conversations recorded with the informed consent of interviewees. This current report is a working draft based on the preliminary findings on access to justice and transitional justice in The Gambia following the authoritarian rule of Yahya Jammeh. Upon further research developments, the final report will be published by December of 2019 and submitted to the International Development Law Organization (IDLO).

1. Transitional Justice and the TRRC Model in The Gambia

A bloodless coup on July 22, 1994 marked the start of a 22-year-long repressive rule under the Gambia's exiled former president, Yahya Jammeh. The Jammeh regime reinforced a climate of fear throughout the entire country. Intimidation by way of forced disappearances, arbitrary arrests, torture, and the silencing of dissent allowed Jammeh to win three elections, before his ultimate defeat by Adama Barrow in 2016. Barrow's entry into office was a shift in Gambia's history, from an era tainted with violence and impunity to the start of one defined by transitional justice and respect for a rule of law.

1.1 Background

Democratic institutions and elections have historically been a priority for the people and the political system in Gambia. Electoral processes have generally been understood to be institutional mechanisms used to balance the power of the people and that of the governing body. Although such institutions have come under threat by attempted coups since the country gained its independence from the United Kingdom in 1965, the two former presidents used national elections as a tool to legitimize their regimes. However, when a president weaponizes the institutions that were designed to bridge the public's voice with those in government, how can any form of democracy truly thrive?

The 1996 elections, which secured Jammeh's presidency, were characterized by intimidation and violence, as opposition parties were banned from participating.¹ For the next two decades, Jammeh consolidated power in the executive branch, eroding the separation of power between the

¹ US Department of State, Bureau of Democracy, Human Rights, and Labor, "Country Report on Human Rights Practices 1997 – Gambia," (Jan. 30, 1998), <http://www.refworld.org/docid/3ae6aa4110.html>.

legislature and the judiciary. The executive had its deep reach in all of the government's branches, which created one of the most repressive and authoritarian administrations in the region.²

Corrupt practices, violence, rampant human rights violations, and a lack of public confidence in government institutions cultivated a hostile state of fear in Gambian society under the former regime. State security agencies – mainly the National Intelligence Agency (NIA) and the Gambian Police Force – were responsible for grave human rights abuses, including: sexual violence as well as the arbitrary and targeted arrests of members (or alleged members) of opposition parties, journalists, students, LGBTQ people, human rights advocates, and any person in civil society considered hostile to the Jammeh regime. Many innocent Gambians were detained *incommunicado* and tortured for months or years at a time.

Christof Heyns, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, characterized The Gambia under Jammeh as a repressive State apparatus in the hands of the security forces who “actively repress any sign of discontent, terroriz[e] civil society and instil[l] a climate of fear and mistrust via routine arrests, enforced disappearances and extrajudicial executions carried out against anyone considered to be critical of or threatening to the regime.”³

While Chapter IV of the 1997 Constitution of The Gambia⁴ safeguards fundamental rights and liberties and prohibits any derogation — even under “public emergency” — from the right to life, Jammeh passed the Indemnity Act of 2001, which grants the president authority to indemnify state

² Human Rights Watch, *State of Fear*, (Sep. 2015), <https://www.hrw.org/report/2015/09/16/state-fear/arbitrary-arrests-torture-and-killings>.

³ UN Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Christof Heyns, Mission to the Gambia, A/HRC/29/37/Add.6 (May 17, 2015).

⁴ Constitution of the Republic of The Gambia, 1997, Reprinted 2002, Chapter VI, Protection 18 on Protection of Fundamental Rights and Freedom, <http://www1.umn.edu/humanrts/research/gambia-constitution.pdf>.

officials for abuse of force during states of emergency. This has since been treated as a *carte blanche* to violently disperse public demonstrations and to silence dissent. As such, victims whose rights, initially protected by the highest law of the land, are violated cannot seek proper redress from the State for their grievances.

An unbiased application of the rule of law by an independent judiciary can not only safeguard rights but also act as an effective oversight tool on a government's actions. However, when state institutions – especially the courts due to their unique function of fairly and impartially applying the law – foster a culture of unlawful corrupt practices, citizens lose trust in their legitimacy.

Given the fact Jammeh hired hand-picked foreign judges to issue judicial decisions in favor of his policies, individuals were not able to receive a fair trial – in direct contradiction of Gambian and international law for due process violations. Fortunately, despite this imbalance of power, human rights defenders braved the threatening institutional pressures to uphold the core values of justice and provide a defense to the accused. The very few human rights attorneys who stood in court to challenge Jammeh, such as Antouman Gaye, were also arrested and detained because they were seen as enemies of the state.⁵ Mr. Gaye, the lead defense counsel on many high profile pro bono human rights cases,⁶ described Jammeh as “a person who thought anyone with whom he had an issue should not have a lawyer defending him or her.”⁷ In 2009, Jammeh stated on national television that he would kill anyone who threatened to destabilize the country, specifically

⁵ Interview with Antouman Gaye, Founder of A.A.B. Gaye & Associates, August 29, 2019, 3:00 PM.

⁶ Mr. Gaye represented several former political opposition leaders and LGBTQ people.

⁷ *Id.*

threatening human rights defenders, and those working with them, by emphasizing that their security and personal safety would not be guaranteed by the government of The Gambia.⁸

Since the judiciary was notorious for issuing favorable decisions to questionable prosecutions that lacked credibility, some independent attorneys and judges began advising Gambians to steer clear of the courts and to use alternative or informal conflict resolution mechanisms. A former magistrate judge under Jammeh's government, the Executive Director at the National Agency for Legal Aid (NALA) explained that Jammeh's government was entrenched in all the courts and exerted heavy pressure on the organization's decisions. "I used to tell people at that time not to go to the courts because they are not transparent and to resolve their issues outside of the judicial system,"⁹ explained the Executive Director. He also received many threats and was questioned often by his Chief Justice (who was one of Jammeh's 'mercenary judges') for issuing decisions that were sometimes not in favor of the State. While he eventually decided to step down as a magistrate judge, he continued to witness and experience the Jammeh government's deep influence across all societal sectors – including NALA, which was supposed to provide unbiased and independent defense counsel, as required by law, to indigent individuals accused of the most serious crimes.

While violent crackdowns on dissidents, journalists, women, LGBTQ communities, activists, and the youth only escalated over the course of Jammeh's tenure, the December 2016 elections came with the backdrop of widespread vocal discontentment, starting from the time Jammeh began

⁸ *20 Years of Fear in the Gambia: Time for Justice*, Amnesty International (July 22, 2014), <https://www.article19.org/data/files/medialibrary/37629/Briefing-20-Years-of-Oppression-Gambia-English.pdf>.

⁹ Interview with the Executive Director, National Agency for Legal Aid, August 28th, 2019, 1:00 PM.

campaigning for reelection. The government sought to use the same coercive and violent tactics to intimidate journalists and opposition leaders to suppress Gambians' freedom of expression, association, and peaceful assembly. Jammeh's quest to control the outcome of the elections is in direct violation of Gambia's international human rights obligations: Article 25 of the International Covenant on Civil and Political Rights (ICCPR) protects the right "of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service."¹⁰

On December 1, 2016, Adama Barrow's electoral win over incumbent Jammeh shocked the entire country, giving them a beacon of hope for new change. Jammeh's authoritarian and brutal reign had come to an end. Even though Jammeh conceded the presidency and congratulated the then president-elect¹¹, he refused to relinquish power, claiming he had the right to rule The Gambia for a "billion years." He declared a 90-day state of emergency calling for "peace, law and order" after what he said were irregularities in the election process.¹² However, soon after Jammeh realized that the threat of military intervention from a coalition of West African and commonwealth states would come to fruition should he not 'step down,' Jammeh fled to Equatorial Guinea.

1.2 Transitional Justice and the Truth, Reconciliation and Reparations Commission

Barrow's administration was keen on rebuilding a new Gambia to provide new opportunities for Gambians living in the country and those who had fled under Jammeh's reign of terror. Nearly

¹⁰ International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N.Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

¹¹ BBC, "Gambia's Jammeh loses to Adama Barrow in shock election result," (Dec. 2, 2016) <https://www.bbc.com/news/world-africa-38183906>

¹² BBC, "Gambia's President Jammeh refuses to leave office as deadline passes," (Jan. 19, 2017) <https://www.bbc.com/news/world-africa-38672840>

45,000 Gambians returned to their home country after the former dictator was forced into exile. Barrow inherited a Gambia that had fallen eighteen places on the Global Peace Index since 2016 and was among the top five countries to have experienced the largest deterioration in an ongoing conflict.¹³

By early January 2018, The Gambia was still experiencing a range of socioeconomic challenges, including increasing poverty, a growing rural-urban divide, a decreasing literacy rate, and high unemployment.¹⁴ Despite the suffering of many Gambians who were barely surviving under unsustainable living conditions, Barrow's administration also prioritized the pursuit of justice – holding those responsible accountable for committing human rights violations under the Jammeh regime. He was also cognizant of the fact that many Gambians were still in pain from the terror Jammeh instilled due to their own lived experiences. Barrow wanted to create a mechanism that also afforded Gambians an opportunity to share their story after years of having to remain silent under Jammeh.

In July 2017, after conducting nationwide public consultations, Attorney General Ba Tambahou announced he would introduce a bill to parliament establishing the Truth Reconciliation and Reparations Commission (TRRC). The government partnered with the United Nations Development Programme (UNDP), Office of the High Commissioner for Human Rights (OHCHR), and United Nations Peace Building Support Office (PBSO) to establish a TRRC. The

¹³ Institute for Economics and Peace, Global Peace Index 2017, 25, <http://visionofhumanity.org/app/uploads/2017/06/GPI-2017-Report-1.pdf>.

¹⁴ World Bank, *Macro Poverty Outlook for Sub-Saharan Africa: The Gambia* (Oct. 2017), <http://pubdocs.worldbank.org/en/214601492188159621/mpo-gmb.pdf>; Government of the Gambia, *National Development Plan* (Draft), 2017.

Ministry consulted with people nationwide to prepare for transitional justice and solicited opinions as to what they wanted to see from the processes.¹⁵

Adopting the UN's definition of transitional justice "as the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large scale past abuses in order to ensure accountability, serve justice and achieve reconciliation," the main objective for the Gambian TRRC is to reflect upon the past to encourage national reconciliation through accountability, while promoting a respect for the rule of law and democracy.¹⁶ The proposed components for transitional justice in The Gambia consist of:

- a) *Truth commissions*: a non-judicial body whose mandate includes investigations of past violations of human rights and abuses through truth telling by perpetrators and victims, holding perpetrators accountable, providing recommendations for compensation of victims, promoting reconciliation, and making proposals on institutional reforms
- b) *Prosecutions*: prosecution of perpetrators are conducted through domestic courts, international courts or special courts¹⁷
- c) *Security Sector Review*: removal of corrupt and abusive officials to ensure such institutions function in accordance with law and democratic principles
- d) *Institutional reforms*: consolidation of democracy and rule of law through institutions such as a Human Rights Commission, an Anti-Corruption body, and constitutional reforms¹⁸

¹⁵ Interview with Senior Counsel at Ministry of Justice (Aug. 28, 2019), 11:30 AM.

¹⁶ Attorney General's Chambers and Ministry of Justice, *Guide On Transitional Justice In The Gambia*, (July 2017) https://docs.wixstatic.com/ugd/2e1259_70342c60820d431aa83074bf2f9669ab.pdf.

¹⁷ See, e.g., Sierra Leone and Rwanda

¹⁸ *Id.*

The TRRC Act was passed by parliament on December 13, 2017 and approved by the president on January 13, 2018.¹⁹ The act mandates: a) the investigation and establishment of an impartial historical record of human rights violations; b) consideration of reparations for the victims of abuses; and c) promotion of reconciliation and non-reoccurrence. In order to do so, the Ministry of Justice set out guidelines for the selection and appointment of Commissioners to the TRRC.²⁰

After the Commissioners were selected and approved by the Ministry of Justice, they conducted extensive training on various Truth and Reconciliation Commission (TRC) models, with a special focus on the South African and Sierra Leonean TRCs. They studied the successes and failures of each model to create a unique mechanism that caters to the historical experience of The Gambia under Jammeh. In order to gather an impartial historical record of human rights abuses, information will be compiled from interviews with individuals, groups, and members of organizations, as well as reports and documents from 1994-2017 requested from the government. Reparations will be available to individuals the TRRC deems to have been victims of human rights violations. The promotion of reconciliation and non-reoccurrence consists of:

- a) Helping victims deal with their personal self-healing
- b) Allowing perpetrators to admit and apologize to the victim
- c) Encouraging peacebuilding within communities in order to reintegrate everyone in the community

¹⁹ Truth, Reconciliation and Reparations Commission (TRRC) Act (2017), <https://www.lawhubgambia.com/truth-reconciliation-reparations-commission/>.

²⁰ See Ministry of Justice, *Guidelines for Selection and Appointment of Commissioners to the Truth, Reconciliation and Reparations Commission in The Gambia*, https://docs.wixstatic.com/ugd/2e1259_07d8c5cc23d24c908658aeb62a6aa11e.pdf (emphasizing “the importance of public participation in and ownership of the TRRC process ... [n]oting the need for a TRRC composed of Gambians of the highest integrity and moral character.”).

- d) Promoting national healing and reconciliation
- e) Undertaking community outreach and engagement activities to enable the nation to learn the lessons from the past and to ensure the new accountability mechanisms actually prevent such violations from occurring again.²¹

In order to achieve the objectives set forth in the mandate, the TRRC is divided into special committees: the human rights committee; the child protection and sexual and gender-based violence committee; the national healing and reconciliation committee; and the amnesty recommendation committee.²² Through these committees, the Commission seeks to develop a ‘victim-centered’ approach to transitional justice, by ensuring that victims have a safe space to voice their stories. They adopt the Rome’s Statute definition of victim to include: “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; ... organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”²³ However, by focusing on the ‘victim-perpetrator’ dichotomy, the TRRC is already narrowing ‘justice’ in ways that exclude pre-conflict injustices.²⁴

²¹ Understanding the TRRC, <http://www.trrc.gm/understanding-the-trrc/>.

²² The human rights committee is the focal point for conducting the TRRC’s investigation by reviewing submitted statements and selecting victims, witness and perpetrators who may be asked to appear before the Commission. They also work with the Research and Investigation Unit of the TRRC “to ensure an accurate historical record of the recent pas[t] is recorded and preserved.” The Child Protection and Sexual and Gender-Based Violence Committee “is responsible for ensuring the highest standards of support and protection are available to victims, especially victims facing a high risk of revictimization, stigma or shaming.” The National Healing and Reconciliation Committee aims to engage and involve Gambians in a national discourse on the past abuses by way of civic education through the help of traditional and religious leaders to help facilitate reconciliation and healing. The Amnesty Recommendation Committee is responsible for exploring all options to ensure the right to justice is balanced with these complex and difficulty realities.

²³ Victims and Survivors, <http://www.trrc.gm/understanding-the-trrc/>.

²⁴ For a greater discussion on the implications of ‘victim-centered’ approach to justice, see Shaw et al., *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, (Stanford 2010) Print. See also Patricia Campbell, *The Truth and Reconciliation Commission (TRC): Human Rights and State Transitions – The South*

1.3 Public Opinion and Criticisms of the Model

The pursuit of transitional justice has become a growing phenomenon across many post-conflict societies and within countries, like The Gambia, that are in the process of democratizing after an end to a brutal authoritarian regime. While concepts like fairness, accountability, and justice resonate in many communities, their local application differs; what exactly is needed to overcome the painful experience of the past remains hotly debated. In transitional justice discourse, the challenges of localization are sometimes characterized as a tense relationship between “traditional” and “universal” justice norms. The Gambia is currently polarized, and there is not a consensus amongst the general public as to what shape the country ought to take. Although the TRRC is currently in the preliminary stages of “truth gathering,” many Gambians feel conflicted with the process.

Sait Matty Jaw, Professor of Political Science at the University of Gambia, is skeptical of the entire TRRC model. Unlike the consultative process that the Constitutional Review Commission (CRC), and despite the fact that the TRRC commissioners insist that the design of the process was in fact inclusive, Professor Jaw argues the deliberations occurred behind closed doors amongst a select few with no public participation.²⁵ He further notes that a hybrid Sierra Leonean and South African TRRC model cannot inform Gambia’s TRRC because the countries have starkly different historical experiences. Sierra Leone and South Africa both endured violent armed conflicts in the

African Model, African Studies Quarterly, 4 No. 3 (2000) (discussing that the to thoroughly understand the past, “future problems will be unexplainable and thus roots of violence unexplored will perpetuate future violence, including the acceptance of structural violence.”)

²⁵ Interview with Sait Matty Jaw, Professor of Political Science at the University of Gambia, August 26, 2019, 4:00 PM.

post-colonial era, and that is not the case for The Gambia. According to Professor Jaw, Ghana would have been a prime example for the TRRC commissioners to follow due to The Gambia's similar history and experience.²⁶

Unlike Sierra Leone, Liberia, or South Africa, Ghana's transition is considered by many to be the 'mild' case. The country has had no recent history of civil strife, widespread violence or state collapse, and the human rights violations witnessed in Ghana have almost exclusively been committed by the state.²⁷ Sierra Leone was recovering from an eleven-year brutal war where two transitional justice mechanisms, the Special Court and the Truth and Reconciliation Commission, were set up to address war crimes committed during the conflict. The TRC was mandated to create "an impartial, historical record of the conflict...address impunity; respond to the needs of victims; promote healing and reconciliation; and prevent a repetition of the violations and abuses suffered."²⁸ The TRC also sought "assistance from traditional and religious leaders to facilitate its public sessions and in resolving local conflicts arising from past violations or abuses or in support of healing and reconciliation."²⁹ The Special Court in Sierra Leone was a judicial body that had the authority to hear cases brought forth by victims. While the TRRC in The Gambia lacks judicial functions and can only make recommendations, the Special Court in Sierra Leone was very much in tune with nation's retributive justice model. Additionally, Sierra Leone's National Committee for Disarmament, Demobilization and Reintegration was focused on reintegrating ex-combatants, many of whom were youth, despite the TRC's victim-oriented mandate.³⁰

²⁶ *Id.*

²⁷ George Wachira et al., *Stretching the Truth: The Uncertain Promise of TRCs in Africa's Transitional Justice*, 86.

²⁸ The Truth and Reconciliation Act of 2000, Part III "Function of the Commission", 22 February 2000.

²⁹ *Id.*, at section 7(2).

³⁰ Rosalind Shaw, "Linking Justice with Reintegration? Ex-Combatants" in *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, (2010), 112.

While Gambia's TRRC was a great improvement from South Africa's failure to define 'victim' and 'perpetrator' in their TRC Act and failure to protect women from the rampant and systemic forms of sexual violence they experienced during the apartheid era, many Gambians are frustrated with the slow pace at which the TRRC has been moving. The lack of general understanding of principles of justice and democracy can be a contributing factor to the growing frustration amongst the Gambian public. People do not understand the idea of a fair trial even for individuals who have been accused of horrendous crimes.³¹ After three months of detention, Jammeh's former hitmen were released, and many Gambians felt betrayed by the Commission's willingness to grant amnesty for the accused rights violators.

However, the TRRC has yet to take a stance on whether they will recommend the Ministry of Justice prosecute low-ranking officials accused of having committed rights violations under Jammeh, or whether they should be granted amnesty and reintegrated into society for national reconciliation purposes. One approach would be to provide amnesty in order for the society to move forward because if prosecutions begin, where and with whom would they end? Another approach would be the complete opposite of amnesty, and call for full prosecution of all individuals involved in a regime complicit in human rights violations.³² A compromising perspective would consist of both amnesty and prosecution in the pursuit of truth and justice, so long as the needs of the victims do not destabilize the society or compromise nation reconciliation efforts. The latter is

³¹ Interview with Victoria Andrews, Treasure of Gambia Bar Association, August 27, 2019 5PM.

³² *See generally* Parker, Peter. 1996. "The Politics of Indemnities, Truth Telling and Reconciliation in South Africa Ending Apartheid Without Forgetting." *Human Rights Law Journal*, 17, 1/2:1-13 (discussing "[i]ndemnities by definition involve the suspension of the rule of law. They demand acceptance of the paradox that lawlessness might be a necessary condition for lawfulness, and of the humbling admission that a state weakened by such a pact might be better than the alternative . . . victims are to respect the law their violators did not . . .").

considered a pragmatic hybrid approach – one that was taken by both South Africa and Sierra Leone – yet no country has seen it applied in the transitional justice period successfully.

2. Legal Sector

One of the key factors in the development of the rule of law is the health of the legal profession outside of the government. The World Justice Project’s Rule of Law Index cites seven factors for civil justice that influence the determination on the quality of the rule of law: (1) people can access and afford civil justice; civil justice is free of (2) discrimination, (3) corruption, (4) improper government influence, (5) not subject to unreasonable delay, (6) and effectively enforced; and (7) alternative dispute resolution mechanisms are accessible, impartial, and effective.³³ In our conversations with stakeholders in The Gambia, we saw major problems with each of these elements.

2.1 International Standards for Quality of Local bar

The Gambia is a member of the United Nations and the African Union; both organizations have promulgated standards on the provision of legal services and development of the legal profession.

The UN’s Human Rights High Commissioner’s “Basic Principles on the Role of Lawyers” lays out some broad principles in regard to the development of the private bar in a country.³⁴ These principles include the right of individuals to choose and retain lawyers for criminal defense, adequate funding for legal services to the poor, and informational initiatives by bar associations

³³ “WJP Rule of Law Index 2019 Insights,” World Justice Project 20 (2019).

³⁴ UN Human Rights High Commissioner Basic Principles on the Role of Lawyers: Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990

and governments to inform individuals of their legal rights.³⁵ The principles also address the need for lawyers to have “appropriate education and training” and ensure that “groups, communities or regions” where there has been a history of discrimination have a particular opportunity to join the legal profession.³⁶ Additional principles as to “guarantees for the functioning of lawyers” include the ability of lawyers to practice without harassment or interference; the ability to practice without tribunals refusing to recognize lawyers for reasons beyond agreed qualification principles; and the recognition that lawyers, like other members of society, have a right to freedom of association and expression.³⁷

The African Commission on Human and Peoples’ Rights has also published standards on fair trial and legal assistance, which include provisions instructing states to ensure the availability of legal aid and the independence of lawyers, among others.³⁸

2.2 Access to Legal Education

The development of local infrastructure for legal education in The Gambia is relatively recent. There was not a law school in The Gambia prior to the 2007 founding of the University of the Gambia’s Faculty of Law,³⁹ alongside the more recent founding of The Gambia Law School.⁴⁰ Many legal professionals we spoke to had received their legal education outside of the country.⁴¹

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ “Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,” African Commission on Human & Peoples’ Rights (2005)7-9, <https://www.icj.org/wp-content/uploads/2014/06/AfricanPrinciplesGuidelines.pdf>

³⁹ “Faculty of Law,” The University of the Gambia

⁴⁰ “About”, The Gambia Law School <http://gls.gm/>

⁴¹ Interview with Antouman Gaye, A.A.B Gaye & Associates, August 29, 2019 3PM, and interview with Executive Director, NALA, August 28, 2019 at 1 PM.

A frequent idea that came up in the team’s interviews was that the related problem of judicial independence and possible over-reliance on foreign judges—discussed in Section 3 of this report—was a downstream effect of the under-supply of lawyers in the country. The prevailing sentiment among the founders of New Nation, a youth advocacy organization, was that there was a need for foreign judges in at least some capacity. Despite the concerns over judicial independence under the previous regime, foreign judges hired with proper judicial independence safeguards were needed because of the lack of development of a local legal tradition and bar, relative to other African countries with British-derived legal systems.⁴²

2.3 Ability to Practice Law

The team was able to speak at length with Victoria Andrews, the treasurer of the Gambia Bar Association, the voluntary professional organization for legal practitioners in the Gambia.⁴³ Andrews considered the end of the Jammeh regime to be good for lawyers in terms of civil liberties, but paradoxically bad for business. Under the current government, led by Adama Barrow, Andrews said she had greater confidence in her ability to practice without a fear of being on the wrong side of the government. However, she also said that—at least for the purposes of her commercial law practice—the current transitional period depressed the market for legal services because businesses were not sure how long the most recent government will last, or how the economy will shift during the transition.⁴⁴

⁴² Interview with leadership of New Nation, August 28, 2019 10 AM.

⁴³ “About Us”, Gambia Bar Association <https://gba.gm/about-us>

⁴⁴ Interview with Victoria Andrews, Treasurer of the Gambia Bar Association, August 27, 2019 5PM

Antouman Gaye, a lawyer who manages A.A.B. Gaye & Associates, one of the most respected law firms in The Gambia, also saw the ebbs and flows of the ability of lawyers to practice in The Gambia. Unlike many of his colleagues, Gaye undertook many human rights cases that his peers declined to pursue under the Jammeh regime.⁴⁵ In 2000, Gaye defended a former colleague of his that had become the leader of an opposition party, after that colleague was arrested alongside other opposition party members from charges relating to the death of someone in Jammeh's party.⁴⁶ After the acquittal in 2005 of several defendants by a Nigerian judge serving in the Gambia on technical assistance, Jammeh fired the judge and later imprisoned Gaye.⁴⁷ Politically motivated imprisonment of lawyers was a recurring problem under the previous regime: Gaye was also detained while representing individuals accused of participating in a 2006 coup attempt, and questioned by government agents as to whether he knew about the attempt.⁴⁸ In a welcome shift, lawyers under the current Barrow regime did not appear to fear arbitrary detention.⁴⁹

2.3 Provision of Legal Aid

During our fact-finding mission, we were able to speak with the Executive Director of Gambia's National Agency for Legal Aid. One of the biggest challenges he spoke of was a general lack of resources, especially with regards to providing legal services in rural areas further away from the capital of Banjul, and in providing legal services to those charged with less serious offenses.⁵⁰

Because of these limitations, legal aid in The Gambia often takes either capital offense and other

⁴⁵ Interview with Antouman Gaye, A.A.B Gaye & Associates, August 29, 2019 3PM

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Under Pressure: a report on the rule of law in the Gambia, page 45

⁴⁹ "Interviews with legal practitioners" refers to interviews with Andrews, Gaye, Ndey Ngoneh Jeng, and Ngneaar Yasin-Jeng, of New Nation

⁵⁰ Interview with Executive Director, NALA, August 28, 2019 at 1 PM

serious crimes, such as rape and murder, at the trial stage, or other offenses at the appeals stage. Other problems raised with the current state of legal aid and criminal adjudication included the lack of forensic evidence in criminal trials,⁵¹ and the general lack of money to attract lawyers to do public service work. Impact litigation—the use of litigation as a vehicle to change laws or improve the rights of groups in society—is also not a major aspect of the legal scene in The Gambia.⁵²

2.4 Self-conception of legal profession

One of the recurring themes in the team’s conversations with legal practitioners in The Gambia was the degree to which many legal problems never reach the “formal” legal system. On the one hand, there are alternative legal forums, including the Cadi courts—Islamic (Sharia) law courts that govern family law matters. However, even beyond family law disputes, Gambia’s “Masala culture”, defined as a culture of letting certain kinds of things “go”, was cited as a reason for the underdevelopment of the civil justice system. Disputes were more commonly resolved outside of the legal system, or else not pursued at all.⁵³

⁵¹ In our conversation with Antouman Gaye, he noted that the lack of forensic evidence is sometimes advantageous from the perspective of a defense lawyer.

⁵² “Litigation: Impact”, Harvard Law School <https://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-interest-work-types/impact-litigation/>; Id, NALA director

⁵³ Interview with Executive Director, NALA, August 28, 2019 at 1 PM.

3. The Independence of the Judiciary

The judiciary is one of the many areas in need of reform, and the Constitutional Review Commission is addressing this with its five subcommittees. Five of the eleven commissioners are themselves lawyers, and they will apply their expertise to improving the functioning of the judiciary. One of the themes that resounded throughout our meetings is the importance of the public's perception of the judiciary, i.e., does the public trust the courts to follow the law? Does the public believe that the rule of law is paramount, and do they trust the judiciary to administer the law?

Under Yahya Jammeh's reign, federal judges were often handpicked by the president himself. Jammeh abused The Gambia's need for technical assistance by selecting foreign judges himself and then wielding influence over them by keeping them on his payroll. The question of the need for and appropriateness of foreign judges in the first place is in play. The Gambia is a small country without tremendous resources or a strong tradition of growing legal professionals domestically. The nation's largest law school itself began graduating lawyers only a few years ago, and some have raised questions about the nascent system's ability to produce capable attorneys.⁵⁴

Several of the judges sitting on the supreme court were appointed by President Barrow, but several who were appointed by Jammeh remain.⁵⁵ The instability that could ensue if Jammeh's supreme court judges were to be removed might create conditions for a political crisis, but it remains to be seen whether the public will believe these judges to be impartial. Judges who were believed to be

⁵⁴ Interview with Ms. Andrews, in Banjul, The Gambia (Aug. 27, 2019).

⁵⁵ Bruce Asemota, President appoints 8 Gambian judges, *The Point* (Oct. 18, 2017), <http://thepoint.gm/africa/gambia/article/president-appoints-8-gambian-judges>.

on Jammeh's payroll have been effectively forced out of the judiciary by being reassigned to 'undesirable' locations, i.e. extremely rural locations where the living conditions are very harsh. Needless to say, these are often the places that are most in need of access to justice but where litigation is almost never pursued.

The Chief Justice and all judges of the superior courts are appointed directly by the president, with only a consultation from the Judicial Service Commission.⁵⁶ The Supreme Court currently has seven judges, five of whom were appointed by President Barrow, with the other two being appointed by Jammeh.⁵⁷ The two judges appointed by Jammeh are both foreign, one from Nigeria and the other from Sierra Leone.⁵⁸ The Constitution provides three ways for judges of a superior court to be removed: (1) voluntary retirement after the age of 65 (2) mandatory retirement at the age of 70 or (3) termination by the President with a consultation with the Judicial Service Commission.⁵⁹ The president is not bound by the Judicial Service Commission, however.⁶⁰ Furthermore, the public strongly believes that under Jammeh, members of the National Assembly who opposed him were stripped of their seats, which stifled dissent from the views of the president in the Assembly. Since the National Assembly is empowered to determine compensation for superior court judges under Section 142 of the Constitution, the president could effectively control the salary and benefits of individual superior court judges.⁶¹ This collapse of separation of powers circumvented the democratic aims of the Constitution.

⁵⁶ Constitution of the Republic of The Gambia, 1997, Ch. 8, Pt. 4, Section 138 (Gam.).

⁵⁷ *Supra* note 2.

⁵⁸ Is the Supreme Court of The Gambia Fully Constituted?, Foroyaa, (May 5, 2017), <https://foroyaa.gm/is-the-supreme-court-of-the-gambia-fully-constituted/>.

⁵⁹ Constitution of the Republic of The Gambia, 1997, Ch. 8, Pt. 4, Section 141 (Gam.).

⁶⁰ Satang Nabaneh, The need for an independent Gambian judiciary, Law Hub Gambia, (Dec. 14, 2018), <https://www.lawhubgambia.com/lawhug-net/independent-gambian-judiciary>.

⁶¹ Constitution of the Republic of The Gambia, 1997, Ch. 8, Pt. 4, Section 142 (Gam.).

The Judicial Service Commission itself is also compromised by this lack of independence from the office of the president. The Judicial Service Commission is composed of (a) the Chief Justice (b) a judge of a superior court (c) the solicitor general (d) a Gambian lawyer with at least five years of experience (e) another person appointed by the president and (f) a person nominated by the National Assembly.⁶²

Section 139(2) of the Constitution states that for a person to be qualified as a Supreme Court judge, he or she must have sat on the appellate bench for no fewer than five years, or he or she must have been a legal practitioner for twelve years or more.⁶³ The current Supreme Court has only one female judge.⁶⁴

Section 142 of the Constitution provides that the compensation for a judge of a superior court shall be prescribed by the National Assembly.⁶⁵

The idea of foreign federal judges may be anathema to many legal systems, but many Gambians are unbothered by the idea. Gambians largely accept the fact that The Gambia is lacking the resources to fully equip the judiciary, and the commonalities between the civil systems of countries like Nigeria and Ghana make it possible to accept competent judges from such countries. A comparison to a country like the United States or South Africa is not very fruitful because the resources of the countries are so different, but there are other similarly situated countries that have managed to grow judges at home. Namibia, for instance, has been independent since only 1990,

⁶² *Id.*

⁶³ Constitution of the Republic of The Gambia, 1997, Ch. 8, Pt. 4, Section 139 (Gam.).

⁶⁴ *Supra* note 4.

⁶⁵ *Id.*

and it is a country of merely two million people. Yet, Namibia does not rely on foreign judges.⁶⁶ Having a fully native judiciary may help to instill some more public trust in the judiciary, but as stated, Gambians mostly seem unbothered by the presence of foreign judges. As long as the judges are competent and impartial, it does not matter if they are from other African countries.

Compensation for judges is a problem in The Gambia. It is true everywhere that it is difficult to persuade the most talented legal professionals to abandon lucrative careers for a much lower paying job in the judiciary. It may be the case that most systems do not want to incentivize the absolute best to enter public service anyway, and the benefits that come along with being a judge are enough to entice perfectly competent lawyers to enter the public sphere. However, in The Gambia, where judges are sorely underpaid and public systems are badly underfunded, it is especially challenging to attract competent professionals to the bench.

Section 125 of the Gambian Constitution sets forth the composition of the Supreme Court of The Gambia.⁶⁷ The Constitution requires that the Supreme Court have (a) a Chief Justice (b) no fewer than four other Justices and (c) appellate judges to be selected by the Chief Justice for the resolution of a particular cause or matter.⁶⁸ The Supreme Court must have no fewer than five judges, and the number of judges sitting on the court must be odd.⁶⁹

⁶⁶ Namibia Superior Courts, Supreme Court Judges, <http://www.ejustice.moj.na/ORGANISATIONAL%20STRUCTURE/Pages/SupremeCourtJudges.aspx>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

Sections 137 and 137A of the Constitution establish the Cadi Court and its appeals process.⁷⁰ The Cadi Court has its own appellate process, and decisions are reviewed by a Cadi appeals panel.⁷¹ Decisions are not reviewed by any other courts, although the Cadi Court itself is established “in such places in The Gambia as the Chief Justice shall determine.”⁷² Parties to Cadi Court proceedings are entitled to representation “at his or her own expense.”⁷³

Another unique challenge facing The Gambia’s reform efforts is the question of how to proceed with the personal religious courts. Roughly 90% of The Gambia’s population is Muslim, and for issues involving inheritance, divorce, and marriage, Sharia courts have personal jurisdiction.⁷⁴ The outcomes tend to be heavily skewed towards males, but the outcomes for women in secular courts are not necessarily any better.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

4. Freedom of the Press

The freedom of the press stands as one of the most significant—and vulnerable—bastions of democracy. Historically, leaders intent on consolidating autocratic rule have targeted members of the media, whose roles center on—or, assuming journalistic independence and integrity, ought to center on—exposing the inadequacies of leadership and rooting out corruption and political misbehavior. Democracy, as the Washington Post’s slogan suggests, dies in darkness, and journalists play a fundamental part in shining light on nefarious activities that would otherwise fester unknown.

Throughout his decades-long reign, President Jammeh focused his animus on members of the press, specifically those who questioned his legitimacy or reported on the misdeeds of his close associates. Reports of torture and killings perpetrated by Jammeh’s “junglers” squad have surfaced since the inception of the Truth, Reparations, and Reconciliation Commission, and journalists have proven eager to tell their stories. In a recent TRRC testimony involving members of the press, Lamin Cham, editor of *The Standard*, one of The Gambia’s largest newspapers, referred to the media as “the most persecuted institution under Jammeh,” and evidence from the time affirms this conclusion: a Doha Center for Media Freedom study showed 20% of practicing Gambian journalists were working in exile in 2009, and 15 media houses were arbitrarily closed under Jammeh.⁷⁵

⁷⁵ “Gambia: ‘The Media Was the Most Persecuted Institution under Jammeh,’” JusticeInfo.net (Jul. 15, 2019), <https://www.justiceinfo.net/en/truth-commissions/41925-gambia-the-media-was-the-most-persecuted-institution-under-jammeh.html>.

Former army officers have also discussed receiving direct orders from Jammeh to murder journalists, including Deyda Hydera in 2004.⁷⁶ Torture was commonplace: Lamin Cham claimed he was arrested in Serekunda, offered no explanation for his detainment, and then, at a police station in Banjul, severely beaten by members of the presidential guard.⁷⁷ As this unfolded, journalists Malick Mboob from The Daily Observer and Lamin Fatty from the Independent newspaper watched from adjoining cells, locked up themselves for supposed crimes against the state.⁷⁸

Challenging the government's official statements, or even illuminating the government's activities, was a death sentence. Legislation reinforced Jammeh's efforts by effectively mandating compliance from the press. Amendments to the country's Criminal Code in 2004 imposed severe punishment for anyone convicted of making "false statements" or otherwise engaging in libel, false publication, and sedition.⁷⁹ Additionally, changes to the Newspaper Act created prohibitive barriers to entry for aspiring publications.⁸⁰

Sainey MK Marenah battled firsthand the repercussions of such Draconian laws. Bucking the trend of his classmates, who avoided the field of journalism due to the "climate of fear" surrounding it, Marenah sought to "give a voice to the disadvantaged" by joining the ranks of Gambia's

⁷⁶ *Id.* (Hydera was the editor of The Point, a daily newspaper).

⁷⁷ "Letter from Africa: I Was Tortured in The Gambia," BBC (Oct. 25, 2018), <https://www.bbc.com/news/world-africa-45917294>.

⁷⁸ *Id.* ("Crimes against the state" in this context simply meaning reporting on human rights violations committed by the Jammeh regime).

⁷⁹ Coupled with a judiciary controlled by Jammeh associates—discussed in Part 3 of this paper—"false statements" became a *de facto* rhetorical disguise for "statements in opposition to the current regime."

⁸⁰ "Attacks on the Press in 2007 – The Gambia," RefWorld, United Nations Refugee Agency (Feb. 2008), <https://www.refworld.org/docid/47c56772c.html> (Bond requirements were increased, and the cost of a publication license rose to USD\$25,000).

reporters.⁸¹ Initially he started at The Standard but was soon pushed into freelancing when the regime ceased the newspaper's operations in 2012.⁸² Following the release of an article in which he detailed dissent in Jammeh's political ranks,⁸³ Marenah was arrested and charged with publishing false news with an intent to cause harm; shortly after his release, and concerned about further retaliation by the regime, Marenah fled to Dakar, Senegal.⁸⁴ His moral obligation to speak on the situation in The Gambia and Jammeh's atrocities continued unabated: "We wanted to get the world to understand what we were living under. Living under a dictatorship is like living in Hell."⁸⁵

Much has changed for members of the press since Adama Barrow's election in 2016, at least in how the current administration approaches its relationship with the media. Marenah, who has since returned to his home in The Gambia, no longer experiences the omnipresent risk of danger to his personal safety, and he can comfortably report on the innerworkings of the Barrow regime.⁸⁶ Indeed, Marenah considers such reporting even more essential now than in the past, for it can raise awareness of the egregious violations that occurred under Jammeh and facilitate justice for their victims.⁸⁷ As someone who came from a rural community, where geographic separation from Gambia's urban centers can limit access to information, Marenah understands the importance of media's role in educating the masses. Hungry for a successful democratization process, the

⁸¹ Interview with Sainey MK Marenah, Head of Communications at the Constitutional Review Commission (Aug. 26, 2019).

⁸² *Id.*

⁸³ "A Year after Jammeh, Free Press Returns to The Gambia," Al Jazeera (Feb. 6, 2018), <https://www.aljazeera.com/indepth/inpictures/year-jammeh-free-press-returns-gambia-180130121440519.html>.

⁸⁴ Interview with Sainey MK Marenah (Aug. 26, 2019).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

population's willingness to engage in the country's transitional justice efforts have piqued; for its part, the press can feed this appetite with quality, balanced, honest reporting.

The Barrow administration has responded in turn, increasing transparency and expanding access to government officials. Minister of Information Demba Ali Jawo has visited radio stations and newspapers as a way to demonstrate the government's willingness to engage with journalists, aiming to mitigate the formerly adversarial relationship between president and press.⁸⁸ Inviting journalists to testify in front of the Truth, Reparations, and Reconciliation Commission has uncovered the insidious ways in which the executive and judiciary squashed voices of dissent. Notably, the Gambia Press Union has established a self-regulatory body, the Media Council of The Gambia, to hear complaints against journalists, offering an alternative mechanism to the country's courts for the resolution of disputes involving members of the press.⁸⁹ Whereas journalists operating under the Jammeh regime '[refused to] publish anything that would get them in trouble,' an almost existential choice at the time, the modern government has permitted the press to "operate without restrictions."⁹⁰

However, several of the obstacles that impeded the establishment of a truly autonomous press in The Gambia persist. Despite a clear refusal to enforce them, the administration has yet to scrap

⁸⁸ "Gambian Media Thriving Since Jammeh's Departure," VOA News (Jun. 14, 2017), <https://www.voanews.com/africa/gambian-media-thriving-jammehs-departure> (Reflecting on this newfound access, Talibeh Hydera, assistant editor of The Standard, claimed, "Now I can pick up a phone and call somebody at the Ministry of Information. The person might not be able to give me all that I want, but at least it's a difference. A big difference from before. Then you dare not.").

⁸⁹ "Gambia's Journalists, Free from Dictator, Work to Win Trust," Associated Press (Dec. 31, 2018), <https://apnews.com/36416cb1f6bf45568c83826209d04c11>

⁹⁰ *Id.*

those same media laws that enabled Jammeh’s intimidation of journalists.⁹¹ Moreover, the journalism community has grappled with how to maintain an appropriate level of sensitivity in their reporting on testimonies before the TRRC, balancing the desire for holistic reporting with the concomitant desire to avoid sensationalizing or commercializing those traumatic stories.⁹²

In his current job as the Head of Communications at the Constitutional Review Commission, Marenah has focused on codifying protections for the press, though, as discussed above, the legislature retains some responsibility for expanding these safeguards. According to Marenah, media and journalists have a professional duty to “make sure the rights defined in the constitution are implemented and people are held to account.”⁹³ Tyranny thrives outside the media’s vigilant gaze; Jammeh’s campaign to weaken journalism’s influence affirms this reality. A New Gambia that avoids the problems of the past will thus necessitate freedom of the press.

⁹¹ Interview with Sainey MK Marenah (Aug. 26, 2019).

⁹² *Id.*

⁹³ *Id.*

5. Visions for a New Constitution

The theatrics of the drafting of a new constitution were inescapable in The Gambia during the summer of 2019 - it was the prime point of discussion in civil society, government entities and activist circles. For many Gambians, a new Constitution symbolized the complete abolishment of a dictatorial regime that permeated all aspects of society - it was after all, a necessary step for truth and reconciliation. With it, came a new vision for the rule of law, fulfillment of democracy and the promotion of human rights. However, as constitution drafting is inherently a political and not legal process, some voices and interests would ultimately be negotiated into or out of the document.

After assuming office in 1996, President Jammeh institutionalized the 1997 constitution. It declared the Constitution as the supreme law of the land and detailed the political order, citizenship requirements and individual rights of the republic. Sainey Marenah, a formerly exiled journalist of The Point and currently the Head of Communications at the Constitutional Review Commission (CRC) states, “The 1997 Constitution [...] was amended 52 times by Jammeh just to suit him but fundamentally it is not a bad law.” Gambians broadly hold the view that the Constitution fundamentally furthered vital social rights and protections. Specifically, as lawyer and women rights’ activist Ndey Ngoneh Jeng insisted, it was under its vanguard that girls’ education was furthered and legislative measures to abolish traditional practices such as female genital mutilation (FGM) and child marriage were enacted. By amending it 52 times, the 1997 Constitution enabled further repressive measures by Jammeh, specifically the suppression of the freedom of the press and the destruction of the due process rights of the criminally accused.

The CRC is the parallel legal structure of the Gambia's Truth, Reconciliation and Reparations Commission (TRRC), designed to establish transitional justice, strengthen the Gambian legal framework and cleanse the scars authoritarianism from the Gambian psyche. After all, a new Constitution is a fundamental stepping stone for a new Gambia. The CRC was established by the Constitutional Review Commission Act issued by the National Assembly in June 2018 and is tasked to "...review and analyze the current Constitution, draft a new Constitution for the Republic of The Gambia and prepare a report in relation to the new Constitution."⁹⁴ As an independent body, the CRC's core values are: inclusiveness, independence, integrity and participation.⁹⁵ The CRC's guiding principles for assembling a new Constitution are also outlined below:

- The existence of the The Gambia as a sovereign independent state;
- The Gambia's republican systems of governance, including democratic values and respect for and promotion of the rule of law and fundamental rights and freedoms;
- The separation of powers;
- National unity, cohesion and peace;
- The importance of ensuring periodic democratic elections based on universal adult suffrage, including the introduction of term limits for serving in the office of the President;
- The Gambia's continued existence as a secular state.⁹⁶

The commission is comprised of 11 members, including a chairperson who is the Chief of Justice, a vice chairperson that is nominated by the Ministry of Justice and nine members who are nominated by the President.⁹⁷ All Commissioners are appointed by the President.⁹⁸ Of the 11 members, five are lawyers, which has helped provide the legal expertise and foundation that many Gambians find to be necessary for effective Constitution drafting. The Commission is also gender-sensitive: there are five male commissioners, five female commissioners and one male

⁹⁴ "About Us." *Constitutional Review Commission (CRC)*, 2019, crc220.org/about-us/.

⁹⁵ "About Us." *Constitutional Review Commission (CRC)*, 2019, crc220.org/about-us/.

⁹⁶ "About Us." *Constitutional Review Commission (CRC)*, 2019, crc220.org/about-us/.

⁹⁷ "About Us." *Constitutional Review Commission (CRC)*, 2019, crc220.org/about-us/.

⁹⁸ "About Us." *Constitutional Review Commission (CRC)*, 2019, crc220.org/about-us/.

chairperson. The Commission is tasked with an 18-month period for providing a draft of the constitution. The act provides for a 6-month extension, if necessary. When asked about the CRC process, The Secretariat proudly stated: “It is a once-in-a-lifetime opportunity to build the kind of Gambia that we want [...] If we get this process right, we want our Constitution to stand the test of time.” The CRC has looked to the best practices of other African constitutions that are globally deemed as progressive and share similar cultural norms and understandings of collective rights like The Gambia: Kenya, South Africa and Rwanda.

The CRC is participatory. The act mandates the Commission to engage in participatory processes and other mechanisms required for the drafting of a new constitution. The Commission describes such processes as the following: “...the CRC will hold focused and thematic discussions with different stakeholders, consult widely with the public and conduct civic education on the constitution-making process.”⁹⁹ The 1997 Constitution was not developed in consultation with local people. To ensure the inclusive and participatory nature of the process, the CRC has produced two essential documents: (1) the FAQ and 2) the issues document. The FAQ was promulgated by the CRC and is provided to on-the-ground communicators who distributed it to all Gambian persons. It is in English and also translated into the predominant local languages: Wolof, Mandinka, Fula, Serahule/Soninke and Jola. Sign-language translators were also hired to ensure that all Gambians may engage in the process, regardless of disability. Local interpreters were also used to read the document to illiterate Gambians. The Issues Document contains over 300 questions and is designed to outline areas for potential constitutional reform. The CRC plans to use it as a tool to review the 1997 Constitution and to inform its draft Constitution. Essentially a

⁹⁹ “About Us.” *Constitutional Review Commission (CRC)*, 2019, crc220.org/about-us/.

survey, it provides the general public the opportunity to express their vision for new Constitution. Also, the CRC has encouraged all Gambians to share position papers expressing their views and concerns to it.

There have been approximately 106 consultation sessions - locally known as *banta banta* meetings - held by the CRC to inform the process. Functionally community town-hall meetings, the sessions provide ordinary Gambians with a platform to participate in the drafting process. Residents are educated about the Commission's mission, asked about their viewpoints and are able to ask the Commission any questions. To ensure that such meetings are accessible, transportation is provided for all citizens, as well as lunch. Furthermore, to truly make the sessions participatory, the CRC has created targeted sessions. For example, after witnessing the silence and marginalization of women from meetings in rural communities, the CRC created a women-specific session so that women are empowered to share their opinions and participate in the process. A youth specific consultation session was also formulated, in which the CRC went to schools to speak with children in grades 10 -12 on their views about the new constitution. The Secretariat emphasized the importance of this initiative: "This is a constitution that will serve the next generation."

The Gambia of 1997 is vastly different from The Gambia of today, and as such the CRC must consider emerging issues. Thus far, environmental justice issues are a new issue. Due to the influx of Chinese investment that has caused the depletion of natural resources and exacerbated the global pressures of climate change, Gambia is undergoing a unique environmental catastrophe that must be addressed in a new constitution to preserve its environment. Such ecological challenges have also manifested in land disputes.

Today's Gambia is also struggling with two new global issues: the rights of LGBTQ citizens and the end of Female Genital Mutilation (FGM). President Jammeh criminalized homosexuality; in 2014, he introduced a law criminalizing homosexuality as “unnatural offenses” under the criminal code. With a new political order, LGBTQ Gambians and allies wonder if such a law will be abolished despite the country's religious and cultural norms. The CRC expressed great reluctance in furthering the rights of LGBTQ persons in the new Constitution. It noted that The Gambia is not ready to recognize the full humanity of LGBTQ community. If included, the CRC argued, 90-99% of the general population would disapprove of the Constitution altogether. Ngenaar Yasin-Jeny, co-founder of a youth-focused socio-economic development non-profit called New Nation, stressed the great legal challenges facing LGBTQ peoples. She insisted that as a marginal community, the LGBTQ community would not be included in the new Constitution. The important pragmatic step that would need to be taken to protect the group would be to revise the criminal code. A general cultural shift, which The Gambia is not ready for, would also be necessary. As an ally to the community and a leader in civil society, she emphasized, the conundrum that she is in for her role as an advocate but her fear of committing social-suicide because of her advocacy.

President Jammeh abolished the practice of FGM and child marriage in 2016. This was a critical step; Jeng emphasizes that it enabled Gambia to address issues of gender-based violence. FGM is an emerging and contentious issue: the general public is unsure as to whether the CRC would further protect anti-FGM laws or reinstate the practice. According to Professor Sait Matty Jaw, Professor of Political Science at the University of The Gambia, civil society leaders, including a local gender-based advocacy organization called Safe Hands for Girls, have submitted papers to

the CRC to criminalize the traditional practice. However, he stated, 70% of the community still practices it and given the prevalence in society, it would remain one of the biggest battles for gender equity. Jeng further elaborated on this, stating how under the new regime, the community continues to see the anti-FGM law as just another authoritarian policy of Jammeh and that the administration isn't pushing against it strongly. The CRC noted that FGM have been raised in consultation sessions and stated that it cannot give a determination as to how the Commission will decide on the issue.

The Secretariat stated, "Gambia belongs to a community of nations." Essentially, a new Constitution must preserve Gambia's international personhood and ultimately, abide by international law. The Gambia is a member of the United Nations, the African Union and the Economic Community of West African States (ECOWAS) as well as a party to a number of international conventions.¹⁰⁰ As such, Gambia's duty is not only to the people within its territorial jurisdiction but to the broader international community. The Secretariat suggested the tension that may arise from such obligations: "What the Gambians want is what matters. However, in some circumstances...even if the majority wants it, it does not mean that it will be there." Marenah also further highlighted a dominant human rights conundrum: how does the CRC ensure that rights are actually implemented? Specifically, how does the CRC assure that the individual and collective rights safeguarded in the Constitution become tangible rights that Gambians can access in actualized form? The question remains, with issues pertaining to the LGBTQ community and

¹⁰⁰ The following contain information on the international conventions that The Gambia is a party to: "Treaties, States Parties, and Commentaries - Gambia." *International Committee of the Red Cross*, ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=GM.; "UN Treaty Body Database ." *United Nations Office of the High Commission*, tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=64.

FGM, how will the Commission decide? Who does it owe ultimate allegiance to? And lastly, if FGM is abolished and the rights of LGBTQ persons are protected, how will the Commission ensure that such rights are actually implemented and furthered at all levels?

The United States Constitution serves as a model for The Gambia. For the CRC, the American Constitution is a timeless document that has survived numerous administrations and changing circumstances. It is this apolitical and enduring nature of the American Constitution at the crux of The Gambia's constitutional vision. Marenah states, "...how do we have a constitution that will stand time like the United States Constitution." In such a discussion, the question arose of the values of a constitution that is timeless or flexible, a debate that in the United States often manifests as "originalism" versus "living constitutionalism." The CRC insisted that it would prefer a flexible Constitution to adapt to new realities. However, given The Gambia's past, a constitution that is flexible may be a tool of furthering human rights violations. As such, the CRC hopes to implement due processes that will create an infrastructure on how amendments to the Constitution are made and ensure that amendments are not arbitrarily made.

According to Marenah, the new Constitution is considering a new media law, specifically, a Freedom of Information Act, to ensure the protection of media freedom. During the Jammeh regime, the media was subject to repressive state action as a means to silence dissenting voices and further Jammeh's authoritarian policies. Journalists were killed and many were in exile. Marenah states, "Being a journalist in a dictatorship is like living in hell." The integrity of the journalism field was also compromised. Journalists sold information to the state and the profession

was used to further Jammeh's propaganda. Marenah asserts that the CRC's promotion of the freedom of the press is integral to its vision of creating robust social institutions.

Furthermore, the CRC envisions constitution drafting as a mechanism to protect the rights of all criminally accused persons and reimagine new criminal laws. According to Kemo Cessay, Executive Director of the National Agency for Legal Aid (NALA), the Gambia's criminal justice system is marked by antiquated laws and deficient infrastructure. For example, he states, the Gambia does not have forensic evidence technology, and as such there are great challenges defending criminals coupled with the lack of funding, capacity and societal attitudes towards criminals. Ansumana Manneh, the Director General of The Gambia's Prison Services, discussed the gross human rights violations that incarcerated persons were subject to under the Jammeh regime. He explained the torture, sexual violence, and lack of due process prisoners were subjected to. Women prisoners in particular, he noted, were victims of gender-based violence and continuously had their reproductive rights abridged. He emphasized that many of The Gambia's criminal laws are from the 1950s. The Director has engaged with the CRC in a security-led consultation meeting to examine the Gambia's criminal laws. As such, the CRC envisions a Constitutional framework that heals and abolishes the grotesque human rights violations of the past. It plans to execute a new legal order that ensures due process protections, regulates and improves prison conditions and helps ensure that all persons who are accused of a crime have access to legal services.

Coexistence of all religious groups is a prime cultural norm of The Gambia, Marenah insisted. Although a Muslim-majority country,¹⁰¹ for centuries, according to Marenah, the country's Muslim and Christian communities have coexisted, resulting in inter-marriage and religiously infused practices. As such, the CRC maintains that it would further such coexistence by preserving The Gambia as a secular state. Part of Jammeh's state building project was to establish The Gambia as an Islamic State. In December of 2015, he publicly declared that The Gambia will assume the domestic and international personality of an Islamic Republic, to which sharia law would be furthered.¹⁰² This aggressively isolated the nation's Christian, animist, atheist, and other faith communities. As such the CRC hopes to revive The Gambia's legacy of religious harmony by reaffirming secularism.

The Gambians in the diaspora are a key player, empowering the CRC to provide them a role in the Constitution drafting process. Marenah stated, "The diaspora is recognized as the 8th region of the country." After all, the economic power of the diaspora - through the remittance system - helped fund political parties and topple the Jammeh regime. As such, the CRC believes that the diaspora is a critical stakeholder and has modeled neighboring Senegal's system in its inclusion of its diaspora in the constitution review process. CRC reviewers have traveled to different localities, including American and European cities. The CRC is examining the incorporation of constitutional protections and measures for the diaspora.

¹⁰¹ In The Gambia, 90% of the general public is Sunni Muslim: "Religion in Gambia: Information." *Religion in Gambia | Information*, Access Gambia , www.accessgambia.com/information/religion.html.

¹⁰² "The Gambia Now an Islamic Republic, Says President Yahya Jammeh." *The Guardian*, Guardian News and Media, 12 Dec. 2015, www.theguardian.com/world/2015/dec/12/gambia-now-an-islamic-republic-says-president-yahya-jammeh.

The public discourse surrounding the CRC and constitution-making process is mixed. For Professor Jaw the process has yet to reach ordinary Gambians. He stated, “When you talk about transitional justice, you have to feel it. It feels like we have changed from one President to another careless one.” However, for Professor Jaw, the constitution review is an important and essential transitional tool. The great challenge of it, he argues, is that it is a highly political process and not a legal process, in which Gambians are not actively engaging. Alieu Bah, socialist, social justice and youth activist, shared a similar discontent with the CRC. For Bah, the CRC is a temporary bandage solution that will fail to address a larger systemic issue: capitalism, he argued, is contrary to any form of people-centered development for The Gambia. According to Bah, The Gambia lacks a social welfare system and is subject to a geopolitical system that exploits and oppresses small African nations. A skeptic of the law, Bah suggests that until The Gambia is an economically prosperous state, any form of Constitution review is pointless, as people will continue to be unable to access their rights.

5.1 Some Considerations

A peoples’ democracy and constitution must incorporate all social groups, particularly those who are marginalized. The CRC must confront the issue of LGBTQ peoples and FGM - the new Gambia owes an obligation not only to its citizens but to the larger international community. The CRC exceptionalizes and reveres the American Constitution but must also examine how it too is subject to great critique and a tool used to limit certain rights. As the 1997 Constitution is fundamentally a rights-based document, it is apparent that the draft Constitution may not differ greatly from the 1997 version. This suggests that in order for the upcoming constitution to truly be the supreme law of the land and a timeless document, the CRC must continue to engage with the National Assembly, the executive, civil society and the general public to further civic education

and build accountable social structures. After all, a constitution that grants immense protections but is not complemented by robust social systems is ineffective, as the general populace would never be able to fully and truly actualize their rights.

6. Local Government in a Centralized System

The Gambia's local government structure is designed under sections 193-194 and 214(3) of the 1997 Constitution and the following legislations: the Local Government Act (2002), the Local Government Amendment Acts (2004, 2006 and 2007) and the Local Government Finance and Audit Act (2004).¹⁰³ Such frameworks establish various local entities, including the Municipal Councils directed by the Mayors, Regional Governors Offices and Village Councils directed by Village "Alkalos."¹⁰⁴ Under such laws, the Municipal Councils are authorized to administer and "...provide basic services in education, health, agriculture, road maintenance, sanitation and animal husbandry, with a concomitant transfer of resources from central to local government."¹⁰⁵ Gambia has eight Municipal Councils: Banjul, Basse, Birkama, Janjanbureh, Kanifing, Kerewan, Kuntaur and Mansakonko. The Mayors of each Council are elected by the residents of the area.¹⁰⁶ Within each Council "...are different wards...[and] elected Councilors who work under the Municipalities through specialized committees such as health, agriculture, environment, education, youth, women and children and sports and culture."¹⁰⁷

The Mayor of the Kanifing Municipal Council (KMC) is Talib Ahmed Bensouda, an entrepreneur, who assumed office in 2018 at 33 years old. According to Musa Badjie, Councilor of Farmers and Chairman of the Education Committee, the KMC has the largest constituencies. However, due to

¹⁰³ Sowe, Samba. "Local Government: A Case Study of The Gambia." *Gazi University, Ankara, Turkey*, 2017, pg. 111, dergipark.org.tr/en/download/article-file/553885.

¹⁰⁴ Sowe, Samba. "Local Government: A Case Study of The Gambia." *Gazi University, Ankara, Turkey*, 2017, pg. 111, dergipark.org.tr/en/download/article-file/553885.

¹⁰⁵ Sowe, Samba. "Local Government: A Case Study of The Gambia." *Gazi University, Ankara, Turkey*, 2017, pg. 112, dergipark.org.tr/en/download/article-file/553885.

¹⁰⁶ Sowe, Samba. "Local Government: A Case Study of The Gambia." *Gazi University, Ankara, Turkey*, 2017, pg. 112, dergipark.org.tr/en/download/article-file/553885.

¹⁰⁷ Sowe, Samba. "Local Government: A Case Study of The Gambia." *Gazi University, Ankara, Turkey*, 2017, pg. 112, dergipark.org.tr/en/download/article-file/553885.

a lack of data technology, the KMC is unable to account for the number of compounds, constituents, and revenue-based markets - the overall demographics of the council. As such, the KMC has found it difficult to map out the tax base, rendering it ineffective in combating issues of corruption. Musa Bah, Deputy Mayor, stated that the mandate of the KMC is “...to promote the interests of the people...and addressing their local needs.” After twenty-two years of dictatorship and governmental mismanagement, the KMC is working to further public trust in local institutions.

With such a mandate and a weak administrative state, the KMC faces great challenges. There are a plethora of community needs to address - infrastructural failure, deficient public institutions and lack of a public welfare system - and a constituency that is urgently awaiting genuine structural reform. The KMC has designed space and forums for the community to directly bring their concerns to the General Council. Outreach strategies have been implemented to further community engagement. The Council has been utilizing a robust social media platform that has enabled the district's growing youth populace to speak truth to power. Also, the Council has a routine programming in QTV (the only privately-licensed television station in The Gambia), which serves as a platform to discuss forthcoming initiatives and allow constituents to express their concerns. The programming is in English as well as the predominant local languages - Wolof, Mandinka, Fulani, Serahule/Soninke and Jola - to ensure that all persons are able to effectively engage with the government.

Local government, historically, had to function under the existence of an exceedingly centralized structure — this fostered issues of local autonomy and in many instances, rendered local government powerless. At the crux of this conundrum, Bah insists is the dichotomy between the

text of the Constitution and how local government has *de facto* been administered. Although the 1997 Constitution enforced decentralization, under Jammeh, the power of local government was reduced to further his vision of authoritarianism. As such, local government was feeble and inadequate in facilitating its mandate of protecting and promoting the interests of the people.

Following the election of President Barrow, local stakeholders assumed the restoration of autonomy would be the main priority of the new administration's nation-building agenda. However, Barrow has failed to reestablish local autonomy. All programming and initiatives pursued by local government must be approved by the Ministry of Justice. Also, the Ministry of Justice is responsible for approving committee appointments from the Council. Bah said that if the new administration wants to make an impact on the lives of people - the only way to do so would be to decentralize the government. He says, "If you want to reach the grassroots, you have to go through the local government." When asked who holds power in Gambian politics, Bah responded that the apparatus is designed so that the President assumes all forms of power. However, the people inherently hold power.

Consequently, the KMC continues to face great challenges in implementing reform policies. For example, the KMC initiated a sanitation project, in which it would purchase and administer the usage of trash compact trucks, given the public health concerns surrounding the Bakoto Dumping Site in the district. However, the Ministry imposed a duty on the trash. Bah further suggested that the Barrow government has yet to institutionalize local autonomy because of "...the fear of giving power to your subsidiaries" that has been entrenched into the fabric of the political structure, stemming from the Jammeh regime.

The question remains: who fills the vacuum for the people, when the national government fails to act and local government is limited? With such a reality, public-private-partnerships have become an avenue to address local interests. According to Bah, KMC is partnering with local non-governmental organizations and local and international private companies to fill such a vacuum, as a means of spearheading specific social projects. Such a partnership leaves open the following questions: To what extent should private entities be relied upon to address public needs? What are the limitations of public-private-partnerships, if any, at all, for filling such a vacuum?

With a national transitional justice project, local entities have assumed an active role in shaping a new political apparatus - specifically, the Constitution. The KMC and other local stakeholders have engaged in consultation meetings with the CRC to discuss community and grassroots concerns they hope to be captured in the draft Constitution. Bah emphasized the importance of the nation-building project to acknowledge and prioritize local issues. He asserted that the viability of the Constitution rests on its ability to examine local issues; if not, the Constitution would be administered weakly. Bah suggested that there is room for improvement for the CRC's engagement of local stakeholders in the drafting process.

The KMC, too, has a vision for the new Gambia. Fundamental to such a vision is a people-centered government, in which total autonomy is restored to local entities. It is the rebuilding of all municipal structures and agencies, to modernize all systems so that public accountability is restored and participatory governance furthered. The KMC plans to establish an office and development committees in each ward so that citizens can reach and directly engage with their

representatives. Similar to the national government, the KMC is encountering emerging environmental issues, due to extractive and exploitative Chinese investment. Although there are regulatory mechanisms implemented - the Environmental Impact Assessment (EIA) process - there is a drastic increase in deforestation, as the national government continues to give away local land to foreign corporate entities. Recently, the government gave to a foreign investment company a forest in the Western area that has exacerbated issues relating to climate change. Chinese factories have also polluted local waters, harming the fish that locals use for subsistence and small business. Bah argues that a vibrant new Gambia must preserve its natural riches.

As 60% of Gambians are youth, according to local stakeholders, and Mayor Bensouda is the youngest mayor elected to the KMC, the youth are at the center of KMC's vision of a new Gambia. Currently, 90% of the KMC's staff are youth. According to Bah, economic development is contingent upon youth employment and engagement. As such, the Council has issued employment contracts for the youth in regional capital infrastructure projects. It has also engaged with the Youth Chamber of Commerce and foresees the robust engagement with private-public-partnerships would help raise youth employment. Bah states, "If you want to develop this country, you must target certain youth-related priorities." Educational reform is also incorporated in KMC's vision, as evident in the Council's creation of the new Education Committee. The Council established a funding mechanism to support financially disadvantaged students pursue higher education. Also, it is spearheading a community libraries project, given the lack of a public library system and the high illiteracy rate in the country.

6.1 Some Considerations

A robust local structure is essential for any nation-state building project. Gambia's transitional justice and Constitution drafting process must center and prioritize local government in order to effect a people-centered development. The Constitution must empower and restore local power in order for democracy to be furthered. An overly centralized government is a vestige of Gambia's dictatorial past - fear of local government assuming too much power must be annihilated. Local structures such as the KMC are at the heart of the people and are the agents who can directly implement the national government's agenda for its citizens. However, this will only be made possible with autonomy.

7. Criminal Justice and Conditions in Prison

Gambian prisons provided President Jammeh a means of physically isolating political dissent, and his use of incarceration to quell political opposition was well-documented.¹⁰⁸ Infused with Jammeh loyalists and overtly antagonistic to anyone who questioned the Jammeh regime's legitimacy, the judiciary in the Gambia exploited prisons not for deterrence or rehabilitation but rather for retribution. The Mile 2 Prison, situated on an otherwise desolate stretch of highway in Banjul, housed Jammeh's most notorious political opponents, its worn barbed-wire fence shielding the public from cruel and inhumane activities. Indeed, torture was commonplace, perpetrated by prison guards and officials who "beat [prisoners] nonstop" beginning immediately after arrest.¹⁰⁹

Inmates were intimidated into submission. Nokoi Njie, a political activist, recounted her nightmare: "When they put me in a cell, they tied my legs with a wire rope which cut deep into my flesh, and I was bleeding. They then beat me with a baton and a rubber whip made from car tire. They filmed everything they did to me. It was so bad I started saying my final prayers."¹¹⁰ Fortunately, Njie survived the brutal conditions, while activists such as Solo Sandeng died in prison, becoming casualties in Jammeh's quest for absolute control of the country.¹¹¹

The current Director-General of Prison Services Ansumana Manneh presented a sanguine view of the transformation of Gambian prisons under the Barrow administration. With a goal of

¹⁰⁸ See, e.g., "Remembering The Gambia's Notorious Mile 2 Prison, Al Jazeera (Mar. 29, 2017), <https://www.aljazeera.com/indepth/features/2017/03/remembering-gambia-notorious-mile-2-prison-170322073015550.html>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

rehabilitating, reforming, and reintegrating inmates into the community, Manneh has established vocational and skills training programs in prisons, along with counseling services.¹¹² Financial constraints have limited the expansion of these efforts to facilities beyond the main prison, but nascent partnerships with such international organizations as Prison Fellowships International and First Step have helped fill the funding gap.¹¹³ Furthermore, Manneh has commenced education initiatives in all of Gambia's prisons. At the juvenile level, Prison Services has joined forces with the Ministry of Education to create a classroom for young offenders, equalizing access to education for offenders and non-offenders. Manneh's own analysis suggests recidivism has decreased as a result.¹¹⁴

In cooperation with international human rights groups, Prison Services has also instituted training programs to prevent the widespread abuse and harassment of prisoners.¹¹⁵ To address the concerns of prisoners incarcerated for purely political activity under the former regime, Prison Services has sent letters to the Minister of Justice informing him of these circumstances, and the Ministry of Justice has started retrying certain offenders.¹¹⁶ A firm institutional stand against bribery and corruption in the prison system has culled bad actors from the ranks of prison officers, as Manneh believes these nefarious activities "destroy the credibility of the entire department and a state as a whole."¹¹⁷

¹¹² Interview with Ansumana Manneh, Director-General of Gambian Prison Services (Aug. 29, 2019).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* (Over 60 officers have completed the training program).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

Manneh claims his department's activities during the transitional justice process has eradicated the previous problems; in fact, so optimistic is Manneh that he asserts, "Human rights violations do not occur anymore in prisons."¹¹⁸ Yet reason for skepticism and caution remain. Prison Services does exchange resources with other government departments but nonetheless lacks its own human rights officer. Though Prison Services has circulated a draft policy to combat sexual violence, a scourge in prisons worldwide,¹¹⁹ Manneh's claim that sexual violence does not at all occur in Gambian prisons understandably leaves outside observers incredulous.¹²⁰ Manneh highlighted a physical partition between male and female inmates and the use of only female officers in the female sections of prisons, but allegations of sexual abuse by guards persist. Questions remain as well about the quality of mental health care available to Gambian prisoners.

In its 2018 report on human rights conditions in The Gambia, Amnesty International confirmed Gambian prison conditions "did not meet international standards," a result of poor sanitation, food, and access to medical services.¹²¹ Human Rights Watch called the state of prisons "dire" for similar reasons.¹²² As part of the administration's "prisons reform agenda," the Barrow government

¹¹⁸ *Id.*

¹¹⁹ "Sexual Abuse in Prison: A Global Human Rights Crisis," Just Detention International, https://justdetention.org/wp-content/uploads/2015/11/International_Summary_English.pdf.

¹²⁰ Fatou Baldeh, an LGBT and women's rights activist, emphasized the difficulty of gathering stories of sexual violence in The Gambia due to cultural misunderstandings of what constitutes sexual violence and the stigma surrounding it. For example, when a dialogue was held with women who worked in the security sector under Jammeh, all of them claimed they had not been victims of sexual violence, despite overwhelming evidence suggesting Jammeh's cronies would regularly demand sexual services from female prisoners and prison guards. *See* "Sexual Abuse in Prison: A Global Human Rights Crisis," Just Detention International, https://justdetention.org/wp-content/uploads/2015/11/International_Summary_English.pdf ("In most countries, there are no official studies on the prevalence of sexual abuse in prison, and few inmates come forward to report that they have been abused. However, most observers of prisons acknowledge that this lack of formal reports does not mean that prisons are safe.").

¹²¹ "Amnesty International Report 2017/18 – Gambia," Amnesty International (Feb. 22, 2018), <https://www.amnesty.org/en/countries/africa/gambia/report-gambia/>.

¹²² "World Report 2018 – Gambia," Human Rights Watch (Jan. 18, 2018), <https://www.hrw.org/world-report/2018/country-chapters/gambia>.

pardoned hundreds of prisoners in early 2017 to reduce overcrowding in prisons and terminated David Colley, head of the Gambian Prison Service under the Jammeh regime.¹²³ However, this has not rectified the “desperately poor” situation in Gambian prisons, nor has it put an end to cases of arbitrary arrest and detention.¹²⁴

¹²³ “Gambia President Fires Yahya Jammeh’s Prison Chief,” Newsweek (Feb. 27, 2017), <https://www.newsweek.com/gambia-prisons-yahya-jammeh-adama-barrow-561557>.

¹²⁴ “Gambia: Key Human Rights Concerns Highlighted in a Meeting with President Barrow,” Amnesty International (May 2, 2019), <https://www.amnesty.org/en/latest/news/2019/05/gambia-key-human-rights-concerns/>.

8. Women's Rights in The Gambia

“Gender equality is something that does not exist in the Gambia”

-Ndey Ngoneh Jeng. August 30, 2019

8.1 Gender (In)equality

The gender disparity in The Gambia between men and women has been a pervasive issue since the country's independence. Discriminatory gender laws only help reinforce the patriarchal social norms which legitimize the subjugation of women in nearly all sectors of the society. Victim shaming, gender-based violence, and female genital mutilation are some of the leading social issues that contribute to gender inequality. Even though the Constitution prohibits discrimination, it does not afford the same protections when it comes to matters of personal law. Based on the OECD's 2019 Social Institutions & Gender Index Report, 88 percent of Gambian women experience discrimination in the family: scoring 100 percent in discrimination against women in the legal framework on household responsibilities, inheritance, and divorce.¹²⁵ The legal framework on working rights discriminates against women in its entirety while access to justice and legal framework on the freedom of movement is at 75 percent discrimination. Women's access to reproductive health is also restricted by draconian laws and traditional social norms. Over 75 percent of women have undergone FGM and over 75 percent of the law discriminates against reproductive rights.¹²⁶

¹²⁵ OECD Development Centre, Social Institutions & Gender Index (2019) <https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/GM.pdf>.

¹²⁶ Id.

8.2 Female Genital Mutilation

While FGM has been outlawed by most countries around the world, the WHO has found that at least thirty countries, including The Gambia, continue the practice.¹²⁷ Many religious leaders, particularly those in rural areas encourage FGM, and insist that the practice is a “rite of passage to womanhood.”¹²⁸ Even though many NGOs have begun advocating against the practice and trying to raise awareness of the medical effects it has on women’s health, the social stigma and taboo on speaking about FGM remains.

Jammeh reinforced the practice and alleged that the individuals who were trying to ban FGM in The Gambia were simply agents of the West. It was not until 2015 where the former dictator came to agree FGM causes more harm to ‘womanhood’ than anything else. He passed the Women’s Amendment Act, which prohibits the practice¹²⁹ but does very little to address how entrenched the practice is in social norms or sensitize communities to the ban. There is a growing concern that decriminalize may only force the practice underground or into neighboring countries where FGM remains lawful.¹³⁰ In many communities, the banning of FGM was resisted heavily by those who thought it should continue in the name of tradition and religion,¹³¹ 65 percent of whom are women who think that FGM should continue.¹³²

¹²⁷ WHO, Female Genital Mutilation (FGM), (last visited September 2019), <https://www.who.int/reproductivehealth/topics/fgm/prevalence/en/>.

¹²⁸ United States Department of State (2017) 2016 *Report on International Religious Freedom - The Gambia*, 15 August 2017, <https://www.refworld.org/docid/59b7d832c.html>.

¹²⁹ Government of the Republic of the Gambia, Women's Amendment Act 2015, Art. 32(A) and (B).

¹³⁰ United Kingdom: Home Office (2013) *Country of Origin Information Report – Gambia*, <http://www.refworld.org/docid/5280976b4.html>.

¹³¹ Thomson Reuters Foundation, The Gambia: The Law and FGM, (September 2018), 6, [https://www.28toomany.org/static/media/uploads/Law%20Reports/gambia_law_report_v1_\(september_2018\).pdf](https://www.28toomany.org/static/media/uploads/Law%20Reports/gambia_law_report_v1_(september_2018).pdf)

¹³² <https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/GM.pdf>

Ndey Ngoneh Jeng, a Gambian woman's rights activist, attorney, and research assistant to the CRC, stated that ever since Jammeh left office there has been an increase in FGM practice against young girls because many people saw it as "Jammeh-only" legislation.¹³³ According to Ms. Jeng, "people do it [FGM] without even hiding it because they don't feel like the current regime will enforce the law. This regime, if it is not careful, will take women's rights activism back to where it used to be."¹³⁴ She, like many other women's rights activists, has been pressing for more sensitization and awareness-raising on the negative effects of FGM; and to encourage the government to enforce the penalties listed under the anti-FGM legislation.

8.3 Violence Against Women

Due to a lack of a comprehensive legal framework that brings the existing protections for women to fruition, women suffer from domestic and sexual violence quite often. Weak enforcement of existing laws meant to punish violence against women, lack of knowledge of existing laws, and a prevailing culture of silence, fear and shame, have allowed for minimal advancements to be made in bringing an end to the gender-based violence.¹³⁵

Sexual abuse, harassment, and rape were an institutionalized practice under Jammeh. He used his power as the nation's dictator to try to coerce and force women to engage in sexual activities with him.¹³⁶ Despite the few human rights reports that are now being published due to women coming

¹³³ Interview with Ndey Ngoneh Jeng, August 30th, 2019, 1:00 PM.

¹³⁴ Id.

¹³⁵ Committee on the Elimination of Discrimination against Women (CEDAW) (2015) *Concluding observations on the combined fourth and fifth periodic reports of the Gambia*,

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16186&LangID=E>

¹³⁶ See generally Human Rights Watch, *Gambia's Women Break Their Silence: How Former President Jammeh Trapped, Raped, and Sexually Exploited Women*, June 26, 2019 6:00 AM,

forward, sexual abuse remains a taboo subject and majority of women are too afraid to speak up.¹³⁷ Sexual harassment against women is very rampant in the workplace because institutions lack sexual harassment policies, and there is no nationwide consensus against men speaking to women in the derogatory manner in which they currently do.¹³⁸

At times, Gambian women do not even understand the concept of rape, or the fact that they have a right to refuse any individual from exerting power and control over their body.¹³⁹ Baldeh argues that there is a need to define sexual violence to most women in a language that is understandable to them, as they currently blame themselves instead of holding the men accountable.¹⁴⁰ When gender-based violence is permeated from the high-ranking officials with impunity it because deeply-engrained in both private and public societal spaces.

8.4 Women's Participation in Public Office and in Transitional Justice

In December 2018, Gambian women who had experienced gender-based violence during the Jammeh regime gathered in a group known as the *kaneleng* for a two-day summit to discuss mechanisms to better engage women in the national truth-seeking process¹⁴¹. Many Gambian women faced immense sexual violence and harassment, sometimes by Jammeh himself¹⁴², and processes like the *kaneleng* and institutions like the TRRC and CRC must take their concerns into

<https://www.hrw.org/news/2019/06/26/gambias-women-break-their-silence> (detailing how Jammeh "handpicked" women whom he would rape or sexually coerce, offering cash, gifts and other privileges in exchange.)

¹³⁷ Interview with Ndey Ngoneh Jeng.

¹³⁸ *Id.*

¹³⁹ Interview with Fatou Baldeh.

¹⁴⁰ *Id.*

¹⁴¹ "Traditional Communicators, Women Lead the Way for Justice in The Gambia." *International Center for Transitional Justice*, 5 Feb.

¹⁴² "Gambia's Women Break Their Silence." *Human Rights Watch*, 26 June 2019, www.hrw.org/news/2019/06/26/gambias-women-break-their-silence.

account in order to fully account for the crimes that have been committed, and to ensure participation of women in the nation-building process.

The CRC has made some efforts to include women in the drafting of the new constitution, with organizations such as the Women's Bureau having sent in position papers,¹⁴³ and some of the Commissioners and key officers of the CRC include women.¹⁴⁴ Efforts have also been made to include women within the local government process, to ensure that their participation at all levels of government can be effectively realized.¹⁴⁵ Some Gambian women have managed to have their voices heard at the TRRC,¹⁴⁶ despite the lack of effective mechanisms of protection as per our conversations with activists such as Fatou Baldeh. This does mean that many Gambian women's stories are being *de facto* silenced, because in a country where they would face immense social stigma for speaking out about sexual violence, legal protections are a basic requirement.¹⁴⁷ The lack of effective mechanisms of protection for Gambian women makes the reconciliation process incomplete.

8.5 Current Reforms and Gambia's Gender Obligations under International Law

Gambia's gender obligations stem from a variety of international human rights legal instruments, which include the CEDAW, the Maputo Protocol, and the Revised ECOWAS Treaty and

¹⁴³ "CRC RECEIVES MORE POSITION PAPERS." *The Voice*, 7 Jan. 2019, www.voicegambia.com/2019/01/07/crc-receives-more-position-papers/.

¹⁴⁴ Jeffang, Kebba. "Gambia: Constitutional Review Commissioners Sworn-In." *AllAfrica.com*, 5 June 2018, allafrica.com/stories/201806050854.html.

¹⁴⁵ "United Nations Human Rights." *Accueil*, www.westafrica.ohchr.org/The-Gambia-training-40-aspiring-female-candidates-to-the-2018-Local-Government.html.

¹⁴⁶ "Gambia's TRRC Encounter with a Man Once Feared." *JusticeInfo.net*, JusticeInfo.net, 24 June 2019, www.justiceinfo.net/en/truth-commissions/41748-gambia-trrc-encounter-with-a-man-once-feared.html.

¹⁴⁷ "A Conversation on Truth and Reconciliation in The Gambia." *International Center for Transitional Justice*, 25 Sept. 2018, www.ictj.org/news/conversation-truth-and-reconciliation-gambia.

Supplementary Protocol on Democracy and Good Governance. In response to a CEDAW assessment of The Gambia's fulfillment of its obligations, their delegation noted that the 1997 Constitution (promulgated by Jammeh) provides for the protection of fundamental human rights irrespective of gender under Chapter IV, section 17 and for full equality for women and men by providing for their right to equal treatment under Sections 28(1) and (2), while arguing that the Women's Bill of 2010 had far-reaching implications by affirming Government commitment to women's equality, prohibiting discrimination, and addressing polygamy, inheritance and marital issues among others.¹⁴⁸ On paper, these laws were very progressive and should have had far-reaching consequences. However, in our conversations with FLAG, women's rights activists and transitional justice institutions such as the CRC we found that these legislations did not have much impact on the ground. The Gambia violated its obligations under CEDAW by failing to protect women's rights advocates who were persecuted under Jammeh,¹⁴⁹ and Gambian women and men are prohibited (and regularly raped, tortured or killed) for engaging in same-sex sexual relations.¹⁵⁰

The Gambia is ranked 120 out of 144 countries in the Global Gender Gap Index.¹⁵¹ The Maputo Protocol requires protections for women in cases of violence, and goes further than CEDAW in

¹⁴⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Consideration of reports submitted by States parties under article 18 of the Convention, Fourth and fifth periodic reports of States parties due in 2010 : Gambia*, 13 December 2013, CEDAW/C/GMB/4-5, available at: <https://www.refworld.org/docid/53c7e0304.html> [accessed 14 September 2019]

¹⁴⁹ "The Gambia: Protect Defenders of Women's Rights." *ISHR*, 9 July 2015, www.ishr.ch/news/gambia-protect-defenders-womens-rights.

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¹⁵¹"The Global Gender Gap Report 2018." *World Economic Forum*, www3.weforum.org/docs/WEF_GGGR_2018.pdf.

Article 4 by requiring protections in conflict situations.¹⁵² The Protocol specifically calls for economic, social and cultural rights, sexual and reproductive rights, and even details special protections for women who are especially vulnerable (such as the elderly, women with disabilities and pregnant incarcerated women) in Article 22, 23 and 24.¹⁵³ The Gambia has never submitted any initial or periodic reports to this instrument since its ratification in 2005.¹⁵⁴ Furthermore, the Supplementary Act relating to Equality of Rights between Women and Men for Sustainable Development in the ECOWAS Region calls for specific protections that have otherwise been left out of conversations in gender equality, such as protection of women's rights in agriculture.¹⁵⁵ Closing this gender gap could be significantly beneficial for The Gambia by also increasing agricultural output.¹⁵⁶ The Gambia is party to many international instruments that call for gender equality and enumerate ways to bring it about. The CRC's mandate necessitates the inclusion of greater and radical protections for women to ensure that The Gambia will live up to its international law obligations.

¹⁵² "PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA." *United Nations*, www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf.

¹⁵³ .

¹⁵⁴ "Maputo Protocol - LawHuGnet." *Law Hub Gambia*, www.lawhubgambia.com/lawhug-net/tag/Maputo+Protocol.

¹⁵⁵ "SUPPLEMENTARY ACT RELATING TO EQUALITY OF RIGHTS BETWEEN WOMEN AND MEN FOR SUSTAINABLE DEVELOPMENT IN THE ECOWAS REGION". *ECOWAS*, <https://www.ccdg.ecowas.int/wp-content/uploads/Supplementary-Act-on-Gender-Equality.pdf>

¹⁵⁶ Bambi, Jerry. "ECOWAS, and Partners Want Protection of Women's Rights in Agriculture." *AfricaNews*,

9. LGBTQ Rights

In The Gambia today, you can be put away in prison for life if you are a “serial offender” or a gay person living with HIV for the crime of “aggravated homosexuality” as part of the criminal code approved by former President Yahya Jammeh.¹⁵⁷ An officer of Jammeh’s party stated that “Homosexuals should be killed because they are enemies of humanity”.¹⁵⁸ Jammeh even threatened LGBTQ asylum seekers who sought to flee the country as a result of these draconian laws saying that “If I catch them [the LGBTQ asylum seekers] I will kill them.”¹⁵⁹ The repercussions of this law, and these statements by individuals within the ruling political party has led to widespread persecution of LGBTQ people in The Gambia.

9.1 Jammeh’s Legacy

The National Intelligence Agency (NIA) routinely used methods such as “beating, sensory deprivation and the threat of rape...and detainees were told that if they did not “confess,” a device would be forced into their anus or vagina to “test” their sexual orientation.”¹⁶⁰ Apart from these legal repercussions for being LGBTQ, Gambian societal attitudes are largely opposed to LGTBQ identities,¹⁶¹ although public opinion regarding the specific question of criminalization of homosexuality with life imprisonment is unclear. The Gambia is one of the nine countries that effectively criminalize same-sex relations even if they take place behind closed doors and are

¹⁵⁷ “Gambia: Life Sentence for 'Aggravated Homosexuality'.” *Human Rights Watch*, 21 Nov. 2014, www.hrw.org/news/2014/11/21/gambia-life-sentence-aggravated-homosexuality.

¹⁵⁸ “Gambia Must Stop Wave of Homophobic Arrests and Torture.” *Amnesty International*, www.amnesty.org/en/latest/news/2014/11/gambia-must-stop-wave-homophobic-arrests-and-torture/.

¹⁵⁹ “Gambian President Threatens Gay Asylum Seekers: 'If I Catch Them, I Will Kill Them'.” *ThinkProgress*, thinkprogress.org/gambian-president-threatens-gay-asylum-seekers-if-i-catch-them-i-will-kill-them-7f8c37fff1d1/.

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¹⁶¹ Bollinger, Alex. “A Man Cut off His Gay Son's Earlobe to Mark Him as an 'Abomination'.” *LGBTQ Nation*, LGBTQ Nation, 16 July 2019, www.lgbtqnation.com/2019/07/gay-teen-says-father-cut-off-earlobe-mark-abomination/.

consensual, out of fifteen countries that constitute West Africa¹⁶² with laws that result in “large numbers of people [being exposed] to the risk of arrest and imprisonment. These consequences can result from a wide range of actions, whether it be for pro-LGBT activism, for being found to engage in same sex relations, or even suspicion of being gay.”¹⁶³

The Gambian legal and social landscape on LGBTQ rights is thus by no means unique in the region. However, it is the only country in the region which currently has a Truth, Reconciliation and Reparations Commission (TRRC) which gives it an opportunity to “deal with the human rights violations of the former regime of President Jammeh, who had ruled The Gambia for the past 22 years”¹⁶⁴ and a Constitutional Review Commission (CRC) which aims to embody the principles of “Participation, Inclusiveness, Representation, Transparency and National Ownership”¹⁶⁵ according to these organizations’ Facebook pages. The LGBTQ community has faced repression, harassment, torture, rape and even death¹⁶⁶ in The Gambia, simply for existing.

9.2 The Constitutional Review Commission and LGBTQ Rights

The interim President, Adama Barrow has stated that his government will not prosecute individuals engaging in consensual same-sex acts, but he has not taken any steps to repeal laws that criminalize such acts, including the draconian 2014 law that was approved by Jammeh.¹⁶⁷ There are many

¹⁶² UN Human rights report p 1.

¹⁶³ .

¹⁶⁴ “Truth, Reconciliation and Reparations Commission - TRRC.” *Facebook*, www.facebook.com/pg/moj.trrc/about/?ref=page_internal.

¹⁶⁵ “Constitutional Review Commission, The Gambia.” *Facebook*, www.facebook.com/pg/CRC220/about/?ref=page_internal.

¹⁶⁶ Feder, J. Lester. “They’re Going To Kill Us’: LGBT Gambians Fear They’re Next In Police Raids.” *BuzzFeed News*, BuzzFeed News, 19 Nov. 2014, www.buzzfeednews.com/article/lesterfeder/theyre-going-to-kill-us-lgbt-gambians-fear-theyre-next-in-po.

¹⁶⁷ “World Report 2018 - The Gambia”, *Human Rights Watch*, <https://www.refworld.org/docid/5a61ee73a.html>

elements that the Constitutional Review Commission (CRC) and the TRRC require to function effectively. These necessarily include visibility and official availability of spaces that allow marginalized communities to share their experiences during Jammeh's regime, and share the truth about the atrocities that they endured. The lack of these spaces in a country that criminalizes the existence of LGBTQ people was apparent in our meeting with the CRC. In our meeting with the CRC, they spoke about the inspirations behind the new Gambian constitution, which included the South African constitution¹⁶⁸ and current international human rights standards. The CRC also spoke about the fact that majoritarianism is unacceptable, and it was important to not allow overwhelming public opinion to allow the Commission to shirk from human rights commitments that arise from The Gambia's membership in the community of nations.¹⁶⁹

To our question on the inclusion of LGBTQ people in the Constitutional review process,¹⁷⁰ many members of the commission were visibly uncomfortable, but to their credit they engaged with the topic and gave what seemed like candid responses.¹⁷¹ In speaking with the CRC, it became apparent that the rights of sexual minorities is not a priority for the draft Constitution. LGBTQ

¹⁶⁸ The South African constitution of 1991 was the first constitution in the world to include protections for sexual orientation. See *Outright International*: <https://outrightinternational.org/content/south-africa-new-constitution-protects-gays-and-lesbians>

¹⁶⁹ The CRC stated: "...But in constitutional building, there are instances where even if 99% of the Gambians are going to say, for instance, they want the death penalty back in the Constitution, it does not mean necessarily mean it will be there [in the Constitution] simply because The Gambia belongs to the community of nations."

¹⁷⁰ Our question was: "...I really appreciated your vision of celebrating diversity, secularism [and] also drawing from progressive constitutions like the South African one, for example. The South African constitution was the first to have protection for sexual orientation and gender identity. I understand how that would have tension with culture and traditions...How do you deal with that [tension]? The way the world is progressing [LGBTQ] rights are progressing" across the world so how would your response be?"

¹⁷¹ Mr. Sainey stated that "[LGBTQ rights]" is an issue that is also under review. As my boss will tell you, these are issues that we open to people to talk about. What I can tell you in most of the public engagement, people have not been forthcoming to talk about this issue...a gentleman came in and then he was talking about the rights of LGBTs should be included in the new draft Constitution but so far it is not an overwhelming number of people who are [talking about this issue]... We have a cultural set up, so [with regard to LGBTQ people] we rarely talk about, because to them it is not an issue in this country.

rights are under review by the CRC, but the probability of an equal protection clause that includes sexual orientation and gender identity is very low. LGBTQ issues have not made it to the issues document¹⁷² that the CRC prepared, which otherwise is quite inclusive and far-reaching. The lack of participation by LGBTQ people in the CRC process is hardly surprising, given that no steps have been taken to perform direct community outreach or respect their anonymity. Constitutional building is a political process, and the Commissioners were quick to admit that certain issues (including LGBTQ rights) might have to give away to allow a new Constitution to be accepted by the public¹⁷³, since there was already opposition by Islamic scholars regarding the inclusion of the word ‘secular’ in the text¹⁷⁴ and President Barrow has committed himself to returning the country to a secular republic, overturning Jammeh’s actions.¹⁷⁵ This parallel between the possibility of widespread public outcry regarding the word “secular” and the inclusion of sexual minorities within the constitutional review process is unfounded. The Gambia has been a secular country for nearly all of its independent history, and even Jammeh’s declaration of an Islamic Republic kept the secular constitution intact¹⁷⁶ which is hardly a parallel to the issue of LGBTQ rights that do

¹⁷² “Issues Document of the CRC of The Gambia” *The Gambia Times*, <https://www.thegambiatimes.com/wp-content/uploads/2018/10/CRC-Issues-Documents-October-2018-FINAL.pdf>

¹⁷³ Chairperson stated: “We are in the kind of environment where if you want to give prominence to certain things, then that will be a recipe for the majority to say no...to the Constitution. Already, we are having that challenge. The challenge is the issue of the word secular. A lot of Islamic scholars take it out of context...This issue, LGBT, if we give it prominence also, we will face the same [problem]...the majority will say...we do not want this Constitution.” He continued: “We are trying to get best practice from other jurisdictions, but that does not mean that we are going to take everything wholesale. We are going to take what suits us and what fits with our Gambianness, our culture and our traditions...Nobody in the Commission as we speak...can tell you what is going to be in the new Constitution. I cannot tell you where public opinion lies on specific issues is...”

¹⁷⁴ Mr. Sainey stated: “We have had meetings with certain partners on the issue of LGBTs...documents are made for posterity purposes. Today there are not many LGBTs openly in this country, but who knows what will happen in twenty years time? So the Commission is aware of all those rights...” He continued: “We will include things in the new Constitution that people are not going to reject.”

¹⁷⁵ U.S. Embassy Banjul. “PRESS RELEASE: U.S. Department of State Acknowledges Gambia's Commitment to Religious Freedom.” *U.S. Embassy in The Gambia*, 5 June 2018, gm.usembassy.gov/press-release-u-s-department-of-state-acknowledges-gambias-commitment-to-religious-freedom/.

¹⁷⁶ Vines, Alex. “The Gambia: Africa's New Islamic Republic.” *BBC News*, BBC, 22 Jan. 2016, www.bbc.com/news/world-africa-35359593.

not even have a voice in official conversations. Even if many Gambians were to reject a Constitution that would enshrine the rights of LGBTQ citizens, a Constitution should look to nation-building for its progeny.

9.3 Civil Society Engagement

A common thread in attitudes on homosexuality is that young people tend to be more open-minded and accepting of LGBTQ rights in the United States.¹⁷⁷ It should thus follow that in a country like The Gambia, where the majority of the population is under 35, there should be greater acceptance on LGBTQ issues. During our meeting with the youth group New Nation, it became clear that they did not do any work on LGBTQ rights although their members have fearlessly spoken out about LGBTQ rights on social media platforms (and faced intense backlash). Members of New Nation held the perspective that they first wanted to put down their roots before committing social suicide by publicly supporting LGBTQ rights. This observation is telling. Josh Scheinert notes that “Unlike other countries such as Uganda and Nigeria, where LGBT communities exist and advocate for themselves despite widespread persecution, there is no such civil society in The Gambia. It is too dangerous¹⁷⁸.” While the youth and non-government stakeholders were more willing to speak with us on the issue of LGBTQ rights, the possible social repercussions of being too outspoken were apparent. There is also a high probability of backlash and resistance from both Gambian society and the legal landscape if foreign LGBTQ activists attempted to step in¹⁷⁹. The movement

¹⁷⁷TheAdvocateMag. “Millennials Support LGBT Rights But Take Issue With 'Homosexuality'.” *ADVOCATE*, Advocate.com, 10 July 2018, www.advocate.com/commentary/2018/7/10/millennials-support-lgbt-rights-take-issue-homosexuality

¹⁷⁸ Scheinert, Josh. “No Truth for Gambia's Queer People.” *The M&G Online*, mg.co.za/article/2019-03-15-00-no-truth-for-gambias-queer-people.

¹⁷⁹ .

to grant LGBTQ Gambians respect, dignity and protection under the law must therefore come from within The Gambia, with external support when needed.

The lack of engagement by civil society on LGBTQ issues in The Gambia distinguishes it from other nations where same-sex conduct is criminalized but queer organizations and activism still exist. In our interview with Mr. Scheinert¹⁸⁰, he noted that the only possible way of including LGBTQ Gambians within the TRRC and CRC process would be for a commissioner to bring up atrocities committed against the community in a meeting, but this would cause the commissions to lose credibility in the public eye.

9.4 International Law and Local Legislation

Currently, The Gambia is shirking from its obligations under international law by criminalizing same-sex relations, and allowing torture, harassment and other atrocities to continue against sexual minorities. The Universal Declaration of Human Rights, which is the basis of the contemporary global human rights regime, states that “All human beings are born free and equal in dignity and in rights.”¹⁸¹ This protection and equality guarantee outlined by the UDHR has led to global human rights jurisprudence embracing LGBTQ rights over time. The first truly global case was that of Nicholas Toonen in which he appealed to the International Covenant on Civil and Political Rights (ICCPR), asserting that the state was violating his right to privacy under Article 17 and non-discrimination in application of rights and law on the basis of sex in Articles 2 and 26 by criminalizing sodomy¹⁸². The Tasmanian sodomy law was struck down.

¹⁸⁰ Author of *Order of Nature*, a book of fiction around same-sex love set in The Gambia.

¹⁸¹ <https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf>.

¹⁸² Human rights sexual orientation gender identity in the commonwealth pg. 8.

There has since been a development in international human rights jurisprudence with regard to LGBTQ rights, including the Yogyakarta principles on global human rights law with regard to sexual orientation and gender identity.¹⁸³ Arguably, the African Charter on Human and Peoples' Rights of 1986 (headquartered in The Gambia) should necessitate protections for LGBTQ people since it affirms equality for all peoples in Article 28, although it has significant claw back clauses that permit signatories to circumvent their obligations, which led to an already underfunded and understaffed Charter to have little force.¹⁸⁴ While global human rights jurisprudence on LGBTQ rights is still only in a nascent stage, The Gambia is violating its obligations as party to the UDHR, ICCPR and the ACHPR by putting away gay and lesbian citizens in prison for a potential life sentence for no crime other than having consensual sex in private.

Jammeh's actions to criminalize "aggravated homosexuality" amplified already existing Gambian laws that criminalized same-sex relations. Under Section 144 of The Gambian Criminal Code of 1965, "carnal knowledge of any person against the order of nature"¹⁸⁵ is punishable by fourteen years in prison. This is similar to Section 377 of the Indian Penal Code¹⁸⁶, since the IPC was first developed and later "the language of the Indian Penal Code 1860...[was] incorporated into the laws of most of British Africa."¹⁸⁷ The idea that African legislators did not care to review these

¹⁸³ Ibid

¹⁸⁴ Mittelstaedt, Emma (2008) "Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations," *Chicago Journal of International Law*: Vol. 9: No. 1, Article 14. Available at: <http://chicagounbound.uchicago.edu/cjil/vol9/iss1/14>

¹⁸⁵"Gambia Criminal Code Act 2014 Briefing Note." *Human Dignity Trust*, www.humandignitytrust.org/wp-content/uploads/resources/Gambia_-_Criminal_Code_Act_2014_briefing_note.pdf.

¹⁸⁶ Section 377 of the Indian Penal Code reads: "Unnatural offences.—Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

¹⁸⁷ Nicol, Nancy. *Envisioning Global LGBT Human Rights: (Neo)Colonialism, Neoliberalism, Resistance and Hope*. Human Rights Consortium, School of Advanced Study, University of London, 2018, p.73

sodomy laws before incorporating them into their own penal codes is highly unlikely since many former British colonies (including The Gambia) expressly dropped many other portions of the Indian Penal Code¹⁸⁸, and during our interview with Mr. Antouman Gaye, we learnt that The Gambian Criminal Code was inspired by that of New Zealand as well. Thus, it is hardly likely that Gambian legislators inadvertently included sodomy laws, like other former British colonies in Africa.

9.5 Recommendations

For next steps, New Nation recommended reversing the criminal code and sensitizing people on what it means to be queer through education programs.

Mr. Scheinert recommends informing the LGBTQ movement with the activism that has taken place against female genital mutilation. The core difference between women's rights and LGBTQ rights is that the latter is systematically persecuted by the state. The government is, at least officially, providing a space for women to talk about the atrocities committed by Jammeh. There is no such space for queer Gambians. Both women and queer Gambians have barriers to access justice, but women can at least access official routes such as the police while LGBTQ communities cannot even go to the police. Women are not persecuted in the same way as LGBTQ, but the challenges they face are due to social norms. LGBTQ Gambians face persecution not just socially, but also institutionalized state violence that continues today. LGBTQ activism must come from within The Gambia to counter narratives that homosexuality is a Western idea and protections for LGBTQ norms are being pushed onto Gambians by the West.

¹⁸⁸ *Ibid.*

Perhaps the most insightful recommendations come from an LGBTQ activist, who would rather not be identified in this report for the sake of her own safety. She notes that she would not encourage anyone from the LGBTQ community to testify in front of the TRRC because there are no protections in place to protect them. LGBTQ people are no longer being arrested to the extent they were persecuted by Jammeh, but they face immense social stigma and discrimination, and are chased out of clinics when they seek help. A necessary step would be to create more inclusive government clinics where doctors are required to treat all Gambians. On paper, access to HIV medications are free, but access remains a barrier. She also contends that while the CRC wants to give the impression the country is not ready for LGBTQ rights, in actuality, this is an excuse; the administration simply does not want to do anything about queer rights.

9.6 Conclusion

The possibility of any truth-telling, reparations, or constitutional protections to facilitate healing and inclusivity is dismal, and the indifference of the CRC and some other stakeholders with regard to LGBTQ rights is concerning, considering that their inaction is illegal under international law. For those who are tortured, harassed and raped for being who they are, and loving who they love, the difference between Jammeh and Barrow is only in that the latter has not made comments such as calling for their death.

10. Youth Engagement

There is a tremendous culture gap between Gambian youth and Gambian elders. The CRC is trying to engage the youth.¹⁸⁹ More than 70% of the country is under 35 years old, so it is critical that they are engaged in the process of reforming the constitution.¹⁹⁰ Unemployment is very high throughout the country, and it is especially high for youth and rural communities.¹⁹¹ The education system is desperately in need of reform. The controversial policy of ‘social promotion’ for underachieving students has had uncertain results for the country’s workforce. Publicly funded schools are poorly maintained, resources are scant, teachers are underpaid, and there are few jobs for those who do manage to graduate. Brain drain is a serious problem for the Gambia. The youth who are achieving often leave for the United Kingdom, United States, or other countries with more opportunities.

Economic concerns dominate the youth agenda. Without more opportunities, Gambian youth will not benefit from the constitutional reform. At the same time, an optimistic note that members of New Nation sounded is that there are more jobs and business opportunities out there than Gambians are aware of. Young Gambians, especially rural ones, are often unaware of the opportunities available to them, but groups like New Nation are using social media and other tools to broadcast those opportunities to youth around the country.

The corporate legal apparatus is also in need of reform for the benefit of the youth in The Gambia. Foreign direct investment leads to substantial sums of money passing through The Gambia, but

¹⁸⁹ Interview with Constitutional Review Commission, in Banjul, The Gambia, (Aug. 27, 2019).

¹⁹⁰ Interview with New Nation, in Banjul, The Gambia, (Aug. 28, 2019).

¹⁹¹ *Id.*

often it does not benefit Gambians. For example, companies are required to have a Gambian director, but the requirements for how many Gambians companies need to employ are very lenient. This makes it easy for foreign companies to hire placeholder directors, whom they can pay next to nothing in the absence of a national minimum wage, while employing many people from, e.g., China.

The official unemployment rate is 41% nationally, according to the mayor's office.¹⁹² The office of the mayor of KMC employs as many youth as they can, and the Chamber of Commerce is trying to encourage young people to take on entrepreneurial roles.

LGBTQ rights are at the forefront for some young activists. There is an active network of young persons working to provide safe spaces for LGBTQ youth in light of the criminalization of homosexuality. This is dangerous work, however, and it cannot be done under the watchful public eye. Despite the relative culture of nonenforcement and largely laissez-faire attitude of many communities toward the law, anecdotes of self-admitted LGBTQ folks being taken to the police station abound.¹⁹³ A strong antipathy toward LGBTQ rights comes from religious sources in the country, but there is no clear indication at this time that there is a mass mobilization of young persons to advocate for LGBTQ persons.

Young people are increasingly interested in politics, but this is not necessarily translating to an increased involvement in government. Young Gambians lack faith in the judicial system because

¹⁹² Interview with KMC Deputy Mayor, in Banjul, The Gambia (Aug. 29, 2019).

¹⁹³ Gambia's latest anti-gay bill, Amnesty International UK, (Jan. 12, 2018), <https://www.amnesty.org.uk/gambia-anti-gay-bill>.

they observed its failures under the Jammeh regime, when judges were handpicked for cases against the government. Many Gambians also do not have faith in the education system because they see how few opportunities there are, even for those who succeed in school and on their qualifying exams. One of the questions where young Gambians seem to be divided is on the question of whether President Barrow should step down at the end of 2019, as he originally promised. The constitution provides the president with a five-year term, but before the election in 2016, the parties agreed that their candidates would step down after three years. Constitutionally, the presidency would then pass to the vice president. Some fear that the political environment in The Gambia is still too unstable for another transition of power to occur successfully. These people fear that the uncertainty surrounding a December transition may hamper the country's investment opportunities and tourism industry. Others believe that it is important for the development of the rule of law, even in the absence of a constitutional mandate, for the president to keep his word and relinquish power as promised.