

Gambia: Criminal Code (Amendment) Act, 2014

On 9 October 2014, Gambia's President Yahya Jammeh signed his assent to the *Criminal Code (Amendment) Act, 2014*, passed by the Gambian Parliament on 25 August 2014. The Act further criminalises the lesbian, gay, bisexual and transgender (LGBT) community in Gambia.

1. Extending criminalisation and harsher sanctions

Under Gambia's pre-existing *Criminal Code, 1965*, consensual sexual activity between same-sex adults in private is criminalised. Section 144 provides that those who commit "*carnal knowledge of any person against the order of nature*" are guilty of an offence and are liable to fourteen years' imprisonment. Section 147 provides that two persons of the same sex, whether in public or in private, who commit an "*act of gross indecency*" commit an offence and are liable to five years' imprisonment. In 2005 the *Criminal Code (Amendment) Act, 2005*, expressly interpreted "*carnal knowledge... against the order of nature*" and "*gross indecency*" as including "*any homosexual act*". The 2005 amendment also expressly extended sections 144 and 147 to acts between two females.

The recent *Criminal Code (Amendment) Act, 2014* (the **Act**), goes further by introducing a new offence of "*aggravated homosexuality*" (under a new section 144A), which attracts the penalty of life imprisonment. Under the Act, a person is deemed to commit aggravated homosexuality where the:

- a) "*person against whom the offence is committed is below the age of eighteen years*";
- b) "*offender is a person living with HIV Aids*";
- c) "*offender is a parent or guardian of the person against whom the offence is committed*";
- d) "*offender is a person in authority over the person against whom the offence is committed*";
- e) "*victim of the offence is a person with disability*";
- f) "*offender is a serial offender*"; or
- g) "*offender applies, administers or causes to be administered by any man or woman, any drug, matter or substance with intent to stupefy or over power*"

him or her, so as to enable any person to have un-lawful carnal connection with any person of the same sex”.

The law is blatantly discriminatory against gay people. Section 144A applies only to same-sex sex; there is no equivalent provision for heterosexual sex.

2. Implications of the Act

Legislation to combat the sexual abuse of vulnerable people would be welcome in Gambia, but the Act’s reference to minors and disabled people does not achieve this. The Act’s coverage of consensual conduct between adults is a further violation of LGBT persons’ rights under the Gambian Constitution and the country’s international law obligations.

Disproportionate effect on the disabled

Disabled people who engage in homosexual acts are automatically deemed ‘victims’ regardless of whether they have consented. The disabled person’s same-sex partner will be liable to the increased sanction of life imprisonment merely due to his or her partner’s disability. The Act further diminishes the standing of disabled LGBT people in Gambian society and increases their vulnerability.

Disproportionate effect on those with HIV/AIDS

Likewise, a person living with HIV or AIDS who engages in homosexual acts is deemed to have committed the offence of aggravated homosexuality regardless of whether consent is given, the HIV status of the ‘victim’, or whether the offender knows his or her own HIV status. The ‘offender’ is liable to the increased sanction of life imprisonment merely due to his or her HIV-status. The Act further diminishes the standing of people living with HIV/AIDS in Gambian society and increases their vulnerability.

Effect on LGBT identity

‘Serial offenders’ are also liable to this increased sanction merely for maintaining their LGBT identity. The Act further diminishes the standing of LGBT people in Gambian society for merely living their lives and increases their vulnerability.

Violation of fundamental rights

The rights violated by Gambia’s suite of anti-gay laws include, but may not be limited to, the protection afforded under Gambia’s Constitution to: personal liberty (Article 19); freedom from inhuman treatment (Article 21); privacy (Article 23); freedom of speech, conscience, expression, assembly and association (Article 25), and non-discrimination (Article 33). The Act adds to

this list the infringement of the rights of the disabled (Article 31) and is likely to further engage Articles already violated by the pre-existing legislation.

With regards to the international law engaged, Gambia has ratified the International Covenant on Civil and Political Rights and the Optional Protocol; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of all Forms of Discrimination Against Women; the Convention on the Rights of the Child; the African Charter on Human and Peoples' Rights.

In addition to violating a number of fundamental human rights, the criminalisation of homosexuality has been recognised by experts as seriously impeding public health outcomes, in particular the prevention and treatment of HIV and AIDS.¹ Such laws hinder the effectiveness of strategies and measures designed to contain the HIV epidemic.

3. Reaction

The UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, denounced the Act on 20 November 2014 stating²:

This law violates fundamental human rights – among them the right to privacy, to freedom from discrimination and freedom from arbitrary arrest and detention. It adds to the stigma and abuses that lesbian, gay, bisexual and transgender (LGBT) people already face in The Gambia...

Governments have a duty to protect people from prejudice, not to add to it. Public hostility towards gay and lesbian people can never justify violating their fundamental human rights. Instead, it requires increased measures to protect them against human rights violations. This has been reaffirmed by UN human rights mechanisms and the African Commission on Human and Peoples' Rights.

The High Commissioner also called on Gambia to:

fulfil its international obligations to promote and protect the human rights of all persons without discrimination, to repeal all provisions of the Criminal Code that criminalize relations between consenting adults and to put in place an immediate moratorium on arrests on the basis of such laws.

¹ Global Commission on HIV and the Law, Final Report of the Global Commission on HIV and the Law, 9 July 2012, pp 45, 48; Commonwealth Secretariat, A Commonwealth of the People: Time for Urgent Reform, Report of the Eminent Persons Group to Commonwealth Heads of Government, London, 2011, p. 100 and p. 102, Recommendation 60.

²<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15318&LangID=E>

President Jammeh's stance, worryingly, is in stark contrast to the High Commissioners'. He said in a speech on state television to mark the 49th anniversary of Gambia's independence from Britain

We will fight these vermins called homosexuals or gays the same way we are fighting malaria-causing mosquitoes, if not more aggressively... As far as I am concerned, LGBT can only stand for Leprosy, Gonorrhoea, Bacteria and Tuberculosis; all of which are detrimental to human existence.³

³ 18 February 2014, <http://www.reuters.com/article/2014/02/18/us-gambia-homosexuality-idUSBREA1H1S820140218>