

AMNESTY INTERNATIONAL

PUBLIC STATEMENT

AI index: AFR 27/003/2013
7 May 2013

GAMBIA: PRINCIPAL ACT RAISES SERIOUS HUMAN RIGHTS CONCERNS

The “Criminal Code (Amendment) Act, 2013”, also known as “The Principal Act”, was passed unanimously by the Gambian National Assembly on 16 April. Amnesty International is concerned that the Principal Act could be used by the government to restrict fundamental human rights, contrary to the Gambia’s regional and international human rights obligations. In particular, Sections 114 and 167 of the Principal Act could be used to restrict the right to freedom of expression, assembly and association. Further, Section 167 is in violation of the right to non-discrimination.¹

1. Freedom of expression, peaceful assembly, and association

Under Section 114 of the Criminal Code Act Cap 10 Vol.III Laws of The Gambia 2009 (Criminal Code), which deals with providing false information to a public servant, the Gambian authorities reportedly arrested and prosecuted journalists, human rights activists, political opponents or anyone who spoke out against the authorities. The new Principal Act broadens the definition of public servant in Section 114 to include the President, Vice President, Ministers and members of the National Assembly. The Act also increases the punishment for providing false information to a public servant from six months to five years imprisonment and/or a fine of 50,000 dalasi (roughly \$1515USD), up from 500 dalasi (roughly \$15USD). Many Gambian journalists, human rights defenders and lawyers have told Amnesty International they fear these changes to the law will facilitate further human rights violations by the authorities and allow them to impose harsher punishments for people who are exercising their right to freedom of expression.

Section 167 of the amended Act covers public disorder offences, including people who are “quarrelling” or “attempting to quarrel”, “hurling abusive insults” (h), or “singing abusive songs” (i). However, such vague definitions leave room for interpretation and application that do not abide by international human rights law. For example, it is clear from authoritative interpretations of international human rights law, such as General Comment 34 of Article 19 of the ICCPR, that freedom of expression should not be restricted or prohibited simply on the grounds that it might shock, offend or disturb.

The rights to freedom of expression, assembly and association are guaranteed under Section 25 of the Gambian Constitution, Articles 9, 10 and 11 of the African Charter on Human and Peoples’ Rights (African Charter), ratified by the Gambia in 1983, and Articles 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR), acceded to by the Gambia in 1979.

The ICCPR clearly defines limitations on these rights as permissible only when they meet each of the following criteria: they are provided by law; are necessary (in a democratic society); and are for one of the following legitimate aims: respect of the rights or reputations of others; protection of national security or public order or of public health or morals. The requirement of necessity means that in any instance the specific restriction must be proportionate to the legitimate aim.

¹ The issues and provisions cited below are illustrative and not exhaustive examples of human rights concerns with the Act, and do not necessarily purport to constitute a comprehensive human rights analysis of the Act. However, the examples below demonstrate why the Act must be reviewed and amended.

International human rights bodies have underlined that restrictions on these rights must not be so extensive as to undermine the rights themselves. Under the new Act, the restrictions on these rights are so extensive that the Act could be used by the government to restrict freedom of expression.

Section 167 also criminalizes men who dress as women; however freedom of expression includes expression through clothing and other self-expression. The United Nations Human Rights Committee has dealt with clothing restrictions mostly in the context of the right to freedom of thought, religion, and conscience. However, its jurisprudence indicates a broad support for self-expression. The Committee has, for example, clarified that reference to a majority culture or tradition does not constitute a legitimate objective for restrictions on clothing worn for reasons of faith or belief. Moreover, blanket bans on clothing based on gender stereotypes not only violate the right to non-discrimination (see below), but further do not have a legitimate aim, as set out in the ICCPR.

2. Right to non-discrimination

In addition to restricting freedom of expression by criminalizing clothing choices, Section 167 of the Principal Act criminalizes men who engage in sex work and imposes up to five years imprisonment and/or a fine of 20,000 dalasi (roughly \$610USD).² Laws such as these often make public health efforts targeting male sex workers difficult to implement. In fact, the criminalization of sex work and related activities has increasingly been recognized by international donors and experts as a major impediment in the global fight against HIV and AIDS, because it prevents sex workers—and sometimes their clients—from taking necessary precautions to lower the risk of transmission, and because it serves as a chilling effect to keep sex workers from testing or treatment centres for fear of arrest.

By criminalizing men who dress as women and male sex workers, the new Act singles out members of a minority group that already face discrimination and marginalization in the Gambia. Arrests and harassment of lesbian, gay, bisexual and transgender (LGBT) individuals are all too frequent in the Gambia. In April 2012, 18 men and two women were arrested and charged with “attempt to commit unnatural offences” and “conspiracy to commit a felony”. The prosecution had argued as evidence of “unnatural acts” that some of the men were wearing women’s clothes, but the case was dismissed in August on the grounds that there was insufficient evidence. President Yahya Jammeh has repeatedly threatened to kill lesbian or gay people or to expel them from the country.

The right to non-discrimination is protected by Article 2 of the African Charter, Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of the International Covenant on Economic and Social Rights (ICESCR) and Article 2 of the Convention on the Rights of the Child (CRC). In addition, the ICCPR protects equality under the law and the right to equal enjoyment of rights by men and women in its Articles 3 and 26.

The African Commission on Human and Peoples’ Rights, based in Banjul, in its 21st Activity Report, said that: “Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights...The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.”³

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD) set out specific state obligations to end discrimination, as it relates to most substantive human rights. CEDAW sets out an obligation to “eliminate[e] prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

² Male sex work is classified as a misdemeanour under Article 135 of the Criminal Code (female sex work is a misdemeanour under Article 136). Article 144 of the Criminal Code, as amended in 2005, also criminalizes same-sex acts as unnatural offences with a maximum 14 year prison sentence. Further, Article 147(1) criminalizes “indecent practices” between men; and Article 147(2), as amended in 2005, criminalizes “acts of gross indecency” between women, which includes “any homosexual act”, and is “liable for imprisonment for a term of five years.”

³ 21st Activity Report of the African Commission on Human and Peoples’ Rights. 10th Ordinary Session. Addis Abba, Ethiopia. 25 to 27 January, 2007. EX.CL/322 (X), p. 88. para. 169, available at <http://www.achpr.org/activity-reports/21/>.

Read in conjunction with the general obligation to take all necessary steps to eliminate discrimination, and to give effect to human rights, States party to CEDAW have a specific obligation to eliminate laws and practices based on discriminatory forms of gender stereotypes, including the notion that some types of clothing can only be worn by either men or women.

Moreover, sexual orientation is part of a person's innermost and immutable identity, and it is a well-established principle in international human rights law that the general prohibition of discrimination includes a prohibition of discrimination on the grounds of sexual orientation as well as gender identity. For this reason, regional human rights courts and other adjudicating bodies have been particularly careful in examining the motives for distinctions based on sexual orientation. The United Nations Human Rights Committee has, for example, been adamant that distinctions made between people based on sexual orientation must be "reasonable and objective."⁴

Distinctions made under the Principal Act between adult sex workers based on their gender or on the type of sex sold when no violence or coercion is involved would not be reasonable and objective.

All adults are entitled to make autonomous decisions about their lives and livelihoods, and governments have an obligation to create an enabling environment where these decisions are free, informed, and based on equal opportunity. The criminalization of those engaged in sex work cannot accomplish this, in part because the criminalization of sex workers adds to rather than subtracts from the risk of police abuse and extortion.

Recommendations:

Amnesty International is calling on the Government of the Gambia to:

- Review and amend Sections 114 and 167 (h and i) of the Principal Act to bring them into line with Gambia's international human rights obligations. Until such time, ensure the rights of individuals are respected by:
 - Ensuring that the interpretation and application in practice of Section 167 (h and i) are reasonable and legitimate and do not undermine the right to freedom of expression, peaceful assembly and association;
 - Ensuring that, in relation Section 114, which deals with providing false information to a public servant, police, judges and lawyers prove beyond a reasonable doubt that the person knew or believed the information to be false, and that the person intended, whether specifically or by knowing that the result was likely, to mislead the public servant into acting or not acting inappropriately in the ways described in the article;
- Ensure that everyone in the Gambia, including those engaged in commercial sex work, are empowered to claim their human rights and live free from fear, violence and discrimination by:
 - Repealing all laws that are inconsistent with the Gambian government's regional and international human rights obligations, such as 167 (j) of the Principal Act and Articles 135, 136, 144 and 147 of the Criminal Code.

⁴ See *Toonen v. Australia*, (CCPR/C/50/D/488/1992). UN Human Rights Committee, 4 April 1994, available at <http://www.unhcr.org/refword/docid/48298b8d2.html>.