The Gambia's Political Transition to Democracy: Is Abortion Reform Possible?

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Abstract

The aim of this paper is to assess The Gambia's laws on abortion. It argues that the restrictive laws on abortion are less a function of religious doctrine and more due to the historical and contemporary structure of the Gambian state, influenced by autocratic rule. As such, the current shift from an authoritarian regime to a democratic one suggests that there may be potential for legal mobilization in the advancement of women's sexual and reproductive rights, including broadening the legal grounds for abortion. In order to achieve the right to safe abortion, the article suggests that a critical mass of support through collaborative networking between parliamentarians, health professionals, human rights activists, the media, and women's rights supporters is needed. Advocacy for expanding the grounds for safe abortion would be premised on international norms and standards, as well as support for research on the magnitude of unsafe abortion and its impact, while addressing the sociocultural context. These different strategies should be adopted to expand access to safe, legal abortion in The Gambia.

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Background: Colonial history

The Gambia, mainland Africa's smallest state, became a British colony in 1821, as part of British West African settlements under the jurisdiction of the governor of Sierra Leone, and became a separate colony in 1888.[1] It achieved independence on February 18, 1965, as a constitutional monarchy within the Commonwealth. On April 24, 1970, it became a republic following a majority-approved referendum.[2]

Prior to the advent of colonial rule, issues of women's sexuality would have been governed through customary law. There is very little record existing about the attitudes of Gambian society towards abortion before or during colonialism. During colonial rule, the first documented case of abortion was the Anna Evans case of 1873, in which a leading British merchant accused the then-colonial secretary of administering "noxious drugs" to Evans to cause a miscarriage. Although an investigation was conducted, the matter was dropped because it was doubtful that a conviction would be secured.[3] Punishment seems to have been the exception rather than the rule, if other reports of abortions were any measure. For instance, in 1890, the acting colonial surgeon, Thomas Spilsbury in his report published in the Annual Bluebook noted, "I regret to have to say that I have certain knowledge that abortion is frequently carried out by herbalists in a manner known to the profession."[4]

In the early 1930s, there was a general perception that sex was rampant, and that society was morally decayed due to premarital sex, teenage pregnancy, population explosion, and independent women that came from the rural areas.[5] In response, the colonial administration imposed paternalistic control. For example, on July 26, 1830, the acting governor commented during a presentation on the health of native Gambians:

> *Maternity is still the normal function that it should be, and so normal it is usual that the birth of a child merely causes a few hours' interruption in a woman's occupation… It must be borne in mind that the raison d'etre of marriage among these people [natives] is the propagation of children.*[6]

Accordingly, ordinary people viewed marriage and procreation as women's primary purpose. The entrenchment of patriarchal norms was further facilitated through indirect rule, wherein local leaders institutionalized discriminatory customary law, particularly with regard to women's roles, marriage, and sexuality.[7] The consequences of the subordination of women continues to the present day, with implications for abortion law.

The colonial legacy of a restrictive abortion law in The Gambia

As a former British colony, The Gambia's abortion law mirrors that of the British Offences Against the Person Act 1861, which permits abortion only to save the life of the pregnant woman. The colonially inherited criminal code was only enacted in The Gambia in 1933 due to the colonial administration's perception that there was no need for a separate criminal code in such a small territory with little serious criminal activity.[8]

Section 140 of the Criminal Code makes it a serious offense to procure an abortion for a woman and carries a maximum punishment of 14 years in prison. Section 141 makes it an offense for a woman to procure her own abortion and she becomes liable on conviction to imprisonment for seven years. Section 142 also punishes anyone who supplies a woman with the means for unlawfully procuring an abortion and they are liable to three years' imprisonment. Section 198 serves as the defense for procuring an abortion; it provides that no person shall be found guilty of the offense of destroying a child capable of being born alive if the act was done in good faith to preserve the woman's life. This is based on the British Infant Life Preservation Act 1929.[9]

The grounds for a legal abortion were expanded through subsequent interpretation based on the 1938 British case of *R. v. Bourne*.[10] In *Bourne*, it was held that the abortion performed by a physician on a 15-year-old girl who had been gang raped, putting her at risk of becoming "a physical and mental wreck," was lawful.[11] Thus, The Gambia, through its received common law, to this day permits abortion on the grounds of preserving the physical and men-

tal health of the pregnant woman.[12]

It is important to note, though, that while it has been argued that *Bourne* was obtained in British colonies through common law, there is no evidence that abortions began to be provided on these grounds based on *Bourne*. This is largely due to the fact that the health ground was never tested for legality or reaffirmed in a Gambian court. It is arguable though, that through section 30(1) of the Women's Act 2010, which recognizes risk to the life of the pregnant woman or the life of the fetus as grounds for legal abortion, that the Gambian legislature has shown its intention not to follow the juridical liberalization of abortion law through *Bourne* or any other more liberal legislation.

A major problem with the applicability of received British laws in The Gambia is that while the 1861 and 1929 Acts are both still in place in Britain—and the 1967 Act broadened the grounds for legal abortion far beyond *Bourne*—the abortion provisions in the criminal code remain stagnant.[13]

Women's reproductive rights in The Gambia

During the past few decades, sexual and reproductive health and rights have been recognized as a key part of the international health and development agenda. In 1994, the International Conference on Population and Development (ICPD) brought attention to women's sexual and reproductive health.[14] In addition, during the Fourth World Conference on Women in 1995, notable African women including conference chair Gertrude Mongella helped lead efforts to affirm reproductive autonomy.[15]

The Beijing Platform for Action provided a "holistic view of health and the social, political and economic factors affecting health."[16] These two agreements have contributed immensely to the recognition of women's reproductive rights as human rights.[17] The rights-based approach recognizes that individuals have the right to the highest attainable standard of health, including the right to life, survival, the right to control sexual and reproductive life, and the right to make reproductive decisions.[18]

African momentum around women's reproductive health also continued to expand. At the African regional level, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) was adopted in 2003.[19] Subsequently, General Comment 1 on Article 14 (1) (d) and (e) of the Protocol was passed, relating to protection of the rights of women against sexually transmitted infections, including HIV in 2012.[20] General Comment 2 on reproductive health rights was adopted in 2014.[21] It focuses on measures to promote and protect sexual and reproductive rights of women and girls in Africa, particularly on access to safe abortion.[22]

The Gambia ratified the Maputo Protocol on May 25, 2005, but with reservations. While the Protocol is silent on reservations, Article 19 of the Vienna Convention on the Laws of Treaties (Vienna Convention) allows states to enter a reservation to any treaty.[23] However, reservations by ratifying states cannot be construed as serving to restrict international and regional human rights obligations.[24] At the time of ratifying the Maputo Protocol, The Gambia made blanket reservations to Articles 5 (harmful cultural practices), 6 (on marriage), 7 (on separation, divorce, and annulment of marriage) and 14 (reproductive health rights, including abortion).

The Maputo Protocol has been hailed as the only international human rights instrument that provides for abortion.[25] Article 14, which has two sections, reaffirms women's right to decide when and where to have children, and to have access to sexual and reproductive health information and services, including family planning. The first section ensures that the "right to health of women, including sexual and reproductive health is respected and promoted." The second section requires States parties to take appropriate measures to provide affordable and accessible health services; establish and strengthen pre- and post-natal services for women; and permit medical abortion. Article 14(2) (c) of the Protocol obligates States parties to permit abortion in cases of "sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."

While the Gambian government did not give any reason as to why it issued reservations to the Maputo Protocol, it can be argued that this was part of the political strategy of former President Jammeh, who used Islam for his own political gain during his 22 years of dictatorship, stretching back to July 1994.[26] Throughout his rule, Jammeh employed various tactics to gain political control and recognition in the Islamic world and among its leaders, using anti-Western rhetoric (including withdrawal from the Commonwealth).[27]

In March 2006, prior to the African Union (AU) Head of States Summit hosted in The Gambia in the same year, the African Center for Democracy and Human Rights Studies, in collaboration with local women's rights organizations and networks, and with the support of Solidarity for Women in Africa, approached the Office of the Vice President and Minister of Women's Affairs and Women's Bureau to put in place an advocacy mechanism which would facilitate the National Assembly Members revisiting these articles.[28] This led to the convening of tripartite meetings comprised of governmental officials, parliamentarians, and selected civil society representatives. All reservations to the Maputo Protocol were eventually withdrawn a few days before the summit.[29]

Premised on Section 28 on women's rights in the 1997 Constitution, as well as the fact that ratified international treaties do not automatically have applicability in national laws, the Women's Act was passed in 2010.[30] This Act is a domesticated legislation resulting from The Gambia's ratification of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) on April 16, 1993, and the Maputo Protocol, respectively.[31]

Grounds for termination under the Women's Act

Section 30 of the Women's Act 2010 states:

1. Every woman has the right to enjoy reproductive rights including the right to medical abortion, where the continued pregnancy endangers the life of the mother or the life of the foetus.
2. The medical abortion permitted under sub-section (1) shall not be carried out without the confirmation of the state of health of the woman in question by a registered medical practitioner who possesses the necessary expertise in the field.
3. Where the woman in question is in an environment where the necessary medical facilities are not available, appropriate referral shall be made in accordance with systems of medical referrals established in the health system.
4. Where the woman in question is unable to afford the medical expenses involved, Government shall bear the cost of the medical expenses.

The Women's Act falls far short of the comprehensiveness of the Maputo Protocol, as the grounds for abortion do not include rape, sexual assault, incest, or risk to the health of the pregnant woman. In fact, the majority of women of reproductive age in Africa live in countries with highly restrictive abortion laws.[32] All these countries that have ratified the Maputo Protocol have abortion laws that are not in line with its provisions. Additionally, the Act follows the circumscribed grounds despite several interpretations in Islamic jurisprudence as to the circumstances under which women can legally access abortion.[33]

The 2006 withdrawal of reservations on Article 14 of the Maputo Protocol was an opportunity to allow abortion on a broader range of grounds than those outlined in the Women's Act, but this did not happen due to ongoing ambivalence about abortion in Gambian society and state politics.

Firstly, there has generally not been a women's rights-driven advocacy or overall public debate on abortion, unlike in other countries where feminist organizations have been instrumental in the push for progressive laws.[34] The Gambian women's rights movement has made notably contradictory responses and actions on abortion. The majority of women's rights activists view abortion as morally and religiously wrong, and therefore do not consider abortion as a priority in the legal reform agenda for women's rights. Their conservative attitudes are mainly framed within the importance of the institution of marriage and reproduction.[35] An uneasy

tension continues between a focus on the right to decide whether to have children—which resonates with liberal feminism—and support for women's distinct roles as mothers, which is in line with religious and traditional norms.[36] Moreover, women's rights activists are unwilling to act on abortion out of fear that they will lose support for other women's rights issues.

Secondly, members of the women's rights movement likely did not act on abortion because they feared backlash from the then-authoritarian government, whose crackdown on human rights defenders included those supporting sexual and reproductive health and rights. For example, Dr. Isatou Touray, now vice president of The Gambia, and her colleague, Amie Bojang-Sissoho, faced corruption charges in October 2010 after former President Jammeh set up a commission of inquiry to investigate the use of funding by the Gambia Committee on Traditional Practices Affecting the Health of Women and Children to work on FGM.[37]

While the Banjul Magistrates' Court decided to drop all charges in November 2012, the judicial harassment or intimidation faced by these two women human rights defenders shows that the government would step in against an issue it considered sensitive or threatening.

Incidence of unsafe abortion

The Gambia has a youthful population, with 64% below age 24 and 38.5% aged 15–35.[38] The population is expected to double in two decades, due in part to the current high fertility rate, estimated at 5.9 children per woman.[39] According to one of the few studies conducted, the Gambia Family Planning Association estimates that abortions are highest among unmarried adolescents between the ages of 14 and 24, mainly in urban and peri-urban areas.[40] These estimates, published in 1996, are out of date. More recent data on the incidence of abortion is scant, as most cases go unreported or undocumented.[41] However, given that the contraceptive prevalence rate is a meager 9% (8% modern methods and 1% traditional methods), which is among the lowest in Africa, it is reasonable to assert that a large number of unsafe abortions occur.[42]

Unintended pregnancy is a major reason for unsafe abortions in The Gambia, as in most African countries. The extent of early sex and sex outside marriage in a very young population can be deduced from the 2013 Demographic Health Survey, which estimates that 15% of women aged 20–49 had sex before age 15 and 42% before age 18.[43] Twice as many girls aged 15–19 become pregnant in rural areas than girls in urban areas (24% compared to 12%).[44] Limited access to sexual and reproductive health information, few adolescent-friendly health services, lack of reproductive autonomy, and a religious and patriarchal belief that family planning leads to promiscuity all contribute to this phenomenon.[45]

In a Muslim-dominated society such as The Gambia, pregnancy before marriage is a social taboo. Consequently, young women seek to cover up the shame and stigma attached to unplanned pregnancy and the knowledge that they have been sexually active. While pre- and extramarital sex for men is generally accepted, the same is not true for women.[46] Those who get pregnant outside marriage are considered promiscuous and are stigmatized, together with their families. Thus, cultural stereotyping leads many to seek unsafe abortions.

Notwithstanding legal restrictions, women self-induce, often with unsafe methods such as bleach and traditional medicines.[47] Others turn to unqualified practitioners who operate in unsafe and unsanitary environments. As a result, women seek post-abortion care, often for severe complications.

Lack of access to legal and safe abortion is a significant cause of maternal deaths. The Gambia's maternal mortality ratio (443 per 100,000) accounts for 50% of deaths among women aged 25–29 and 36% of all deaths among women aged 15–49.[48] Maternal mortality has largely been due to teenage pregnancy, limited access to skilled birth attendants, and poor quality of emergency obstetric care services.[49] A 2011 study found that young women and girls form the majority of patients treated for complications of unsafe abortion.[50] According to the Ministry of Health, in 2018, there were 1,985 post abortion-care cases in public hospitals nationally.[51] This figure is likely to be much lower than the actual prevalence,

as most women who have abortion-related complications do not seek treatment from a health facility.

Government health facilities are legally allowed to provide abortion services only to save the life of the woman. The misoprostol-only recommended regimens by International Federation of Obstetricians and Gynecologists (FIGO) are used.[52] Apart from the FIGO guidelines, there are no national guidelines or protocols for health professionals to provide abortions. However, due to misunderstandings about the legality of the procedure, leading to fear of prosecution, doctors are dissuaded from providing abortions.[53]

As of this writing, implementation of the National Health Policy Framework (NHPF) 2012-2020, developed in 2012 during Jammeh's regime, is ongoing. However, it conspicuously does not address the issue of abortion or post-abortion care services at all.

Influence of human rights bodies

Human rights treaty monitoring bodies have put pressure on The Gambia to liberalize abortion, based on the country's ratification of international and regional human rights instruments. For example, the Human Rights Committee noted in 2004 that the restrictive abortion law results in unsafe abortions, which contribute to a high rate of maternal mortality.[54] The Committee on the Rights of the Child also urged the Gambia in 2015 to decriminalize abortion and ensure that the best interests of pregnant teenagers are guaranteed.[55] In 2015, the Association of Non-Governmental Organizations (TANGO), Women's Rights Organizations (WRO), and Civil Society Organizations (CSOs) highlighted in their shadow report the need to harmonize the laws on abortion in line with the international and regional human rights obligations to promote the sexual and reproductive health and rights of women in The Gambia.

As a result, the CEDAW Committee made similar recommendations to government: to remove all punitive measures, in particular for women undergoing abortion; expand the grounds for legal abortion to cases of rape, incest, and severe fetal impairment; and ensure the availability of safe abortion and post-abortion services.[56] Yet even these leave out the main reason for seeking an abortion— unintended and unwanted pregnancy on social and economic grounds.

Transition to democratic rule

On December 1, 2016, Jammeh lost the presidential election to opposition coalition candidate Adama Barrow, who took office peacefully with the backing and support of the Economic Community of West African States (ECOWAS). Since the transition to democratic rule in January 2017, The Gambia is undergoing a period of rebuilding and transformation. Since assuming office, the government has been fulfilling its reporting obligations under the various human rights treaty monitoring bodies. Most recently, the Human Rights Committee recommended in 2018 that The Gambia should review its restrictive abortion law:

> *… to provide safe, legal and effective access to abortion where the health of the pregnant woman or girl is at risk and where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable, and ensure that criminal sanctions are not applied against women and girls undergoing abortion or against medical service providers assisting them in doing so, since taking such measures compels women and girls to resort to unsafe abortion.*[57]

At the Africa regional level, during the previous Jammeh regime there has been a deafening silence on women's rights issues generally relating to The Gambia, due to the country's lack of adherence to its reporting obligations to the African Commission on Human and Peoples' Rights.[58] During the 22 years of dictatorship (1994–2016), The Gambia did not submit a single report to the regional body. In August 2018, the new government submitted a combined report on the African Charter on Human and Peoples' Rights and the Maputo Protocol, which was reviewed in May 2019.[59] The report noted the following:

> *Abortion remains criminalised in The Gambia except when the health or life of the mother is at risk. However, the continued practice of clandestine abortions remains an issue and a concern as it leads to adverse consequences on the health of women and girls. Due to the near total ban on abortion, this has resulted in the paucity of reliable data on the national burden of abortion.*[60]

During the review process, the Special Rapporteur on the Rights of Women in Africa requested further information on steps the government has taken to harmonize and reform its abortion laws in line with the Maputo Protocol. It is anticipated that the concluding observations from the Commission will urge The Gambia to take steps to prevent mortality due to unsafe abortion and comply with its obligations under article 14(2)(c) of the Protocol.

While treaty monitoring bodies' engagement with The Gambia on abortion reform can be seen as a positive development, any optimism must be tempered by the persistent problem of the weak implementation of concluding observations, evident both in the former government's unwillingness and the current government's slow pace.

The potential for law reform

The transition from an authoritarian regime to a democratic government serves as an opportunity for legal mobilization to advance women's sexual and reproductive rights, including broadening the grounds for abortion.

Prior to assuming office, the current government noted that its goal is to establish a democracy that is underpinned by the protection of fundamental rights and freedoms and the rule of law. Within the framework of a transitional justice process, the new government, headed by President Barrow, is implementing sweeping measures, including a review of the constitutional, legal, and institutional framework, as well as the quality of its strategies, policies, and programs in the judiciary, security sector, and civil service. The aim is to consolidate democracy and align the entire governance architecture with international justice and human rights standards.[61]

Given that the state is undertaking key constitutional and legal reforms to bring Gambian laws in harmony with international obligations, it is plausible to argue that the transition represents a significant opportunity for ensuring that critical rights issues, such as the sexual and reproductive health and rights of women and girls, are addressed. While the state has shown little interest thus far in doing so, it is making efforts to provide post-abortion care. For instance, the National Reproductive, Maternal, Neonatal, Child and Adolescent Health (RMNCAH) Strategic Plan (2017–2021) noted the data gap and need for evidence-based policy and strategy for better provision of post-abortion care services.

While very little is known about entry points and strategies for fostering supportive abortion laws and policy change in The Gambia, strategies from other countries that have been successful in reforming laws on abortion, or are successfully on the road to doing so, can be drawn upon.

Building a national coalition

Coalition-building among key stakeholders is an important component in driving legislative and policy change on issues such as safe abortion. For instance, coalition building was key to law reform in Mexico City and Ethiopia, and for political norm change on abortion despite a restrictive abortion law in Pakistan.[62]

Thus, a movement-building initiative to launch a Sexual and Reproductive Rights Network was set up in May 2019.[63] The new network is made up of individuals and organizations and hosted the first-ever National Coalition Building Meeting on Sexual and Reproductive Health and Rights on May 4, 2019, sponsored by the International Campaign for Women's Right to Safe Abortion. The Minister of Women's Affairs, Children, and Social Welfare attended the meeting.

Attendees deliberated over the need for and focus of a coalition for legal mobilization on abortion in The Gambia. They recognized the need to broaden alliances from a broad spectrum of actors, including health care professionals, women's organizations, legal experts, family planning supporters, and women's rights supporters. This

is particularly important given that, while there is broad consensus on gender equality within the constitutional review process, this has not translated into widespread support for legalizing abortion. For instance, the position paper of the Women's Bureau highlighted the need for reproductive health services for HIV-positive women.[64] The focus on HIV might be as a result of it being addressed as a public health issue, rather than a moral issue, as is the case with abortion. Other proposals include the consideration of the following:

> *Everyone shall have the right to the best attainable standard of health care, which includes the right to health care services, including reproductive health care.*

This proposal has been included under Section 60(1)(a) of the draft constitution released by the Constitutional Review Commission on November 15, 2019. It is contended that if such a right is retained in the new constitution, along with other progressive provisions, including equality and dignity, it can provide an enabling framework for a call for abortion law reform.

In addition, the review and redrafting of the criminal code and the criminal procedure code, spearheaded by the Ministry of Justice, also serves as a good opportunity to advocate for and recommend the removal of punitive abortion provisions. The review is under the framework of The Gambia National Development Plan 2018–2021, United Nations Development Assistance Framework 2017–2021, and the United Nations Office on Drugs and Crime Regional Program for West and Central Africa 2016–2020.

Legal reform

With the primary goal of empowering women to make decisions concerning reproduction, and in line with Article 14 of the Maputo Protocol, abortion law reform in The Gambia would entail expanding the current grounds. The network of activists, lawyers, and health professionals at the May 2019 meeting agreed to work towards changing the law to allow abortion in cases of rape, incest, and health of the pregnant woman. While not a radical move, such a strategy has been used in several countries as it stands a better chance.[65] For example, in 2005, Ethiopia expanded its previous abortion law only to save the life of a woman or protect her physical health, to abortion now legal in cases of rape, incest, or fetal impairment.[66]

Data-driven advocacy and policy engagement

Ongoing and planned legislative and policy reforms are a great opportunity to provide relevant and reliable evidence to drive advocacy and policy engagement. The national coalition-building meeting agreed that there is a need for evidence on the incidence and magnitude of unsafe abortions to support policy engagement and call for the expansion of the existing grounds through engagement with relevant stakeholders. This strategy has been used in other African countries. For example, evidence of unsafe abortion was used by feminists to push for abortion reform on public health needs in South Africa.[67]

This strategy can also support national evidence on maternal mortality through fundraising for the Ministry of Health to conduct such research as part of a broader strategy to address maternal mortality in The Gambia. Advancing work on this front requires a holistic approach to address unsafe abortion-related mortality and morbidity.

In addition, legal reform work should be accompanied by advocacy on the need to invest in sustaining efforts to realize democracy, gender equality, and universal access to the full range of sexual and reproductive health and rights. Indeed, the push for women's political, social, and legal control of their sexual and reproductive rights, including making decisions concerning reproduction, should be grounded in the broader global shift in reproductive rights as they relate to the goals of the UN's Sustainable Development Goals (SDGs) 2030 and the African Union's Agenda 2063.[68]

Conclusion

The Gambia's recent transition from autocratic rule to democratic government offers an opportunity for public debate and legal mobilization on issues of

women's reproductive autonomy. The possible recognition of a right to health care, including access to reproductive health care services, can serve as an enabling framework to amend abortion legislation and remove all punitive measures related to women and girls, and to health care providers. It can also guide expansion of the grounds for legal abortion and ensure accessibility to safe abortion services and post-abortion care in public health facilities.

At this earliest possible stage, advocacy for legal reform is focused on expanding the grounds to include legal abortion in cases of rape, incest, and to protect the woman's health. Conversely, coalition building and national evidence generation on the magnitude and impact of unsafe abortion are necessary. In addition, there is need to utilize international human rights law to hold government accountable for service provision.

Lastly, in order to gain progress, the women's movement needs to be the foremost voice in advocating for abortion reform. The women's movement should be a central element in ensuring that the current government does not renege on its commitment to address women's issues and ensure gender equality.

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