



# TOWARDS REVERSING DISCRIMINATION IN LAW

MAPPING AND ANALYSIS OF THE LAWS  
OF THE GAMBIA FROM A GENDER PERSPECTIVE





# Mapping and Analysis of the Laws of The Gambia from a Gender Perspective: Towards Reversing Discrimination in Law

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# ACRONYMS

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<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CRC</b>	Convention on the Rights of the Child
<b>FGM</b>	Female genital mutilation
<b>ILO</b>	International Labour Organization
<b>SDGEA</b>	Solemn Declaration on Gender Equality in Africa
<b>USD</b>	United States Dollar
<b>UN Women</b>	United Nations Entity for Gender Equality and Women's Empowerment

# FOREWORD

The 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals present unprecedented opportunities for the Government of The Gambia to accelerate gender equality at all levels and across all sectors.

My Government is fully aware of the impact and implications of discrimination in law on any country. Laws which stifle gender equality prevent women and girls from realizing their full social, cultural, economic, political and civil rights and the immense potential and gains that can be derived from the exercise of those rights.

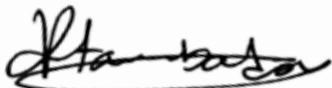
The Government of The Gambia's commitment to uphold gender equality is anchored in its ratification of the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child, the Solemn Declaration on Gender Equality in Africa and other instruments. Investments have been made in the enactment of several domestic laws such as the Children's Act of 2005 and the Women's Act of 2010 (as amended in 2015).

Law-making in The Gambia, however, dates back several years before international women's rights were crystallized and has taken place across different historical contexts. As with all aspects of human endeavour, stocktaking is essential for ensuring quality of life. Taking stock of laws from a gender perspective is critical to the health and progress of The Gambia.

I am therefore pleased to present, this "Mapping and Analysis of the Laws of The Gambia From a Gender Perspective: Towards Reversing Discrimination in Law", which represents our stocktaking of laws dating back from the time of statutory developments in The Gambia.

I endorse this report and its recommendations as my Government's step towards the implementation of *Equality in Law for Women and Girls by 2030: A Multistakeholder Strategy for Accelerated Action*, a joint initiative of UN Women, the African Union, the Commonwealth, the Organisation Internationale de la Francophonie, the Secretaría General Ibero-Americana and other organizations.

It serves as the framework for achieving full de jure equality, which in turn, is the foundation for de facto and substantive equality.



**Honourable Abubacarr Ba Tambadou**  
Attorney General and Minister of  
Justice of The Gambia

# STATEMENT OF SUPPORT BY THE EXECUTIVE DIRECTOR OF UN WOMEN AND THE COMMONWEALTH SECRETARY-GENERAL

One of the stated aims of the 2030 Agenda for Sustainable Development is the creation of gender equal world. This means that women and girls will live lives free of violence and opportunities will be created for their effective participation in the social, cultural, economic, and political development of their communities.

The COVID-19 pandemic has however exposed cracks in socio-economic policies as well as deepening social inequalities across the world. Prior efforts at consolidating modest gains in gender equality in past decades are now being eroded. The absence of laws which promote gender equality, or the existence of those which reinforce gender inequality can serve as both stumbling blocks to development as well as catalysts of reversing those modest gains.

We therefore congratulate the Government of The Gambia for the bold step in undertaking a comprehensive review of its laws to ascertain the extent to which they are compliant with international and regional norms and standards. The completion of this exercise

in 2020 coincides with important gender equality milestones, particularly the twenty-fifth anniversary of the Beijing Declaration and Platform for Action and the twentieth anniversary of United Nations Security Council Resolution 1325 on Women, Peace and Security.

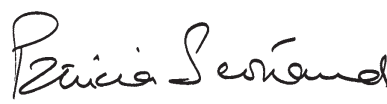
This exercise demonstrates a determination to create a peaceful, secure, and economically prosperous country. With this step, The Gambia is the first country to demonstrate a commitment to de jure equality within the context of the Equality in Law for Women and Girls by 2030: A Multistakeholder Strategy for Accelerated Action.

With the resulting Cabinet Paper and Women (Amendment of Discriminatory Laws) Bill before the National Assembly, we are confident that The Gambia will also be the first to undertake sweeping reforms of its laws in favour of women and girls.

The implementation of the recommendations of the report will make the women and girls of The Gambia even more empowered and therefore support the Governments efforts at building back better after the pandemic.



**Phumzile Mlambo-Ngcuka**  
Executive Director  
UN WOMEN



**The Rt Hon Patricia Scotland QC**  
Secretary-General  
of the Commonwealth



# ACKNOWLEDGEMENTS

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The report would not have materialized without the active support and political will of the Government of The Gambia, exemplified through commitments of the Speaker of the National Assembly, Honourable Mariam Jack-Denton; the Attorney General and Minister of Justice, Honourable Abubacarr Ba Tambadou; and the Minister of Women's Affairs, Children and Social Welfare, Honourable Fatou Sanyang Kinteh.

The report was commissioned by the Ministry of Justice and prepared by Janet Ramatoulie Sallah-Njie, a legal practitioner, lecturer of law and member of the Constitutional Review Commission of The Gambia. A steering committee, comprising relevant ministries, national agencies and civil society organizations was established by the Ministry of Justice to guide the process and substantive dimensions of the design of the report. The Ministry wishes to acknowledge the timely contributions of Ms. Ndey Ngoneh Jeng, pupil legal practitioner at Torodo Chambers, in the provision of much needed assistance in compiling relevant national legislation and case law.

The preparation of the report was made possible through financial and technical assistance from the Commonwealth Secretariat and UN Women. Special thanks are owed to staff of the Commonwealth Secretariat's Gender Section and Rule of Law for their invaluable technical support and to UN Women (Beatrice Duncan and Oulimata Sarr) for their substantive guidance and technical coordination.

It is hoped that this report will serve as a useful frame of reference for necessary legislative action by the Ministry of Justice and National Assembly in harmonizing national laws with international and regional obligations related to the promotion and protection of the rights of women and girls in The Gambia.

# EXECUTIVE SUMMARY

## Overview

This mapping and analysis of national laws of The Gambia from a gender perspective forms a critical part of the Government of The Gambia's democratic and transitional justice reforms. The mapping was designed to inform a roadmap for comprehensive legislative reforms through a review of relevant national legislation and judicial decisions to determine their direct and indirect impacts on the rights of women and girls in The Gambia. The analysis reviews the 1997 Constitution, statutes and corresponding legislative and legal instruments in the form of regulations, orders, guidelines, directives as well as case law.<sup>1</sup> The review was guided primarily by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the African Charter on the Rights and Welfare of the Child (ACRWC), various International Labour Organization (ILO) Conventions and other instruments. These global and regional norms and standards constitute a charter of rights for women and girls in Africa and therefore served as the measuring rod with which to assess progress being made by the Government of The Gambia in fulfilling its obligations.

This review is furthermore anchored in the concluding observations and recommendations of the Committee on the Elimination of All Forms of Discrimination against Women (the CEDAW Committee) in response of The Gambia's combined fourth and fifth periodic state party reports.

It is also grounded in "Equality in Law for Women and Girls by 2030: A Multistakeholder Strategy for Accelerated Action", a global framework and plan of action for eliminating

gender discriminatory laws.<sup>2</sup> The strategy was launched by UN Women, the Inter-Parliamentary Union, the African Union, the Commonwealth, Internationale de la Francophonie, the Secretaría General Ibero-Americana, the International Development Law Organization and other institutions at the 63rd session of the United Nations Commission on the Status of Women in March 2019 to serve as a framework for accelerated action on eliminating de jure discrimination in the following six priority areas:

- *Comprehensive reforms*: Repeal discriminatory laws that directly and indirectly impact women and girls;
- *Promoting women's economic empowerment*: Repeal laws that undermine equal pay, recognition of unpaid care work, protection of domestic workers, parental leave and freedom of choice of employment;
- *Eliminating harmful and discriminatory minimum age of marriage provisions*: Promote 18 years as the minimum age of marriage, equalize the age of marriage between women and men, and eliminate related exceptions as appropriate;
- *Ending gender discrimination in nationality laws*: Uphold women's rights to equality in nationality and citizenship laws;
- *Addressing discriminatory rape laws*: Revise provisions that exempt perpetrators from rape charges if they marry the survivor; and
- *Promoting equality in family relations*: Repeal gender discriminatory personal status laws (one or more of the following: marriage, divorce, parental rights and inheritance).

Prevailing political will in The Gambia supports a comprehensive review of discriminatory laws (priority Area 1) affecting women and girls as a basis for subsequent legislative action.

## Methodology

This report was prepared through a desk review of relevant statutes, case law and consultations with a broad range of stakeholders, drawn from both government institutions and civil society organizations. The desk review entailed in-depth research into current legislation and legal provisions that are relevant to The Gambia's global and regional obligations related to gender equality as cited above. To ensure a participatory and inclusive process in preparing the report, a review committee

was established, comprising stakeholders from both government and civil society organizations that are involved in the protection and promotion of the rights of women and girls. Prior to finalization, the findings of the report were presented to a broad range of stakeholders consisting of members of the National Assembly, Government Ministries, the Truth and Reconciliation Commission, civil society organizations and the United Nations system for feedback and inputs.<sup>3</sup>

## Findings

The analysis reveals that a total of 10 laws or provisions must be repealed in whole or in part; 19 laws must be revised or amended, and two new laws must be enacted to bring The Gambia's legislative framework in line with its regional and international obligations on gender equality and women's empowerment. The report also emphasizes the need to prioritize the implementation of national laws that comply with gender equality standards, and, in this context, recommends 14 policy measures to ensure that laws fully deliver on women's rights.

# INTRODUCTION

## Background

The Gambia is the smallest country in mainland Africa and is specifically located in West Africa. It gained independence on 18<sup>th</sup> February 1965 and achieved the status of a Republic on 24<sup>th</sup> April 1970. The country is currently in political and economic transition following democratic elections, which ushered in a coalition Government led by President Adama Barrow in December 2016, effectively ending a 22-year dictatorship. The Gambian economy primarily relies on tourism, rain-dependent agriculture and remittances. The current gross domestic product is estimated at USD 1.62 billion with total debt service (percentage of exports of goods, services and primary income) standing at 16.8 per cent.<sup>4</sup> The country is recovering from a range of economic shocks arising from erratic rainfall patterns, post-election electoral and political crisis, and the sub regional impact of the Ebola crisis.

The Government of The Gambia is committed to delivering “good governance and accountability, social cohesion, and national reconciliation and a revitalized and transformed economy for the wellbeing of all Gambians” through its National Development Plan (2018-2021). Recognizing that gender equality and women’s empowerment are still major challenges in Gambian society, the Government seeks to empower Gambian women to achieve their full potential as a key component of the National Development Plan and the National Gender Policy (2010-2020).

The legal system of The Gambia is plural in nature, with the 1997 Constitution serving as the main legal source for guarantees of human rights, including the protection of women from all forms of discrimination. Section 7 of the Constitution provides for the following as the main sources of law:

- Acts of the National Assembly made under this Constitution and subsidiary legislation made under such Acts;

- Any orders, rules, regulations or other subsidiary legislation made by a person or authority under a power conferred by this Constitution or any other law;
- The existing laws including all decrees passed by the Armed Forces Provisional Ruling Council;
- The common law and principles of equity;
- Customary law so far as it concerns members of the communities to which it applies; and
- Sharia law as regards matters of marriage, divorce and inheritance among members of the communities to which it applies.

Section 7 therefore recognizes multiple sources of law as part of the laws of The Gambia. Customary and sharia law govern all matters relating to personal law status—more specifically, laws relating to marriage, divorce, inheritance and general family matters. Customary law also includes land tenure, and tribal and clan leadership. Sharia law, which has to some extent, displaced customary law, is limited primarily to Muslim marriage, divorce and inheritance matters, whereas the common law is based on the received English law and operates as the residual law.<sup>5</sup>

The Gambia is predominantly Muslim. Therefore, over 90 per cent of matters relating to family law are adjudicated in the Cadi or Islamic courts. Within the realm of customary law, district chiefs preside over local customary district tribunals. In essence, this means that the majority of cases that are adjudicated by the district tribunals and the Cadi courts are presided over by persons who may not be familiar with human rights norms and principles. As a result, court decisions tend to discriminate against women and girls, and deepen patriarchy. This is further complicated by the fact that most of the provisions of the Women’s Act 2010 (which domesticates relevant provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol), are subject to personal law and the general

clawback limitations on discrimination prescribed in the Constitution (Section 33 (5) (c)).

This analysis responds to the Government of The Gambia's goal of ensuring that the national laws of The Gambia are compliant with its global and regional commitments to women and girls. A brief review of

The Gambia's legal landscape reveals that some constitutional and statutory provisions, as well as judicial decisions (case law) discriminate against women and girls directly or indirectly. Since these undercut prospects of treating them as equal citizens, it is imperative that such legal frameworks are revised or repealed to pave the way for a gender equal legal environment.

## Methodology

This report was prepared through a desk review of relevant statutes and case law, and consultations with a broad range of stakeholders from both government institutions and civil society organizations. The desk review entailed an in-depth analysis of current legislation and legal provisions relevant to The Gambia's international obligations under CEDAW, the Maputo Protocol and other international commitments related to gender equality. The review was anchored in the work of the Constitutional Review Commission, which at the time of preparing this report was undertaking a review of the 1997 Constitution of The Gambia. To ensure a participatory and inclusive review process, a committee, comprising stakeholders from both the Government and civil society, was established. It drew members from the Ministry of Justice; judiciary; Ministry of Women, Children and Social Welfare; National Women's Council; Female Lawyers Association-Gambia; Think Young Women; The Gender Platform and Network Against Gender Based Violence.

The penultimate draft of the report was submitted for extensive discussion, review and validation at a national consultative workshop held on 23 July 2019 in Banjul. The report is presented in four parts:

**Part I** reviews The Gambia's international treaty obligations and the steps taken by the Government to domesticate the provisions of CEDAW, the Maputo Protocol, and other global and regional instruments, including best practices in domesticating them.

**Part II** offers an in-depth analysis of domestic legislation, starting from the Constitution as the fundamental law, followed by statutes and sectoral laws. It also considers the role played by the courts in advancing and reinforcing gender equality principles. This segment of the report determines the extent to which The Gambia is compliant

with the international and regional obligations highlighted in Part I. Laws, Regulations and Orders with a direct or indirect bearing on the provisions of CEDAW, the Maputo Protocol and other related commitments were analysed. They consisted of the following:

- ▶ The 1997 Constitution of The Gambia
- ▶ Statutes and regulations (in order of presentation)
- 1. The Women's Act, 2010
- 2. The Children's Act, 2005 Cap 45:01 Volume 7
- 3. Sexual Offences Act, 2013
- 4. Domestic Violence Act, 2013
- 5. Legal Aid Act, 2008 Cap 6:07 Volume 2
- 6. Criminal Code, 1933
- 7. Tourism Offences Act, 2003 Cap 13:02 Volume 3
- 8. Trafficking in Persons Act, 2007 Cap 13:04 Volume 3
- 9. Skin Bleaching (Prohibition) Act, 1995 Cap 13:08 Volume 3
- 10. Nationality and Citizenship Act, 1965 Cap 16:01 Volume 4
- 11. Prisons Act, 1953 Cap 20: 01 Volume 4
- 12. Lunatics' Detention Act, 1917 Cap 40:04 Volume 6
- 13. Births, Deaths and Marriages Registration Act, 1886 Cap 41:01 Volume 7
- 14. Civil Marriage Act, 1938 Cap 41:02 Volume 7
- 15. Christian Marriage Act Cap, 1862 41:03 Volume 7
- 16. Married Women's Property Act, 1885 Cap 41:05 Volume 7
- 17. Muslim Marriage and Divorce Act, 1941 Cap 42:01 Volume 7
- 18. Matrimonial Causes Act, 1986 Cap 43:01 Volume 7
- 19. Maintenance Orders (Facilities for Enforcement) Act, 1923 Cap 44:02 Volume 7
- 20. The Labour Act, 2007 Cap 56:01 Volume 8
- 21. The Sharia Law Recognition Act, 1905 Cap 6:04 Volume 2

22. Social Security and Housing Finance Corporation Act, 2015
23. Forced Labour Act, 1934 Cap 56:03 Volume 8
24. Basic and Secondary Education Act, 2018 Cap 46:06 Volume 7
25. Food Act, 2005 Cap 40:07 Volume 6 and The Breastfeeding Promotion Regulations, 2006
26. The Public Service Regulations and General Orders of the Civil Service, 2013

**Part III** of the report presents an overview of judicial interventions in matters affecting the rights of women.

**Part IV** of the report maps out the specific actions needed to address discriminations in law, through the repeal, revision, the enactment of specific laws and policy interventions, based on highlighted gaps in current legislation. The recommendations serve as a basis for the Ministry of Justice to formulate a set of proposals through a Cabinet Paper for consideration by both the executive and legislative branches of Government.



1

PART 1.

THE GAMBIA'S GLOBAL  
AND REGIONAL  
GENDER EQUALITY  
COMMITMENTS

## PART I:

# THE GAMBIA'S GLOBAL AND REGIONAL GENDER EQUALITY COMMITMENTS

## An overview of global and regional commitments

Equality between men and women is espoused under the Charter of the United Nations<sup>6</sup> and reinforced by core international human rights instruments and their associated optional protocols. These include CEDAW, which establishes not only “an international bill of rights for women, but also an agenda for action by countries to guarantee the enjoyment of those rights.”<sup>7</sup> CEDAW was ratified by The Government of The Gambia on 16 April 1993. Also, of critical importance is the Convention on the Rights of the Child (CRC), which was ratified by The Gambia on 3 August 1990. Norms and standards of the International Labour Organization (ILO) cover the prohibition of forced labour; the protection of maternity rights; equal remuneration; protection of domestic workers; and more recently, sexual harassment.

As monitoring bodies to these conventions, the CEDAW Committee and CRC Committee require States Parties to submit periodic reports on implementation progress, after which the Committees issue concluding observations and recommendations on specific areas of concern. Systematic monitoring of human rights obligations and the continuing feedback loop with States attest to the fundamental importance of translating human rights commitments into national law, policy and practice.

Ratified by The Gambia on 25 May 2005, the Maputo Protocol, provides comprehensive provisions on the elimination of discrimination against women in Africa, in many cases, breaking boundaries in areas where CEDAW struggled to introduce additional provision. The Protocol takes into account the socio-political realities of African societies, and deals with important issues, such as access to justice, equal protection before the law, economic and social welfare rights, and health and reproductive rights.<sup>8</sup> In 2004, the Solemn Declaration

on Gender Equality in Africa (SDGEA) was adopted by African Heads of State and Government to accelerate the implementation of the Maputo Protocol in areas such as women’s health, gender-based violence, gender parity at national and local levels, and women’s land and property rights. The Gambia ratified the African Charter on the Rights and Welfare of the Child (ACRWC), the only regional instrument to comprehensively reflect the provisions of the CRC, on 14 December 2000.

These regional and global instruments have profoundly influenced the legal landscape of The Gambia. CEDAW, the Protocol and SDGEA have been significantly incorporated into domestic law through the Women’s Act, 2010 (as amended in 2015), the Domestic Violence Act, 2013 and Sexual Offences Act, 2013, while the CRC and ACRWC have been domesticated through the Children’s Act 2005 (as amended in 2016); and some ILO Conventions through the Labour Act, 2007.<sup>9</sup>

## An overview of de jure inequality in The Gambia

In line with Article 18 of CEDAW, The Gambia submitted its initial, second and third periodic reports to the CEDAW Committee in July 2005 and subsequently, its combined fourth and fifth periodic reports in October 2012. In response to the latter, the Committee issued the following concluding observations and recommendations to the Government of The Gambia:

*The Committee notes that many provisions of the Convention have been incorporated into national law through the adoption of relevant legislation, in particular the Women's Act in 2010. It remains concerned, however, that the legislation does not adequately address female genital mutilation, marital rape or child marriage. It also remains concerned about the constitutional provision under which the prohibition of discrimination does not apply in respect of adoption, marriage, divorce, burial and devolution of property upon death and the fact that these issues are regulated under personal law, which contains discriminatory provisions, some of which are re-enacted in the Women's Act.*

1. *Harmonize national legislation, including the Constitution, the Women's Act and personal laws (sharia and customary law), by repealing all discriminatory provisions to ensure that women and girls enjoy the same rights as men in all areas of life;*
2. *Urgently repeal article 33 (5) (c) of the Constitution, which provides that the prohibition of discrimination does not apply in respect of adoption, marriage, divorce, burial and devolution of property upon death.<sup>10</sup>*

The CEDAW Committee also noted that persisting patriarchal norms and gender stereotypes impede implementation of gender equality commitments, and hinder women's ability to access justice and participate in political and public life as well as in all economic domains. Some of the greatest challenges to attaining the fundamental rights and freedoms of women and girls are therefore deeply rooted in traditional social, economic, judicial, political and religious structures. For instance, while women were accorded the right to own land under the 1997 Constitution, in practice, customary land is transferred through patrilineal systems of land tenure that grant women only nominal access rights. Another example is the enactment of legislation prohibiting female genital mutilation (FGM) and child marriage through amendments to the Women's Act and Children's Act in 2015 and 2016, respectively. Implementation of these laws has been ineffective due to deeply entrenched patriarchal norms and beliefs. Legal prohibitions alone are therefore not sufficient for curbing such harmful practices in Gambian society.

Matters such as rights to inheritance, marriage and divorce remain under the purview of sharia law for Muslims by virtue of Section 7 of the 1997 Constitution and Section 7 of the Sharia Law Recognition Act (1905). However, Muslim women are often denied equal rights in matters of marriage, divorce and inheritance, even where these rights are protected by law. Added to this, women generally do not have adequate knowledge of their rights or of institutions created to protect and promote these rights. Other limitations include lack of institutional capacity, inadequate monitoring, budgetary constraints and widespread illiteracy among women.

The observations and recommendations of the CEDAW Committee provide unequivocal evidence of the need for The Gambia to do much more to ensure the realization of commitments under the Convention. Table 1 identifies the thematic areas covered in CEDAW and the Maputo Protocol, and serves as the basis of the legal analysis in this report.

TABLE 1:

## Summary of obligations under CEDAW and the Maputo Protocol

Thematic area	Protection from discrimination	Employment	Education
Summary of obligations	<p><b>CEDAW Articles 1, 2, 3, 4 and 5; Maputo Protocol Article 2</b></p> <p>Principle of the equality of men and women in national constitutions; sanctions where appropriate as part of prohibiting all discrimination against women; equal protection of the rights of women on an equal basis with men through competent national tribunals; appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women; repeal all national penal provisions that constitute discrimination against women; modify the social and cultural patterns of conduct of men and women, with a view to eliminating prejudices embodied in customary and all other practices based on the idea of the inferiority or the superiority of either of the sexes.</p>	<p><b>CEDAW Article 11, Maputo Protocol Article 13</b></p> <p>Equality of access to employment and choice of profession; equal pay and allowances; training opportunities, including vocational training and apprenticeships; maternity benefits; social security and social insurance; childcare; safety nets; protection from harassment; protection of women in the informal sector; recognition of unpaid care work; equal taxation; protection from economic exploitation.</p>	<p><b>CEDAW Article 10, Maputo Protocol Article 12</b></p> <p>Equal rights to access quality education; equality of conditions for career and vocational guidance; access to the same curricula, examinations and teaching facilities; protection from sexual harassment in educational institutions; elimination of stereotyping; promotion of literacy among women; enrolment and retention of girls in schools; access to programmes of continuing education; equal opportunities to benefit from scholarships and grants; access to information, including family planning.</p>
	Armed conflict, peace and security	Disability and distress	Economic and social benefits
	<p><b>Maputo Protocol Articles 10 and 11</b></p> <p>Right to peaceful existence and to participate in the promotion and maintenance of peace; participation in programmes of education for peace and a culture of peace; reduction of military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular; ensure respect for the rules of international humanitarian law applicable in armed conflict; the protection of asylum-seeking women, refugees, returnees and internally displaced persons against all forms of violence, rape and other forms of sexual exploitation; the protection of children, especially girls under 18 years of age from direct participation in hostilities or recruitment as a soldier.</p>	<p><b>CEDAW Article 12; Maputo Protocol Articles 23 and 24</b></p> <p>Protection of women with disabilities; specific measures commensurate with their physical, economic and social needs to facilitate access to employment, professional and vocational training, and participation in decision-making; freedom from violence, sexual abuse and discrimination based on disability and treatment with dignity; protection of poor women and women heads of families, and women from marginalized populations; protection of pregnant or nursing women; protection of women in detention.</p>	<p><b>CEDAW Article 13; Maputo Protocol Articles 13, 15 and 16</b></p> <p>Eliminate discrimination against women in other areas of economic and social life; right to family benefits; right to bank loans, mortgages and other forms of financial credit.</p>

Health and reproductive rights	Violence against women	Nationality	Marriage, divorce and inheritance	Access to justice
<b>Maputo Protocol Article 14</b> The right to health; sexual and reproductive health and rights; protection from harmful practices; health services for victims of harmful practices; protection against sexually transmitted infections including HIV/AIDS; family planning education; adequate, affordable and accessible health services; establishing and strengthening maternal health services; authorized medical abortions; attention of mental health; promotion of a healthy and sustainable environment;	<b>Maputo Protocol Article 4</b> Protection from all forms of violence e.g. harmful practices, rape, sexual exploitation and sexual abuse by enacting and enforcing laws to prohibit all forms of violence; the provision of services for victims of violence, including elderly women, asylum seekers, refugees, returnees and the internally displaced.	<b>CEDAW Article 9, Maputo Protocol Article 6</b> Equal rights to acquire, change or retain nationality and transfer nationality to a spouse and child.	<b>CEDAW Articles 11, 16; Maputo Protocol Articles 6, 7, 20 and 21</b> Equality in marriage; protection of rights of women in marriage by ensuring their full consent to marriage; marriage registration; acquisition and management of property; equal rights during separation, divorce and annulment of marriage, the protection of widows; reciprocal rights towards children; equitable distribution of joint property; equitable inheritance rights.	<b>Maputo Protocol Article 8</b> Equality before the law; equal protection and benefits of the law; access to judicial and legal services including legal aid; equal representation in judiciary and law enforcement organs; reform discriminatory laws and practices.
Political and public life	Trafficking in women and girls	Rural women	Elderly women	Environment, sustainable development, food security and housing
<b>CEDAW Articles 4, 7 and 8</b> Temporary special measures aimed at accelerating de facto equality; affirmative action; quota systems; equal representation; appropriate measures to eliminate discrimination against women in political and public life; participation in the formulation of government policy and implementation on equal terms with men; represent at the international level; participation in the work of international organizations.	<b>CEDAW Article 6</b> Suppression of all forms of trafficking in women and exploitation of prostitution of women.	<b>CEDAW Article 14</b> Take account of particular problems faced by rural women; significant roles that rural women play in the economic survival of their families; access to adequate health-care facilities, including information, counselling and services, family planning; access to social security.	<b>Maputo Protocol Article 22</b> Protection of elderly women; specific measures commensurate with their physical, economic and social needs, and employment and professional training; freedom from violence, sexual abuse and discrimination based on age; the right to be treated with dignity.	<b>Maputo Protocol Articles 15, 16, 18 and 19</b> Access to clean drinking water, sources of domestic fuel, land and the means of producing nutritious food; access to housing; acceptable living conditions in a healthy environment; healthy and sustainable environment; protection of indigenous knowledge systems.



# 2

PART 2.

## A LEGAL ANALYSIS OF DOMESTIC LAWS

## PART II:

# A LEGAL ANALYSIS OF DOMESTIC LAWS

## Introduction

Part II of this report presents an in-depth analysis of domestic laws in The Gambia, using global and regional commitments as frames of reference. The natural starting point of the analysis is the Constitution, as the fundamental law through which all other laws derive their validity. This is followed by other national legislation, regulations, orders and case law that directly and indirectly impinge on the rights of women and girls in The Gambia.

The review also takes into account “cross-cutting” laws that play an important role in the implementation and interpretation of laws in general. These include but are not limited to the Evidence Act, 1994, the Criminal Code, 1933, the Criminal Procedure Code, 1933, the Courts Act, 1964, the

Subordinate Courts Civil Proceedings Act, 1964, The Court of Appeal of The Gambia Act, 1961, the Supreme Court Act, 1999, and rules regulating the procedures of specialized courts such as the Children’s Court and Industrial Tribunals.

These laws are an integral part of The Gambia’s judicial system, as they guide practice and procedure in State courts. Practices and procedures before the sharia courts and district tribunals are regulated by the Cadi Court (Civil Procedure) Rules 2010 and The Cadi Appeals Panel Rules 2009, respectively. This leaves room for an arbitrary and discriminatory application of customary law and sharia law, particularly as it relates to matters of procedure, evidence and substance.

## The Constitution of The Gambia, 1997

### Protection from discrimination

The Constitution of The Gambia, 1997 is the basic law of the land. The Preamble highlights that “the fundamental rights and freedoms enshrined in the Constitution will ensure full respect for and observance of human rights of the people at all times without discrimination based on ethnicity, gender, language or religion.”

Chapter IV of the Constitution contains provisions which safeguard the fundamental rights of persons. Under this chapter, Section 28 stipulates that women shall be accorded “full and equal dignity of the person with men”, as well as “the right to equal treatment with men, including equal opportunities in political, economic and social activities.” This is a fundamental right that reflects the language of Article 2(1)(a) of the Maputo Protocol and Article 2(a) of CEDAW, both of which provide that States Parties should combat all forms of discrimination against women through appropriate legislative, institutional and other measures.

The issue of discrimination is exclusively dealt with under Section 33, particularly Section 33(2), which stipulates that, “Subject to the provisions of subsection (5), no law shall make any provision which is discriminatory either of itself or in effect.” Furthermore, the definition of discrimination is provided in Section 33(4):

*In this section, the expression “discrimination” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject, or are accorded privilege or advantages which are not accorded to persons of another such description.*

Though generic in nature, this definition of discrimination is compatible with the definitions of discrimination against women as contained in CEDAW and the Maputo Protocol. In the former, discrimination is defined as:

*For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

Section 33(2) is however subject to exceptions expressed in Section 33(5) (c):

*Subsection (2) shall not apply to any law in so far as that law makes provision—*

*c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; d) for the application in the case of members of a particular race or tribe of customary law with respect to any matter in the case of persons who, under that law, are subject to that law.*

Reflective of The Gambia’s plural legal system, matters of marriage, divorce and inheritance are usually decided on in accordance with sharia and customary laws through their respective court systems. Sharia and customary courts determine an estimated 90 per cent of such cases. Therefore, the majority of women in The Gambia are impacted by the opportunities and challenges presented by the use of these courts as very few resort to regular courts. Even where women seek this recourse, the relevant discriminatory provisions of sharia and customary law would still apply, as a constitutionally guaranteed source of law, under Section 7. This contradicts the principles of non-discrimination and equality as espoused in CEDAW and the Maputo Protocol. The continued existence of Section 33(5)(c) therefore renders provisions on the prohibition of discrimination such as those contained in the Women’s Act, null and void. This reinforces the supremacy of the Constitution under Section 4, which affirms the Constitution as “the supreme Law of The Gambia

and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.”

#### RECOMMENDATIONS:

- Section 33(5)(c) of the Constitution should be repealed to ensure consistency and harmonization with progressive parts of the Constitution and the Women’s Act, 2010. The repeal of this section would pave the way for de jure equality between men and women, particularly in the area of personal law.
- To ensure that women are protected from harmful cultural and traditional practices as enshrined in the Maputo Protocol (Article 2(f)), and are not deprived of their right to positive aspects of culture, the application of sharia and customary law should be subject to express provisions of fundamental rights principles enshrined in Chapter 4 of the Constitution, which protects women from all forms of discrimination.
- To this extent, the application of customary law and sharia in The Gambia should be subject to the principle of non-discrimination as enshrined in subsections (2) and (4) of Section 33 of the Constitution, cited above.
- Furthermore, to ensure that women are additionally protected from discriminatory, unpredictable and arbitrary application of customary law and sharia, it would be useful to introduce a unified Family Code that aims to protect women of all systems of law.
- To secure all of the above, provisions on equality and non-discrimination as provided in the Women’s Act, 2010 should be amended to ensure full consistency with Section 28 of the Constitution, which as noted reflects the relevant provisions on equality and non-discrimination of CEDAW and the Maputo Protocol.

## The right to participate in public and political affairs

Section 26 of the Constitution guarantees the political rights of all persons in The Gambia on a non-discriminatory basis. It provides that:

*Every citizen of The Gambia of full age and capacity shall have the right, without unreasonable restrictions—*

- *to take part in the conduct of public affairs, directly or through freely chosen representatives;*
- *to vote and stand for elections at genuine periodic elections for public office, which election shall be by universal and equal suffrage and be held by secret ballot;*
- *to have access, on general terms of equality, to public service in The Gambia.*

These provisions align with the requirements of CEDAW and the Maputo Protocol for States Parties to ensure women's full participation in public life and decision-making at all levels. In particular, Article 9 of the Maputo Protocol (the Right to Participation in Political and Decision-Making Processes) is a State obligation to "take specific positive action to promote participative governance and the equal participation of women in the political life of their countries." States are also required to "ensure increased and effective representation and participation of women at all levels of decision-making." In the same vein, Article

7 of CEDAW requires States to "take all appropriate measures to eliminate discrimination against women in the political and public life of the country." These two provisions suggest that women's political rights should be exercised without restriction.

Section 26 of the Constitution, however, provides for the exercise of political rights with reasonable restrictions and implies that the exercise of a person's political rights may be subject to whatever is deemed to amount to reasonable restriction. The phrase "unreasonable restrictions" is not defined and therefore weakens the ability of The Gambia to give full effect to the two treaties. Most importantly, the provisions of the two instruments impose an obligation on The Gambia to put in place temporary special measures as a means of addressing historical imbalances between women and men across all sectors. This commitment is not reflected in the laws of The Gambia.

### RECOMMENDATION:

Section 26 of the Constitution must be amended by:

- Removing the phrase "without unreasonable restrictions" and including a subsection that guarantees a minimum 30 per cent quota to guarantee women's representation in political institutions.

## Marriage and family

Section 27 of the Constitution provides that "men and women of full age and capacity shall have the right to marry and found a family." It further provides that "marriage shall be based on the free and full consent of the intended parties." The section, however, does not protect women's equality with the men in marriage or at its dissolution, nor does it reflect additional rights under the Maputo Protocol and CEDAW (e.g., see Box 1 below). The section is also subject to Section 33(5)(c), which permits discrimination in matters of personal law in matters of marriage and divorce.

### RECOMMENDATION:

Section 27 of the Constitution should be amended to include a specific provision on equality between women and men in marriage and family life, and to ensure legal recourse for women who seek justice in such contexts.

**BOX 1:****ARTICLE 16 OF CEDAW**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- a. The same right to enter into marriage;
- b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- c. The same rights and responsibilities during marriage and at its dissolution;
- d. The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- e. The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- f. The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- g. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- h. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

## The right to education

Section 30 of the Constitution guarantees “the right to equal educational opportunities and facilities” in line with Article 10 of CEDAW, which obliges States Parties to “take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education.” This includes providing the same conditions for career and vocational guidance, access to the same curricula and examinations, elimination of any stereotyped concepts of gender roles, and opportunities to benefit from the same scholarships and study grants.

While Article 12 of the Maputo Protocol (Right to Education and Training) are similar to Article 10 of CEDAW, it also deals with sexual harassment in schools,

counselling and rehabilitation services for women who suffer abuse and sexual harassment in such settings, and gender sensitization and human rights education at all levels of educational curricula. These provisions highlight the importance of education as a tool for ensuring that women are able to benefit from all rights enshrined in the Constitution and other relevant laws of The Gambia. Particular emphasis is placed on protecting and rehabilitating girls who are sexually harassed in schools and instituting measures for the retention of pregnant girls in schools. While the Women’s Act prohibits the expulsion of girls on grounds of pregnancy, social stigma related to teenage pregnancy renders this legal provision ineffective.

Even though basic education is compulsory through relevant policies, there are gaps in implementation due to high levels of poverty, which often drives children into economic activities, which expose them to sexual exploitation and trafficking. There is therefore need for awareness-raising to fully protect the rights of pregnant girls to receive a full dose of education in addition to the provision of young mothers with counselling, rehabilitation and reintegration support services.

### The Directive Principles of State Policy

Most of the socioeconomic rights enshrined in CEDAW, the Maputo Protocol and SDGEA are found in the “Directive Principles of State Policy” of Chapter 20 of the Constitution. Some of the Principles include the Political Objectives (Section 214), Economic Objectives (Section 215), Social Objectives (Section 216), Educational Objectives (Section 217) and Cultural Objectives (Section 218). These Principles are expected to guide “the Executive, the Legislature and all other organs of the State in taking policy decisions, making laws and in the administration of The Gambia.” They “shall according to their respective functions be guided by and observe them with a view to achieving by legislation or otherwise the full realisation of these principles; and (b) the courts are entitled to have regard to these principles in interpreting any laws based on them.”

However, “These principles shall not confer legal rights or be enforceable in any court but (a) subject to the limits of the economic capacity and development of The Gambia, the Executive, the Legislature and all other

#### RECOMMENDATION:

- The Government of The Gambia should take stringent steps to implement Section 30 of the Constitution in order to ensure that all girls not only have access to compulsory basic education but also are not denied that right due to their socio-economic circumstances.
- Efforts must also be made to address social stigma associated with teenage pregnancy through awareness raising and appropriate services which promote their reintegration into the education system.

organs of the State in taking policy decisions, making laws and in the administration of The Gambia, shall according to their respective functions be guided by and observe them with a view to achieving by legislation or otherwise, the full realisation of these principles” (Section 211). The lack of justiciability of these provisions may render them ineffective in addressing women’s rights.

#### RECOMMENDATIONS:

- The Constitution’s Directive Principles of State Policy guide the design, implementation and enforcement of Government policy. Therefore, it would be necessary to consider a constitutional revision which integrates these provisions into Chapter 4 of the Constitution which deals with Protection of Fundamental Rights and Freedoms, to ensure their enforceability and accountability of Government to women.

## Statutes

### The Women's Act, 2010

As noted, the Women's Act domesticates CEDAW and the Maputo Protocol. To that extent, it harmonizes and consolidates all laws related to the rights of women and girls in The Gambia. The Act was enacted in 2010 after a comprehensive review of all laws affecting women and was amended in 2015 to criminalize FGM in line with the recommendation of the CEDAW Committee.

The Act addresses a substantial number of women's rights concerns as reflected in its long title:

*An ACT to implement the legal provisions of the National Policy for the Advancement of Gambian Women and Girls, and to incorporate and enforce of the United Nation Convention on the Elimination of all Forms of Discrimination against Women and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and for other matters connected therewith.*

**The Act is divided into 12 parts and provides for the following specific protections:**

<b>Prohibition of discrimination</b>	<b>Right to education and training</b>
<b>Women's human rights protection</b>	<b>Prohibition of expulsion on the ground of pregnancy</b>
<b>The Government's obligation to eliminate all forms of discrimination</b>	<b>Prohibition of withdrawal from school for purposes of marriage</b>
<b>Temporary special measures in favour of women</b>	<b>Elimination of discrimination in the field of education</b>
<b>Prohibition of discrimination against women in employment</b>	<b>Elimination of discrimination in reproductive health rights and services</b>
<b>Free choice of employment and profession</b>	<b>Right to marry</b>
<b>Maternity leave</b>	<b>Separation, divorce and annulment of marriage</b>
<b>Equal remuneration</b>	<b>Widows' rights</b>
<b>Right to inheritance</b>	<b>Special protection of elderly women</b>
<b>Right to positive cultural context</b>	<b>Special protection of women with disabilities</b>

It is however apparent from the above review of the Constitution as well as from the concluding observations and recommendations of the CEDAW Committee that the Act contains provisions which are not compatible with the Convention or falls short of addressing specific forms of women's rights.

The enactment of the Women's Act is the first step towards eliminating discrimination against women. The Government is obligated to eliminate all forms of discrimination against women under Section 14 of the Women's Act and through Section 2 (the interpretation section), discrimination is defined as "any distinction, exclusion or restriction or any differential treatment

based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life." This provision requires the Government to take affirmative steps to ensure, among other things, that the Act is fully implemented with a gender perspective in designing, implementing and monitoring of all policy actions and initiatives. While the Act's definition of discrimination is an adaptation of CEDAW's, the former needs to be interpreted in conjunction with the clawback clause contained in Section 33(5)(c) of the Constitution already discussed.

The provision on access to justice and equal protection before the law (Section 7) of the Women's Act, provides for access to justice and equal protection before the law. Section 7(2)(c) guarantees that women "shall be treated equally in all stages of the procedures in courts, tribunals and other judicial proceedings." Judicial practice and procedures in Cadi courts and the district tribunals, however, often deviate from the principle of equality and non-discrimination. In Cadi courts, the evidence of one male witness is equivalent to the evidence of two female witnesses. With the exception of district tribunals in Niamina East, Niamina Dankunku and Niamina West, where women are adjudicators, the remaining districts do not have experienced and competent women in Cadi and customary courts. In the three districts, bringing more women into the court system took place under the initiative of local chiefs, who saw the benefits of including women in making decisions on matters affecting women and their families and communities. In contrast, attempts by civil society organizations to promote and encourage the participation of women in adjudicatory panels of the district tribunals have yet to yield positive results due to a lack of acceptance of such roles for women within the sociocultural context of The Gambia.

Section 15 of the Act requires all public and private institutions to adopt temporary special measures to accelerate de facto equality between men and women. There is however need to amend this provision to extend this obligation to all areas and levels of public life and the private sector, with a specific quota of at least 30 per cent in all cases. Implementation of this commitment should therefore apply across the three arms of government: The National Assembly, the executive branch (including the Cabinet and ministries) and the judiciary as well as parastatals and the security forces. At the time of preparing this report, only 4 out of 21 members of the Cabinet and 5 out of 53 National Assembly members were women.

Except for FGM, the Women's Act does not contain any provisions prohibiting the practice of other harmful practices such as levirate marriage and unequal inheritance, although these practices are rooted in patriarchy and stifle the ability of women and girls to achieve their full potential.

Similar to Section 33(5)(c) of the Constitution, the Women's Act contains provisions which subject the rights of women to personal law. These include the right to health and health care (Section 29(1)); the right to choose a matrimonial home (Section 42); separation, divorce and annulment of marriage (Section 43(1)); widows' rights (Section 44); and the right to inheritance (Section 45).

In the distribution of property, under customary law, women are usually denied their share of inheritance (especially where land is involved) due to existing patrilineal land ownership systems. Consequently, the majority of land in The Gambia is owned by men, leaving women to rely on communal land for subsistence farming. Furthermore, inheritance is mostly governed by both sharia law and customary law. Under the former, daughters receive half of the share of their brothers (Quran 4:11). Because sharia law is mainly sourced from the Quran and the teachings of the Prophet Muhammad (Peace Be Upon Him), attempts to reform inheritance laws, if made, will likely face resistance and opposition from faith-based groups. In some instances, Muslim women living under customary law settings are completely deprived of the right to inherit under sharia. This has led such women to increasingly resort to Cadi courts for the distribution of estates, rather than district tribunals, where they are totally deprived of the right to inherit land. Such women who insist on their inheritance rights under sharia are frowned upon, and in some instances ostracized by male relatives.

In relation to distribution of matrimonial property upon divorce, Section 43(4) of the Women's Act provides that "in the cases of separation, divorce or annulment of marriage, a man and a woman have the right to equitable sharing of the joint property derived from the marriage." This is meant to prevent and address the usual practice of evicting women from their marital homes by husbands in situations of divorce. However, under customary law, the husband is deemed to own the matrimonial home and therefore decides whether the wife stays after separation, divorce or annulment of the marriage. In the distribution of property, the woman's contribution (monetary or equitable) to the acquisition of marital property is not given due consideration.

#### RECOMMENDATIONS:

- The Evidence Act, 1994 should be applied in civil cases in the Cadi courts to ensure equal treatment of women in judicial proceedings. This can be achieved through the amendment of Section (2) (a) and (b), which provides that the Act shall not apply in proceedings before the Cadi courts and the Cadi Appeals Panel. An alternative would be to ensure the full implementation of Section 1(3) of the Act, which empowers the Minister of Justice to “by Order published in the Gazette apply any provision, part or the whole of this Act to any of the proceedings referred to in subsection (2).”
- Similarly, the District Tribunal Act, 1933 should be amended to ensure mandatory equal representation of women as adjudicators. The Government of The Gambia should conduct civic education programmes to teach the populace about the positive effects of including women in these decision-making bodies.
- The Women’s Act should be amended to include provisions prohibiting levirate marriages, as well as provisions rendering it mandatory for all matters of inheritance affecting Muslim women to be handled by Cadi Courts instead of customary law courts as is practiced in some communities. This is the only way in which women can be guaranteed at least a right to their “fair” share of inheritance as enshrined in sharia law.
- The above should be accompanied by awareness-raising and training of Cadis on women’s rights. Ultimately, it would be important to codify and incorporate equal inheritance rights in a unified Family Code to ensure that all women benefit from the standards contained in CEDAW and the Maputo Protocol.
- Section 15 of the Women’s Act should be amended to specify the implementation of temporary special measures in all areas of the public life, including the private sector, with the introduction of a provision on a compulsory quota of at least 30 per cent for women at all levels of decision-making.
- Section 9 of the Women’s Act (prohibition of discrimination against women in employment) contains very detailed and progressive provisions pertinent to eliminating discrimination in employment and the workplace, in accordance with CEDAW and the Maputo Protocol. While these provisions require no reform or amendment, other laws that were enacted prior to the Women’s Act are yet to be reviewed and updated accordingly. Such laws must be reviewed and updated to conform to Section 9 of the Women’s Act.
- Section 43(4) of the Women’s Act must be amended to take into consideration the equitable principle of joint endeavour to acquire and develop property during marriage on the understanding of joint ownership in the event of dissolution of the marriage through death or divorce. The Act must also fully recognize women’s unpaid care work, which should not serve as a barrier to the right of women to benefit jointly or equitably from matrimonial property.
- All sections of the Women’s Act that are subject to personal law should be repealed in order to safeguard the right of women to be protected from discrimination. The alternative option would be to amend the sections by deleting the phrase “subject to personal law” from the text of each provision.

### The Children’s Act, 2005

The Children’s Act, 2005 is comprehensive legislation consisting of 242 sections and 18 parts. It regulates all legal matters relating to children in The Gambia and is described in its long title as:

*An Act to set out the rights and responsibilities of children, to consolidate the laws relating to children, to provide for the care, protection and maintenance of children, to establish a Children’s Court, to provide for a criminal justice system for children, and for connected matters.*

The Children's Act is in line with international norms and standards related to the protection and promotion of children as contained in instruments such as the CRC and ACRWC. Its passage was prompted by an urgent need to address child marriage and betrothal, and other forms of child exploitation and abuse. While the Act had originally made child marriage subject to any applicable personal law, this provision was amended in 2016 by criminalizing child marriage, with a penalty of up to 20 years imprisonment, in line with the recommendations of the CEDAW Committee's concluding observations to the combined fourth and fifth periodic reports of The Gambia (see Part I for the full text).

While Section 15 of the Children's Act affords children the right to parental property, this right is subject to applicable personal law, leaving children (particularly girls and children born out of wedlock) vulnerable to discrimination in matters of inheritance of parental property. Under sharia, children born out of wedlock are not entitled to parental property through whatever means. Section 19 of the Children's Act therefore guarantees the right of children to be protected from harmful social and customary practices, in particular, customs and practices that are discriminatory to the child on the grounds of sex or other status. While this is an essential provision, specific legal changes must be made to fully protect children, especially girls, from discrimination.

The Government has an obligation to give full effect to the CRC through necessary legislative, policy and

administrative measures (Article 4 of the CRC). The suggested reforms will however not be effective without public sensitization on the prohibition of harmful practices such as child marriage and FGM. The repeal of Section 33(5) (c) is therefore all the more necessary since it potentially excludes child marriage from the ambit of protection from discrimination. This should be accompanied by effective policies and monitoring to track the prevalence of child marriage in communities where it is practised.

#### RECOMMENDATIONS:

- The proposed repeal of Section 35(5)(c) of the Act will ensure the effective implementation of Section 19 of the Children's Act. This would include the express protection of the rights of children born out of wedlock to inherit parental property.
- Relatedly, the law must ensure mandatory handling of all matters of inheritance of Muslim children by Cadi courts instead of customary law courts.
- In addition to legal reforms, the Government must take steps to raise awareness on the scale and impact of child marriage on the rights of girls and women. It should institute adequate mechanisms for reporting cases of child marriage and take action on them. In doing so, it should protect the identities of persons who report cases, including by providing shelters for victims of child marriage who may become ostracized within their communities for reporting/seeking assistance.

### Sexual Offences Act, 2013

The Sexual Offences Act, 2013 was enacted to amend substantive laws and procedures related to the prosecution of rape and other sexual offences. The Act provides a broader definition of the offence of rape and increases the circumstances under which a person may be charged with it. An important innovation of the Act includes the abolition of the cautionary rule which negates the need for corroboration in the prosecution of sexual offences.

Despite being a progressive move, the Act does not contain any provisions prohibiting marital rape. Section 3(3) provides that "for the purposes of this section, rape shall not apply to married couples." This is contrary to

regional and global standards which relate to the protection of women from all forms of violence e.g., the CEDAW Committee's *General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19*; *United Nations General Assembly Resolution 48/104, Declaration on the Elimination of Violence against Women*; and Articles 3(4) and 4 of the Maputo Protocol.

Amendment of the section will likely be met with extreme backlash from sections of society who believe that the institution of marriage carries an implied consent to sex. This notion of marriage and women's rights within marriage stems from patriarchal attitudes

which can be changed only through awareness-raising programmes targeting all sections of society, including religious and traditional leaders who greatly influence social norms in The Gambia.

### Domestic Violence Act, 2013

In 2013, the National Assembly passed the first ever piece of legislation dealing with domestic violence in The Gambia. The purpose of the Act is to combat domestic violence and provide protection for victims of it, particularly women and children, and other related matters. The Act deals with all forms of violence within current or past relationships, including physical assault; sexual abuse; economic abuse; emotional, verbal or psychological abuse; and sexual harassment.

While the Act is generally compliant with global and regional norms and standards, Section 36 (settlement of matter out of court) extends to victims, the right to choose to settle domestic violence cases through alternative dispute resolution. This and other provisions in the Act signal women's agency and voice in the prosecution of domestic violence cases. This is crucial in a society

### Legal Aid Act, 2008

The Legal Aid Act established the National Agency for Legal Aid, the Government institution responsible for the delivery of legal aid to defined population groups. In The Gambia, legal aid is available to: persons charged with criminal offences where the penalty is death or life imprisonment (Section 30); in actions brought by or on behalf of a child in Children's Court; and in criminal and civil cases where the person requesting legal aid earns less than the official minimum wage. The provision of legal aid is in line with Article 8 of the Maputo Protocol, which requires States to take all appropriate measures to ensure "effective access by women to judicial and legal services, including legal aid." While the Act mentions the scope of legal assistance and the mode of application for legal aid, it does not provide for special measures to ensure that marginalized groups such as women and girls are sensitized on the provision of legal aid by the State.

#### RECOMMENDATIONS:

- Section 3(3) of the Sexual Offences Act should be amended to render rape in the context of marriage a criminal offense. This step should be accompanied by extensive awareness-raising among all sectors of society.

where women and girls, who are the most common victims of domestic violence, are rarely heard in the resolution of such issues. In doing so, it would also be important to ensure that women are able to exercise this right voluntarily, devoid of societal pressures and stigma associated with being a victim of domestic violence and its related consequences.

#### RECOMMENDATION:

- The Domestic Violence Act must be revised by the inclusion of a clause that enables courts to take steps to ensure that out of court settlements do not prejudice the complainant's right to secure a satisfactory outcome and to later pursue prosecution and protection as needed.

The requirement for provision of legal aid is also mentioned in Section 7 of the Women's Act, which stipulates that every woman is entitled to equality and justice before the law, and to equal protection of the law.

#### RECOMMENDATIONS:

- The National Agency for Legal Aid should be mandated to undertake national sensitization on the availability of legal aid, and how and where to obtain legal assistance, focusing especially on women and girls in rural communities.
- The Act should expressly stipulate the provision of legal aid for marginalized and excluded women and girls.
- The Act should also establish a gender unit within the National Agency for Legal Aid to assist women and girls who need legal support.

## Criminal Code, 1933

The Code governing criminal conduct in The Gambia came into force in 1934 and was revised in 2009. Currently, the United Nations Office on Drugs and Crime is supporting criminal justice and prison reform processes, with a first step being the review and redrafting of the Criminal Code and the Criminal Procedure Code. Other legislation related to criminal law and all subsidiary legislation relating to the two codes will also be reviewed and redrafted to improve the criminal justice system.

The provisions of the Criminal Code on abortion is an important gender consideration. Any attempt by a woman to procure her own abortion or to procure abortion by another person and the supply of drugs or instruments to procure abortion are all criminalized without exceptions under Sections 140, 141 and 142 of the Criminal Code. This means that even where carrying a pregnancy to term will have harmful effects on the woman, or in cases of rape or incest, the woman would be faced with criminal liability if she aborts the pregnancy. The liability also extends to any person who assists in procuring the abortion.

These provisions infringe on women's right to health and reproductive rights (Article 14 of the Maputo Protocol), which include the right to control fertility and

the right to decide whether to have children, the number of children and the spacing of the children. Article 14 further obliges States Parties to take appropriate measures to inter alia "protect the reproductive rights of women by authorizing medical 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 unborn child." The right to medical abortion is protected under Section 30(1) of the Women's Act, which gives women "the right to medical abortion, where the continued pregnancy endangers the life of the mother or the life of the foetus."

### RECOMMENDATIONS:

- The Government is obligated to repeal the provisions of sections 140, 141 and 142 of the Criminal Code in order to bring the law in conformity with the Maputo Protocol.
- At the barest minimum, the law should legally authorize medical abortions in cases of sexual assault, rape or incest, or where the continued pregnancy endangers the life of the mother or the mental and physical health of the mother or the unborn child.

## Tourism Offences Act, 2003

This Act defines offences which are tangential to the tourism sector. They include unlawful sexual advances, sexual abuse of a child, and procurement of a child for sex, child pornography, sexual exploitation of a child. All provisions are in line with those of international standards related to the protection of children, particularly girls, including those defined under the ACRWC and the CRC and its Optional Protocols."

The Act is however not aligned with other similar laws. For example, whereas Section 13, relating to the trafficking of a child, carries a penalty of five years imprisonment, the punishment for trafficking of persons under Section 28 of the Trafficking in Persons Act 2007 is presented as a fine of not less than 50,000 Dalasis (approximately USD 980) and not more than 500,000

Dalasis (approximately USD 9,800) in addition to imprisonment for a minimum of 15 years and a maximum of life imprisonment.

### RECOMMENDATION:

Section 13 of the Tourism Offences Act must be amended to ensure consistency with Section 28 of the Trafficking in Persons Act, which affords greater protection to women and girls against trafficking. In contrast with the Trafficking in Persons Act, the Tourism Offences Act fails to integrate comprehensive implementation arrangements in line with the CEDAW Committee's concluding observations and recommendations on trafficking and exploitation of prostitution (see Box 2 for further details).

## Trafficking in Persons Act, 2007

The Trafficking in Persons Act was enacted in 2007 in compliance with Article 6 of CEDAW and Article 4(2) (g) of the Maputo Protocol. The Act provides for the prosecution of perpetrators of trafficking in persons and the treatment of victims of trafficking. Section 45 of the Act places an obligation on State authorities to ensure that victims of trafficking are not “subjected to discriminatory treatment in practice on account of race, colour, gender, sexual orientation, age, language, religion, political or other opinion, cultural beliefs or practices, national, ethnic or social origin, property, birth or other status, including his or her status as a victim of trafficking or having worked in the sex industry.”

### RECOMMENDATIONS:

- There are no provisions in the Trafficking Act that require amendment or repeal. The Government of The Gambia however needs to create the means for implementing the provisions of the Act effectively, particularly with regards to early identification of victims of trafficking, and free legal and psycho-social support.
- The recommendations of the CEDAW Committee on The Gambia's combined fourth and fifth periodic reports, in relation to trafficking and the exploitation of prostitution, should be implemented (see Box 2 for full details).

### BOX 2:

#### CONCLUDING OBSERVATIONS AND RECOMMENDATIONS OF THE CEDAW COMMITTEE IN RELATION TO TRAFFICKING AND THE EXPLOITATION OF PROSTITUTION

24. The Committee notes with concern that there have been no prosecutions under the Trafficking in Persons Act (2007) and that only one investigation is currently under way. It is also concerned about the lack of information on the number of victims of trafficking and on the measures taken to address exploitation of prostitution of women and girls and child sex tourism, as well as about the lack of programmes to support women wishing to leave prostitution.

25. The Committee recommends that the State party: (a) conduct a study to investigate the extent and root causes of trafficking in women and girls and exploitation of prostitution; (b) implement the Trafficking in Persons Act effectively, including by allocating adequate resources, ensure early identification and referral of victims of trafficking, prosecute and adequately punish perpetrators, and provide free legal and psychological support and compensation to victims of trafficking; (c) adopt measures to address exploitation of women and girls in prostitution and child sex tourism, and provide assistance and rehabilitation to victims, as well as economic alternatives to prostitution.

Source: Committee on the Elimination of Discrimination against Women, Concluding Observations and Recommendations on the combined fourth and fifth periodic reports of The Gambia, 28 July 2015, CEDAW/C/GMB/CO/4-5.

## Skin Bleaching (Prohibition) Act (Decree No. 65 of 1995)

The Skin Bleaching (Prohibition) Act is a piece of concise legislation prohibiting the use, sale, importation and purchase of skin-bleaching products and was enacted during the transition period after the 1994 military takeover by the Armed Force Provisional Ruling Council with the objective of curbing perceived high rates of skin bleaching among women.

While the intention was to protect people from the long-term effects of the practice and despite being drafted in gender neutral language, the Act is inherently discriminatory as the impact is felt primarily by women, as the primary users of such products. It is also questionable whether the State has the right to interfere with what people do to their bodies, particularly

as long as third parties are not harmed in the process. In addition, The Gambia has a responsibility under Article 3(2) of the Maputo Protocol to ensure that every woman has the right to respect as a person and to the free development of her personality. The sanctioning of a woman for developing her personality in the manner that pleases her amounts to an infringement of this right.

## Nationality and Citizenship Act, 1965

The Gambia Nationality and Citizenship Act is derived from Section 15 of the Constitution and regulates the acquisition of citizenship by registration, naturalization, and renunciation as well as deprivation of citizenship. Section 9 of the Act deals with renunciation of citizenship by reason of dual citizenship or nationality and provides the conditions under which a Gambian may renounce his or her citizenship. It provides under Subsection 3 that “a woman who has been married shall be deemed to be of full age.” This assumes that all women who are or were married are above the legal age, therefore implying that where a woman is stated to have been married, regard will not be given to her actual age.

Renunciation of citizenship is a right that is only accorded to Gambians of full age and capacity by virtue of Section 9 (1) of The Gambia Nationality and Citizenship Act. Therefore, the Government has the responsibility to ensure that persons seeking to make that declaration fulfil the requirement of full age and capacity, irrespective

## Prisons Act, 1953

The Prisons Act deals with the custody of prisoners and regulation of prisons. The Act contains provisions dealing with different categories of prisoners as well as issues of custody and release. It includes subsidiary legislation the Prisons Act–Subsidiary Legislation, 1953 which provides procedural details on the maintenance of prisoners.<sup>12</sup> The Act was revised in 2009 as part of an exercise that aimed to integrate gender-sensitive language into all the laws of The Gambia. Therefore, the pronoun “he” was replaced with “he or she” wherever it occurred in all laws of The Gambia. Despite the 2009 law revision exercise, the Act does not contain sufficient provisions on women prisoners. Its shortcomings include the following:

### RECOMMENDATION:

- The Skin Bleaching (Prohibition) Act should be repealed in its entirety.

of sex. Assessing the declarations of men and women on the basis of different standards is discriminatory against women, especially in a country where women or girls are more likely to be married under the legal age of adulthood, which is 18 years. The assumption that a woman who is married is of full adult age disregards the existence of child marriage, and the State obligation to protect women and girls from the practice (see Articles 2 and 5 of CEDAW and Article 2 of the Maputo Protocol). The State has a responsibility to ensure that all persons seeking to make a declaration of renunciation of citizenship are of full age and capacity, as required by Section 9(1), irrespective of their marital status.

### RECOMMENDATION:

- Section 9(3) of the Nationality and Citizenship Act should be revised by deleting the phrase “a woman who has been married shall be deemed to be of full age.”

1. With the exception of Section 50 of the Prisons Act and Regulations 37 and 89 of the Prisons Act–Subsidiary Legislation which deal with labour/employment for women prisoners, the protection of pregnant women from the death penalty and similar matters, there are no other provisions dealing with issues that are specific to women prisoners, such as nursing mothers and mothers with children in prison and pregnancy.
2. The Act does not contain any provisions on the manner in which pregnant women or nursing mothers should be kept in custody. This does not fully conform

to the provisions of Article 24 of the Maputo Protocol, which requires States Parties to “ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.”

3. In addition, in 2010, the UN General Assembly approved and adopted the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), which are intended to improve the treatment of women prisoners and respond to other issues not sufficiently covered in the Standard Minimum Rules for the Treatment of Prisoners (1955). As a Member

State of the United Nations, The Gambia has an obligation to review its legislation regarding the detention of women prisoners and amend relevant provisions in line with the Maputo Protocol and Bangkok Rules.

#### **RECOMMENDATION:**

- Women in detention must be provided a conducive prison environment through inter alia an enabling legal environment that is respectful of women’s rights. The Prisons Act and its subsidiary legislation must therefore be revised to ensure that their provisions are in line with the Bangkok Rules and Maputo Protocol.

### **Lunatics’ Detention Act, 1917**

While the National Health Policy 2012-2020 serves as the framework for addressing mental illness in The Gambia, the Lunatics’ Detention Act provides for the custody and detention of persons who suffer this disability. The term “lunatic” is not consistent with terminology used the Convention on the Rights of Persons with Disabilities. In addition to being outdated, the legislation does not protect the human rights of mentally ill persons.

#### **RECOMMENDATIONS:**

The Lunatics’ Detention Act, 1917 should be repealed and replaced with new legislation dealing with mental illnesses as recommended by the National Health Policy 2012-2020. Therefore:

- Current efforts by the Government to enact a Mental Health Act based on a draft bill should be expedited.

- The draft bill should take into consideration principles of non-discrimination as outlined in CEDAW and the Maputo Protocol, and the Convention on the Rights of Persons with Disabilities, particularly Articles 5, 6 and 17. Under the latter Convention, mental illness is regarded as a disability by virtue of Article 1, which states that, “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” Therefore, the draft bill should replace “lunatic” with “person with a mental disability” in line with the language of the Convention on the Rights of Persons with Disabilities.

### **Births, Deaths and Marriages Registration Act, 1886**

This Act provides for the registration of births, deaths and marriages, and although amended in 1974, it retains a number of discriminatory provisions which require deletion and amendment.

Sections 16 and 17 provide for the registration of birth by the father of a child born in wedlock, and by the mother of the child, respectively. According to the Act, a mother may only register the birth of her child where the father

is dead or absent from the place of birth, at the time of the birth. This contravenes the general principles of equality in both CEDAW and the Maputo Protocol, as well as the right to enjoy equal rights as equal partners in marriage, as provided for in Article 6 of the Maputo Protocol and Article 16 of CEDAW. Both parents should have an equal right to register the births of their children, whether the other parent is present or not.

The Act also contains distinct requirements for the registration of children born in wedlock and children born outside of wedlock. This distinction is discriminatory and violates the provisions of the CRC and ACRWC (see

Box 3), and by implication, the Children's Act, 2005, which provides for the right of every child to be protected from discrimination irrespective of the circumstances of their birth.

### BOX 3:

#### PROVISIONS OF THE CRC AND ACRWC

**Article 2(1) of the Convention on the Rights of the Child:** States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

**Article 3 of the ACRWC:** Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

#### RECOMMENDATIONS:

- Sections 16 and 17 of the Births, Deaths and Marriages Registration Act should be amended to allow for the registration of the birth of a child by either the mother or the father, without attaching any preconditions on the status of the mother.
- All hospitals should have personnel who are tasked with registering births immediately after birth, to ensure that such records are collected and kept in an efficient and timely manner.

### Civil Marriage Act, 1938

Notwithstanding the prohibition of child marriage by the Children's Act (Amendment) 2016, the Civil Marriages Act still allows for the parents of a child to give consent to the marriage of unmarried minors. Even though the title of the provision uses the generic term "minor", girls are the most common victims of child marriages in The Gambia and are therefore disproportionately impacted by this law. Section 8 of the Act provides as follows:

*The father, if living, of any party to an intended marriage under eighteen years of age, the party not being a widower or widow, or, if the father is dead or unable for any reason to give such consent, the mother of the party, or if both parents are dead or unable for any reason to give the consent, then the guardian or guardians of the party, if any, will have authority to give consent to the intended marriage, and the consent is hereby required*

*for the marriage of the party unless there is no person authorized to give the consent.*

According to the Children's Act (Amendment) 2016 however, "a person below the age of 18 cannot marry in The Gambia, irrespective of personal law." This is in line with Article 6 of the Maputo Protocol, which provides that "the minimum age of marriage for women shall be 18 years."

#### RECOMMENDATION:

Section 8 of the Civil Marriages Act must be deleted and replaced with a section specifying 18 years as the minimum age of marriage without exception in The Gambia. This will also ensure consistency with the Children's Act.

## Christian Marriage Act, 1862

The Christian Marriage Act provides for the solemnization of Christian marriages in The Gambia. The Act has not undergone any amendment since 1957. As a result, it still contains provisions that can directly and indirectly harm women and girls. Although addressing separate issues, Sections 10, 11 and 12 of the Act indirectly and directly deal with the requirement of consent of the parent or guardian where one of the parties to an intended marriage is under the age of 18 years. Section 11 of the Act is identical to Section 8 of the Civil Marriages Act discussed above.

In addition, the Christian Marriages Act does not contain provisions protecting a women's right to inheritance as a man has a right to will his property as he pleases. This means that there are no remedies in situations where a man completely deprives his wife or children of his property upon his death. The lack of a provision in the Christian Marriage Act prohibiting a man from depriving his wife and children of a specified portion of his estate contravenes the Women's Act, which although subject to personal law, as noted above, does guarantee a woman's right to inheritance.

By way of example, Section 13(1) of the Wills Act, 1971 (Act 360) of Ghana provides for reasonable provision out of the estate of a deceased person for a defined class of persons. The section provides as follows:

*If upon application being made, not later than three years from the date upon which probate of the will is granted, the High Court is of the opinion that a testator has not made reasonable provision whether during his lifetime or by his will for the maintenance of any father mother, spouse or child under 18 years of age of the testator, and that hardship will thereby be caused, the High Court may, taking account of all relevant circumstances, notwithstanding the provisions of the will, make reasonable provision for the needs of such father mother, spouse or child out of the estate of the deceased. (2) Without prejudice to the generality of subsection (1), such reasonable provision may include: (a) payment of a lump sum, whether immediate or deferred, or grant of an annuity or series of payments; (b) grant of an estate or interest in immovable property for life or any lesser period.*

### RECOMMENDATIONS:

- Repeal Sections 10, 11 and 12 of the Christian Marriages Act to remove any justification for child marriage.
- Amend the Act by including a provision that protects women and children from deprivation particularly when they have been excluded from the testamentary disposition of a husband and father.

## Married Women's Property Act, 1885

Under Article 6(1)(g) of the Maputo Protocol, "during her marriage, a woman shall have the right to acquire her own property and to administrate and manage it freely." Furthermore, "in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage" (Article 7). This obligates the State to guarantee a woman's right to property as a means of achieving sustainable development. The same rights are guaranteed under Article 16(1)(h) of CEDAW. In The Gambia, the right of women to own and maintain property belonging to them either before or after marriage has been protected since 1885 by the Married Women's Property Act. The Act upholds the rights to own property, enter into contracts, be sued

jointly and severally in respect of property, and to be held criminally liable for actions taken in respect of property, among other elements. Although enacted in 1885, the Act conforms to the principal modern norms of property ownership.

The Act however uses the term *feme sole*, a Norman French term to describe a woman who has never been married, or a woman who is divorced or widowed, as well as "a woman whose legal subordination to her husband had been invalidated by a trust, a prenuptial agreement, or a judicial decision."<sup>13</sup> The term is not only archaic, but also sexist in connotation, as it reinforces the inferiority status of women in society. In its attempts to eliminate discrimination against women, The Gambia has a commitment to take steps to modify all practices

based on the idea of the inferiority or superiority of the sexes (see Article 5 of CEDAW and Article 2 of the Maputo Protocol). This includes eliminating language that infers the inferiority of women.

### Muslim Marriage and Divorce Act, 1941

The Muslim Marriage and Divorce Act deals primarily with the registration of marriages and divorces in accordance with sharia law. Under the Act, both men and women are permitted to register marriages and divorces, without any preferences stated over which of the spouses commences the process.

### Matrimonial Causes Act, 1986

The Matrimonial Causes Act deals with marital issues such as divorce petitions, annulments, child custody and maintenance. The provisions of the Act are extensive and generally provide for equal protection of both spouses in matrimonial causes, in compliance with Article 7 of the Maputo Protocol. According to the Act, divorce may be granted upon proof by the petitioner that the marriage has broken down beyond reconciliation. The conditions for proof of breakdown of marriage range from adultery, desertion and separation to cases where the petitioner cannot be reasonably expected to live with the respondent (Section 4).

There is no mention of domestic violence as a ground for granting a divorce petition, however, although it may

#### RECOMMENDATION:

The term *feme solo* in the Married Women's Property Act must be replaced with "unmarried women" or a more acceptable term used to refer to women who are not married.

#### RECOMMENDATION:

- The Muslim Marriage and Divorce Act should be maintained without any amendments or repeals. The focus should be on effective implementation and enforcement.

be implied that domestic violence could be a ground in cases where the petitioner cannot be reasonably expected to live with the respondent. Given the risks that domestic violence pose to women, it would be critical for the Act to include acts such as a specific ground for leaving an abusive relationship through divorce. This is a necessary step that the State needs to take, as required by Article 4 of the Maputo Protocol.

#### RECOMMENDATION:

The Matrimonial Causes Act should be amended to include a clause that specifically allows a party to raise domestic violence (including marital rape) as a ground for divorce.

### Maintenance Orders (Facilities for Enforcement) Act, 1921

This Act provides for the processing of maintenance orders made in the United Kingdom and Northern Ireland against persons ordinarily resident in The Gambia, or provisional maintenance orders made in The Gambia against persons residing in the United Kingdom. The Act defines maintenance orders as an order for the periodic financial contributions towards the maintenance of a wife or other dependents. The Act covers all the basic requirements of enforcing maintenance orders against persons residing in the two countries. While its provisions

are equally applicable to both men and women, the restriction to specific jurisdictions could limit the ability of women and children in other jurisdictions to seek the same protections afforded by the Act.

#### RECOMMENDATION:

The Maintenance Orders (Facilities for Enforcement) Act should extend to all jurisdictions through the insertion of an appropriate provision.

## The Labour Act, 2007

The Labour Act provides for the administration, recruitment and hiring of labour, protection of wages and other matters. The Act consolidates and harmonizes all labour laws applicable to The Gambia prior to its enactment. Section 83 of the Act prohibits the dismissal or disciplinary action against women due to pregnancy or having taken maternity leave. It came into force before the Women's Act. As a result, there are inconsistencies between the two that should be resolved in favour of the Women's Act, which domesticates CEDAW and the Maputo Protocol. One of these inconsistencies is reflected in the contradictory provisions on maternity leave in the two Acts.

- The Women's Act provides for six months of maternity leave for all pregnant women (Section 20).
- The Labour Act provides 12 weeks of maternity leave (Section 71(2)). According to Section 71(1) of the Labour Act, maternity leave is granted on condition that the female employee has "two years continuous service with the same employer" or that her "period of service with the same employer has been interrupted by one or more periods, none of which exceeds seven months and who has in aggregate not less than eighteen months service with the same employer."

CEDAW and the Maputo Protocol protect pregnant women's unconditional entitlement to maternity leave. In The Gambia, the Women's Act is the law regulating the rights of women. As a result, its provisions on any aspect of women's rights supersede those in other legislation. Based on this, the provision on maternity leave in the Labour Act should be amended to conform to the provision in the Women's Act.

Furthermore, The Gambia is yet to ratify the ILO's Maternity Protection Convention, 2000 (No. 183). This Convention provides that as determined by national law, women are entitled to maternity leave of not less than 14 weeks. Therefore, in addition to rectifying the inconsistencies between the Labour Act and the Women's Act, the Government of The Gambia should ratify, without reservations, the Maternity Protection Convention. This would be essential for protecting women from employers who use maternity as a basis for discriminating against female employees.

Another inconsistency is found in the State's obligation to protect women's right to equal remuneration, including benefits. The Labour Act is silent on guaranteeing women's rights to equal remuneration for work of equal value. Equal remuneration is covered under the Equal Remuneration Convention, 1951 (No. 100), which The Gambia ratified in September 2000, seven years before the enactment of the Labour Act. Even though the Act uses the generic term "employee" in the section dealing with payment of wages (Section 76), the Maputo Protocol (Article 13 (b)) and CEDAW (Article 11(1)(b)) require specific provisions on the right of women to equal remuneration for work of equal value. (Section 18 of the Women's Act). Therefore, the Labour Act should be amended to create a provision that expressly protects this right.

The Discrimination (Employment and Occupation) Convention, 1958 (No. 111) furthermore obligates States Parties to "pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof" (Article 2). Although this Convention was ratified by The Gambia in September 2000, the Labour Act does not contain any specific provisions prohibiting discrimination against employees, especially women as is required by Article 11 of CEDAW. A more recent ILO Convention, the Violence and Harassment Convention, 2019 (No. 190) aims to secure "a general environment of zero tolerance to violence and harassment in order to facilitate the prevention of such behaviours and practices, and that all actors in the world of work must refrain from, prevent and address violence and harassment."<sup>14</sup> This Convention is yet to be ratified by The Gambia.

In The Gambia, women comprise a large share of domestic workers. They are marginalized, excluded and vulnerable to various forms of abuse and violence committed by employers, and often suffer in silence due to their socioeconomic status. The Gambia should provide equal protection to women against all forms of violence, including sexual and verbal violence based on international standards e.g. Article 3 of the Maputo Protocol. The Domestic Violence Act recognizes violence against domestic workers as domestic violence and

provides for penalties against acts or omissions that amount to violence committed against them (see Part II of the Domestic Violence Act).

**RECOMMENDATIONS:**

- The provision on maternity leave in the Labour Act should be amended to ensure consistency with the Women's Act.
- The Government should ratify all outstanding ILO conventions without reservations and ensure that the Labour Act fully domesticates relevant ILO conventions through a comprehensive revision.
- The Gambia is yet to ratify 68 ILO conventions, of which the following are most relevant to this report: Employment Policy Convention, 1964 (No. 122); Workers with Family Responsibilities Convention, 1981 (No. 156); Maternity Protection Convention, 2000 (No. 183); Domestic Workers Convention, 2011 (No. 189); and Violence and Harassment Convention, 2019 (No. 190).

These conventions are key to eliminating discrimination against women in employment, with an emphasis on promoting full, productive and free choice of employment for men and women; providing protection for all workers with family responsibilities; protecting all employed women; and effectively promoting and protecting the human rights of all domestic workers.

The failure to ratify and implement these conventions can be directly linked to concerns raised by the CEDAW Committee, particularly in relation to the lack of gender equality, the low participation of women in the formal sector, the gender wage gap and the absence of legislation criminalizing sexual harassment in the workplace. Ratifying these conventions and domesticating them in national legal frameworks would be essential steps towards fully and comprehensively addressing the employment and maternity rights of women in The Gambia.

## The Sharia Law Recognition Act, 1905

This Act recognizes the application of sharia law in the determination of the validity of marriages between Muslim parties to a marriage and confers on Muslim marriages the same status as those contracted under the Christian Marriage Act (Section 3). This ensures that Muslim women are not discriminated against on the basis of religious affiliation. It also establishes Cadi courts and gives them jurisdiction (Section 7) to handle “all causes and matters, contentious or uncontentious, between or exclusively affecting Muslims, relating to marriage, divorce and inheritance” as provided for under Section 7 of the Constitution. The Act therefore ensures that women have equal access to justice in the Cadi courts in matters relating

to marriage, divorce and inheritance. As discussed above, however, sharia law principles remain inherently discriminatory towards women and as such, the Act will require review.

**RECOMMENDATION:**

The Sharia Law Recognition Act will benefit from the repeal of Section 33 (5) (c) of the Constitution which, as mentioned earlier, currently hinders the application of gender equality principles in matters of personal law. Once this repeal takes place, the law will need to be revised to take account of the new provisions of the Constitution.

## Social Security and Housing Finance Corporation Act, 1981

This Act establishes the Social Security and Housing Finance Corporation and confers a mandate to manage and administer social security funds. The Act is divided into 10 parts dealing with contributions to the social security fund scheme, registration of contributors, the housing finance fund and other administrative matters.

It contains general provisions on the proportion of contributions to be made by employers and employees, as well as contributions of self-employed persons. The law provides that men and women are equally entitled to benefit from the social security fund and housing fund. While it would seem that the Act may not require

any reforms or amendments, a pertinent gap relates to the fact that the Government does not recognize and accord women any benefits for unpaid care work. This is an area that needs review with provisions made for benefits and social security schemes for women as caregivers and homemakers.

### Forced Labour Act, 1934

This Act provides for the prohibition of forced labour, except under clearly stated circumstances found in Sections 6 and 7. The provisions of the Act apply universally to men and women, and therefore do not specifically protect vulnerable women and girls. The act of forced labour is governed by Article 1 of the Forced Labour Convention, 1930 (No.29) which states as follows:

1. Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.
2. With a view to this complete suppression, recourse to forced or compulsory labour may be had, during the transitional period, for public purposes only and as an exceptional measure, subject to the conditions and guarantees hereinafter provided.

#### RECOMMENDATION:

The Social Security and Housing Finance Corporation Act should be amended to recognize unpaid care work, by making provision for social security schemes for family members who spend significant time in diverse forms of caregiving.

3. At the expiration of a period of five years after the coming into force of this Convention, and when the Governing Body of the International Labour Office prepares the report provided for in Article 31 below, the said Governing Body shall consider the possibility of the suppression of forced or compulsory labour in all its forms without a further transitional period and the desirability of placing this question on the agenda of the Conference.

Since the Convention clearly suppresses the use of forced labour in all its forms, legislation on such an act is demonstrably outdated and therefore unnecessary.

#### RECOMMENDATIONS:

- In the light of international standards, forced labour can no longer be justified and in that context, the Forced Labour Act must be repealed in its entirety.

### Basic and Secondary Education Act, 2018 and Education Regulations, 1963

The Basic and Secondary Education Act deals with matters of administration, management and development of educational services, registration of teachers and the monitoring of schools. The Education Regulations (subsidiary legislation to the Act) deal with admissions, the general welfare of pupils, and the conduct and affairs of teachers. Section 8 of the Regulations provides that “a child shall not be refused admission to any school solely on account of his or her religious creed, race or class.” The regulations also deal with the qualifications of teachers and disciplinary measures.

The regulations however do not take into account the reality that girls are most at risk of being denied an education due to factors such as early marriage, FGM

and poverty. They also do not contain any provisions on how to respond to occurrences of sexual harassment committed by teachers against fellow staff and students, including where such situations lead to pregnancy.

#### RECOMMENDATIONS:

- Amend Section 8 of the Education Regulations by including sex as a ground on which a person should not be excluded from the education system. Based on the disproportionate impact of poverty, early marriage, FGM and other harmful practices on girls on school going age, the term “sex” should be included in existing categories that are protected from discrimination, as means of reinforcing

education as a human right for all. This would be in line with Articles 10 and 12 of CEDAW and the Maputo Protocol, respectively, and by extension, all domestic and international instruments that reinforce Education for All.

- The Minister responsible for the administration of this Act should also take steps to revise existing

regulations to address sexual harassment in schools and protect both teachers and students. A sexual harassment policy should be designed to cover all settings, including schools and workplaces. The Regulations and proposed policy should integrate the special needs of girls and boys across the life cycle and should convey the goal of creating “child and teacher friendly environments.”

### Food Act, 2005 and Breastfeeding Promotion Regulations, 2006

The Food Act regulates the production, manufacture, sale, distribution, import and export of food. The Breastfeeding Promotion Regulations contain strict guidelines on the advertisement and sale of infant formula and obligates merchants who deal in such products to provide proof of the benefits of their products over breastfeeding to customer. They also require persons producing material and information on breastfeeding to clearly explain the benefits and superiority of breastfeeding, as well as a recommended duration of six months exclusive breastfeeding from

birth to consumers. These provisions are geared towards strengthening postnatal health and nutritional services, as required by Article 14 of the Maputo Protocol and Article 12 of CEDAW.

#### RECOMMENDATION

The Breastfeeding Promotion Regulations should be maintained in the present form with a focus on implementation in order to protect women and their children during the postnatal period.

### Public Service Regulations and General Orders of the Civil Service, 2013

The General Orders and the Public Service Regulations apply to all public officers and create the system under which they are engaged and employed. The General Orders deal with a wide range of issues, including a guaranteed period of six-month maternity leave. The Orders and Regulations reflect the different social contexts of employees by urging employees to “deal fairly, professionally and equitably with other employees, irrespective of race, gender, ethnic or social origin, colour, age, disability, religion, political persuasion, conscience, belief, culture or language.”

The public service’s stance on discrimination against women could however be stated in more explicit terms by adopting the definition of discrimination that is prescribed by CEDAW. In addition, there is no sexual harassment policy in an environment where most senior positions are held by men and women mostly hold junior and secretarial positions. In the absence of such a policy and appropriate reporting mechanisms, women will remain at risk of abuse and harassment in environments in which they wield less influence and are less visible in decision-making.

Furthermore, the General Orders and the Public Service Regulations do not contain any provisions on implementing and enforcing temporary measures to accelerate gender equality in The Gambia’s public service. Since women are entitled to equal access to employment and all its ensuing benefits, temporary special measures are needed to level the playing field and should therefore be reflected in the Regulations and subsequently implemented to increase women’s representation in the civil service, including in decision-making positions.

#### RECOMMENDATIONS:

- A sexual harassment policy should be adopted, with provisions for the protection of female public sector workers, and sanctions for harmful and stereotypical attitudes and practices.
- The proposed policy should be disseminated among all staff of the public service and measures put in place to monitor its implementation and measure its impact.

- The General Orders and the Public Service Regulations should be revised to include provisions that expressly prohibit direct and indirect discrimination against women in the public service.
- The General Orders and the Public Service Regulations should be revised to also include provisions on temporary special measures to increase women's representation in decision-making positions within the public service.
- As previously noted, the Government of The Gambia must also take steps to ratify ILO Convention on Violence and Harassment, 2019 (No.190).



# 3

PART 3.

**THE ROLE OF  
THE JUDICIARY IN  
THE ENFORCEMENT  
OF GENDER EQUALITY  
NORMS AND STANDARDS**

## PART III:

# THE ROLE OF THE JUDICIARY IN THE ENFORCEMENT OF GENDER EQUALITY NORMS AND STANDARDS

## Introduction

The courts play a vital role in the enforcement of gender equality principles and standards contained in international, regional and national commitments. In The Gambia, judicial protection of the citizenry is mandated by both informal (e.g., district tribunals) and formal courts (common law and Cadi courts). As previously stated, the district tribunals and Cadi courts have limited jurisdiction, while common law courts possess wider jurisdiction and consequently play a broader role in the protection of justiciable rights. The Constitution and the Women's Act guarantee access to justice for women, thereby protecting their right to seek redress for violations of their rights in the courts. This right has been

exercised in many instances in the Cadi courts in cases of marriage, divorce and inheritance. Despite the principles of sharia law related to these issues being discriminatory towards women, the Cadi courts ensure that women receive a “fair share” in their claims. Although not what is preferred in terms of gender equality and equal access, the Cadi courts are more progressive in according women remedies in cases where they would be denied such rights under customary law. For instance, Cadi courts ensure that in cases of divorce, the husband is legally enjoined to provide accommodation and maintenance for his children.<sup>15</sup>

## Examples of case law where the Cadi courts are courts of first instance

Judicial precedent in favour of gender equality has not been consistent in The Gambia. For example, the case of *Ebrima D.M. Jagne v. Mass Jagne, Yassin Jagne and the Attorney General Civil Appeal No. GCA 005/2015* (unreported) was initially heard by a Cadi court. The parties at the time were *Mustapha Jagne v. Aji Haddy Njie, Aji Arret Cham and Aji Kombah Jagne in the matter of the estate of Alhaji Dodou Jagne*. During the trial, the Cadi panel deliberated extensively on the legitimacy of the appellant's birth and declared him “illegitimate”, therefore disqualifying him as a beneficiary of the estate of his

father. These disclosures violated privacy rights and caused the mother of the appellant embarrassment in court. A deed of gift is the only instrument through which male and female children can benefit from the properties of their parents without any need for recourse to potentially discriminatory rules of inheritance. However, in addition to delving into the circumstances surrounding the birth of the appellant, the Cadi court acted *ultra vires* by declaring that the assignment of property by the deceased to the appellant by way of a gift was null and void without giving him an opportunity to be heard.

The decision of the Cadi court was reversed by the Court of Appeal which held that the Cadi court exceeded its jurisdiction by adjudicating on the validity of the deed of gift executed in accordance with the general law. This outcome demonstrates the necessity of putting in place adequate mechanisms to monitor all Cadi courts.

Despite this decision, there have been additional attempts by Cadi courts and even common law courts to interfere with valid transfers of property. An example is the case of *Alieu Garba v. Fatou Jaiteh and Others* (unreported), where despite the High Court holding that the gifts were valid in accordance with existing law, it referenced sharia law principles relating to the equality of gifts to beneficiaries, and ordered the Cadi court to adjudicate upon the validity of a gift to a daughter of a deceased woman.

Judicial enforcement of the Women's Act has similarly been inconsistent in common law courts. The decision of the Supreme Court in the case of *Dawda Jawara v. Matty Faye SC CA 023/2016* (unreported) involved the equitable distribution of matrimonial property based on Section 43(4) of the Women's Act. In ruling in favour of a divorced woman, Matty Faye, the trial court ordered that "Matty Faye has an equitable share in the Respondent's property...to the value of D152, 773.00 being half the value of the extensions and renovations carried out on the property by the Applicant."

On appeal, the Court of Appeal held that the parties were jointly entitled to the property on a 50-50 share ownership basis or in equal shares. The Supreme Court however set aside the decision of the Court of Appeal and awarded the

respondent 305,546 Dalasis (approximately USD 6,000) as the full amount she had proved as expenses due to her in the trial court. This decision is based on the premise that the property was acquired prior to the marriage of the appellant and the respondent. The property was therefore not considered jointly owned, despite the contributions made toward the completion of the unfinished building as well as extensions and renovations of the property by the respondent, Matty Faye. This decision of the Supreme Court failed to take into consideration the following issues:

1. The equitable and matrimonial law principle of joint and common endeavour on the part of the parties to develop the property on the understanding that it was matrimonial property for the benefit of the marriage, irrespective of the date of initial acquisition;
  2. Contributions that parties make to marital property should take into account the economic value of their contribution over time;
  3. In the absence of a financial contribution, clear evidence of caregiving roles and other forms of unpaid care work should be factored into quantifying shares in matrimonial property; and
- Similarly, in situations where a man had not been engaged in any gainful employment for the best part of the marriage, and the woman was the main breadwinner of the family, her contributions towards the upkeep of the family should be factored into quantifying her share of matrimonial property.

This case demonstrates the need to sensitize the judiciary on gender equality standards and principles and to further apply these in the interpretation and application of the law.

## Examples of case law where the common law courts are courts of first instance

As previously stated, common law courts tend to be vested with broader jurisdiction in contrast to Cadi courts. The former play a substantive role in the administration of justice, especially in the interpretation of statutory provisions. This means they have a responsibility to ensure that the interpretation of statutory provisions do not discriminate against women and girls or impede their socioeconomic advancement. The

Supreme Court decision in the *Matty Faye* case above is an illustration of how restrictive interpretations of statutes can discriminate against a woman, despite the legislative improvements in the Women's Act.

*Isatou Secka v. Susan Badgie* (2014-2015) GSCLR. P102 is another Supreme Court decision that had a discriminatory result. In this case, the respondent, Susan Badgie,

and Ebrima Badjie (deceased) contracted a civil marriage on 4 April 1995 under the Civil Marriage Act 1938. During the marriage, Ebrima contracted a Muslim marriage with Isatou (the appellant) in a mosque under the Muslim Marriage and Divorce Act 1941 Cap 42:01 Vol. 7 Laws of The Gambia 2009. Ebrima was a Muslim at the time he contracted both marriages. The suit was filed through an originating summons at the High Court of The Gambia. Without advancing any reasoning or supporting precedent in support of its decision, the trial judge held that “the marriage between the respondent (Isatou Secka) and Ebrima Badjie was not void, but voidable at the option of the applicant.”

On appeal, the Court of Appeal held that “the purported marriage of the late Ebrima Badjie to Isatou Badjie (Appellant) which was contracted at a time when the same Ebrima Badjie was married to Susan Badgie, was considered void for want of capacity by Ebrima Badjie because he was already married to Susan Badgie under the Civil Marriage Act, 1938 Cap 42:01 Vol 7 Laws of The Gambia 2009.” This decision respected and recognized the legal effect of a monogamous marriage under the Civil Marriages Act, but was overturned by the Supreme Court, which held that:

*The right of the Muslim male to marry more than one wife under Sharia Law is unalterable. The Muslim male may decide not to exercise the right, but the right remains exercisable. Under a person’s Islamic personal law one can decide to marry and remain married to one wife whether or not the marriage contracted is a Muslim marriage or one contracted under the Civil Marriage Act, but that by itself does not mean that such a person had ‘opted’ out of his personal law and his decision is irreversible while he remains married to that one wife.*

The effect of this decision is that even where a Muslim man voluntarily chooses to contract a monogamous marriage, under the Civil Marriage Act, the courts are still required to uphold his right to marry more than one wife as permitted under sharia law. This decision effectively encourages a Muslim man to disregard the legal effect and consequences of a monogamous union under the Act, despite having the right to opt for a civil marriage, which by law is monogamous.

The decision of the Supreme Court puts women in a disadvantageous position, as there is no protection in

cases where a husband chooses to engage in “forum shopping” and seeks to exercise “marital rights” under different applicable systems of law. There is therefore no legal protection for women in cases of bigamy, except to file a complaint for possible prosecution of a bigamous husband. This position makes it feasible for men to deceive women with whom they knowingly contract a monogamous marriage in accordance with the law, by contracting another marriage under customary and/or sharia law. It reverses the protective intent of the Civil Marriages Act, the Christian Marriages Act and Women’s Act by infringing on the legal status and rights of a woman who contracts a monogamous marriage under these laws, where the male party to the union is a Muslim.

#### **RECOMMENDATION**

In view of the fact that precedents set at the level of the Supreme Court could have damaging effects on the rights of women, continuous legal training of judicial officers is needed at all levels, based on gender equality norms and standards and on the role that judicial activism can play in the full and effective realization of women’s rights.



# 4

PART 4.

**RECOMMENDATIONS OF  
THE LEGAL ANALYSIS BY  
ACTION AREAS**

## PART IV:

# RECOMMENDATIONS OF THE LEGAL ANALYSIS BY ACTION AREAS

## Introduction

The following Section regroups the recommended constitutional, legislative and policy actions to be taken. In the specific situation of constitutional and legislative reforms, the Section is organized by provisions

or statutes which need to be repealed or revised. Each law is arranged chronologically according to the year in which it was passed.

## Laws and Provisions to be Repealed

### 1. The Constitution of The Gambia, 1997

Section 33(5)(c) should be repealed as a basis for harmonizing national legislation – i.e., the Constitution, the Women’s Act, Children’s Act, sharia and customary law in relation to personal law with CEDAW, as recommended by the CEDAW Committee. The proposed repeal would ensure de jure equality between men and women in all areas of life and strengthen the implementation of national legislation.

### 2. Christian Marriage Act, 1862

Repeal Sections 10, 11 and 12 of the Christian Marriage Act to protect girls from marriage and prevent exceptions to 18 years as the statutory age of marriage. This will be in line with other laws such as the Children’s Act, the Women’s Act and the proposed repeal to the Civil Marriage Act (below).

### 3. Married Women’s Property Act, 1885

The term “feme sole” in the Married Women’s Property Act must be deleted and replaced with “unmarried women” or a more acceptable term used to refer to women who are not married.

### 4. Lunatics Detention Act, 1917

The Lunatics’ Detention Act, 1917 should be repealed and replaced with new legislation dealing with mental illnesses as recommended by the National Health Policy 2012-2020. The draft bill should take into consideration principles of non-discrimination as outlined in CEDAW and the Maputo Protocol, and the CRPD, particularly Articles 5, 6 and 17 and must be informed by rights-based language of these Conventions and other relevant international human rights instruments.

### 5. Criminal Code, 1933

- Repeal the provisions of Sections 140, 141 and 142 of the Criminal Code, and ensure uniformity and consistency with Section 30(1) of the Women’s Act in relation to abortion.
- Alternatively, amend the sections to authorize medical abortions in cases of sexual assault, rape or incest, or where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the unborn child.

## 6. Forced Labour Act, 1934

Repeal the Act in its entirety on the basis that forced labour has been abolished under international law.

## 7. Civil Marriage Act, 1938

Section 8 of the Civil Marriages Act must be repealed and replaced with a section stipulating 18 years as the minimum age of marriage in The Gambia. All exceptions to the legal age of marriage should be removed. This will be consistent with the provisions of the Children's Act and Women's Act.

## 8. The Gambia Nationality and Citizenship Act, 1965

Section 9(3) of the Nationality and Citizenship Act must be deleted on the basis that it sets different standards for men and women on renouncing citizenship. The phrase 'a woman who has been married shall be deemed to be of full age' should be deleted.

## 9. Skin Bleaching (Prohibition) Act (Decree No 65 of 1995)

The Skin Bleaching (Prohibition) Act must be repealed in its entirety as it is primarily targeted at women.

## 10. The Women's Act, 2010

- All sections of the Women's Act that are subject to personal law (Sections 21(1), 42, 43(1), 44 and 45) should be repealed to safeguard women's rights.
- Alternatively, amend the sections by deleting the phrase "subject to personal law" from the text of each provision.

# Laws and Provisions to be Revised/Amended

## 1. The Constitution of The Gambia, 1997

- To ensure that women are not deprived of their right to positive cultural context, as enshrined in the Maputo Protocol, the application of sharia and customary law should be made subject to the express provisions of the fundamental rights principles enshrined in Chapter 4 of the Constitution, which protects women from all forms of discrimination. The application of customary and sharia laws should be expressly subject to the principles of non-discrimination enshrined in Subsections (2) and (4) of Section 33 of the Constitution.

Furthermore, Section 26 of the Constitution must be amended by:

- Removing the phrase "without unreasonable restrictions."
- Including a subsection that guarantees a minimum 30 per cent quota for women's political representation to increase their participation.

- Including a provision on equality in marriage and upon its dissolution, including matrimonial property distribution, in Section 27.
- Providing for the retention of girls in schools and positive steps towards combatting sexual harassment in schools, in Section 30, in line with Article 12 of the Maputo Protocol.

Provisions on the Directive Principles of State Policy must also be transferred to Chapter 4 of the Constitution dealing with Fundamental Human Rights and Freedoms, to ensure that they are enforceable, and that Government can be held accountable to women through enforcement of their rights before the courts.

## 2. Christian Marriage Act, 1862

- Amend the Act by including a provision that protects women and children from deprivation particularly when they have been excluded from the testamentary disposition of a husband and father.

### 3. Births, Deaths and Marriages Registration Act, 1886

- Sections 16 and 17 of the Births, Deaths and Marriages Registration Act should be amended to allow for the registration of the birth of a child by either the mother or the father, without attaching any preconditions to when a mother may register the birth of her child, or the marital status of the child's parents at the time of birth.

### 4. Maintenance Orders (Facilities for Enforcement) Act, 1921

The Act should extend to all jurisdictions beyond the United Kingdom. An appropriate provision to this effect must be inserted into the Act accordingly.

### 5. Prisons Act, 1953

The entire Prisons Act and its Subsidiary Legislation must be revised in line with the Bangkok Rules, with a view to making prison environments that are respectful of women's rights.

### 6. Social Security and Housing Finance Corporation Act, 1981

The Act should be amended to include recognition of unpaid care work with provisions made for social security schemes for family members who spend significant time on caregiving.

### 7. Matrimonial Causes Act, 1986

The Act should be amended to include a clause that specifically allows proof of domestic violence (including marital rape) as a ground for divorce.

### 8. Education Act, 1992 and Regulations, 1963

- Amend Section 8 of the Education Act to include "gender" as one of the reasons for which a girl cannot be denied access to education. This would be in line with Articles 10 and 12 of CEDAW and the Maputo Protocol, respectively, and by extension, other domestic and international instruments dealing with the rights of women and girls.

### 9. Tourism Offences Act, 2003

Section 13 of the Tourism Offences Act must be amended to ensure consistency with Section 28 of the Trafficking in Persons Act, which affords greater protection to women and girls against trafficking.

### 10. The Children's Act, 2005

- The Act should be comprehensively revised to address outstanding discriminatory provisions. For example, the rights of children born out of wedlock to inherit parental property must be expressly protected, especially when such issues are brought before Cadi Courts.

### 11. The Labour Act, 2007

- The Act should be amended to reflect the provisions on maternity leave in the Women's Act.
- The Labour Act should fully domesticate relevant ILO conventions through a comprehensive review and revision.

### 12. The Sharia Law Recognition Act, 1905

- The Sharia Law Recognition Act will benefit from the repeal of Section 33 (5)(c) of the Constitution which, as mentioned earlier, currently hinders the application of gender equality principles in matters of personal law. Once this repeal takes place, the law will need to be revised to take account of the new provisions of the Constitution.

### 13. Legal Aid Act, 2008

- The Act should expressly stipulate the provision of legal aid for marginalized and excluded women and girls.
- It should also make provision for the creation of a gender unit within the National Agency for Legal Aid to provide legal assistance to women and girls.

### 14. The Women's Act, 2010

- Legislation enacted prior to the Women's Act should be reviewed and updated to conform to the standards set in Section 9 of the Women's Act, and provisions prohibiting levirate marriages must be inserted.

- Insert new provisions to ensure mandatory handling of all matters of inheritance affecting Muslim women by Cadi courts instead of customary law courts.
- Section 15 of the Act must be amended to specify a compulsory quota for women to comprise at least one-third of positions at all levels of decision-making.

Section 43(4) of the Women's Act must be amended to take into consideration the following:

- The equitable matrimonial law principle of joint endeavour on the part of the parties to develop property acquired during marriage on the understanding of joint ownership in the event of dissolution of the marriage upon death or divorce.
- The full recognition of women's unpaid care work, which should not serve as a barrier to their right to benefit jointly from matrimonial property.
- The principle of equity should guide the distribution of marital property upon the dissolution of the marriage either by death or divorce.

### 15. The Evidence Act, 1994

Paragraphs (a) and (b) of Subsection (2) of Section 180 of the Evidence Act should be amended for consistency with Section 7 of the Sexual Offences Act, which expressly abolishes the cautionary rule.

### 16. The District Tribunal Act, 1933

The District Tribunal Act should be amended to ensure mandatory equal representation of women as adjudicators.

### 17. Sexual Offences Act, 2013

Section 3(3) of the Sexual Offences Act should be amended to render the offence of rape applicable in marriage.

### 18. Domestic Violence Act, 2013

The Act must be revised by the inclusion of a clause to require the courts to take steps to ensure that out of court settlements of domestic violence do not prejudice the complainant's right to be protected from violence and to be satisfied with the outcome of the case.

### 19. Public Service Regulations and General Orders of the Civil Service, 2012

- The General Orders and the Public Service Regulations should be revised to include provisions that expressly prohibit direct and indirect discrimination against women in the public service.
- They should also include provisions on temporary special measures to increase women's representation in decision-making positions within the public service

## Proposals for New Laws

- 1. A Family Code:** To ensure that women are further protected from discriminatory and uncertain laws, due to the fluid nature of customary law, and the uncertainty related to schools of sharia law in The Gambia, it may be useful to codify these sources of law as enshrined in Section 7 of the Constitution into a gender-responsive Family Code.
- 2. A law on the jurisdiction of the Cadi courts in inheritance matters:** Legislation must be enacted to outline the rules related to Muslim inheritance for adjudication in Cadi courts.

## Social Policy and Related Actions

### 1. The Constitution of The Gambia, 1997

- The Government of The Gambia should take stringent steps to implement Section 30 of the Constitution on the Right to Education in order to ensure that all children not only have access to compulsory basic education but also are not denied that right due to their biological or socioeconomic status.
- There should be equal representation of men and women in the Cadi court panels and the district tribunals across the country.
- The Government should conduct civic education programmes to educate people on the positive effects of including women in these decision-making bodies.

### 2. Births, Deaths and Marriages Registration Act, 1886

All hospitals should be capacitated by personnel who are tasked with registering births immediately after birth, to ensure that such records are collected in an efficient and timely manner.

### 3. Muslim Marriage and Divorce Act, 1941

While the Muslim Marriage and Divorce Act does not require any amendments or repeals, implementation is lacking and therefore should be the focus of the Government.

### 4. Education Act, 1992 and Regulations, 1963

- The minister responsible for the administration of the Act should take steps to design a sexual harassment policy encompassing all settings, including schools and workplaces.
- The regulations and policy should integrate the special needs of girls and boys across the life cycle with a view to creating “child and teacher friendly environments.”

### 5. The Children’s Act, 2005

The Government must take steps to increase awareness-raising on child marriage; put in place adequate

mechanisms for reporting cases of child marriage and take action on them; protect the identities of persons who report such cases; and provide protection/shelter for victims of child marriage who may become ostracized within their communities for reporting/seeking assistance.

### 6. Trafficking in Persons Act, 2007

- The Government needs to create an enabling environment for effectively implementing the provisions of the Act, particularly with regards to early identification of victims of trafficking, and the provision of free legal and psychosocial support to them.
- Other recommendations of the CEDAW Committee in relation to trafficking and exploitation of prostitution based on The Gambia’s combined fourth and fifth periodic reports should be implemented.

### 7. The Labour Act, 2007

- The Government should ratify, without reservations, the Employment Policy Convention, 1964 (No. 122); the Workers with Family Responsibilities Convention, 1981 (No. 156); the Maternity Protection Convention, 2000 (No. 183); the Domestic Workers Convention, 2011 (No. 189) and the Violence and Harassment Convention, 2019 (No. 190).

### 8. Legal Aid Act, 2008

- The National Agency for Legal Aid should be mandated to carry out sensitization fora on legal aid and the means of obtaining legal assistance. Such fora should be particularly aimed at women and girls in rural communities.

### 9. The Women’s Act, 2010

- Proposed new provisions prohibiting levirate marriages must go hand in hand with extensive awareness-raising on the harmful effects of the practice, to be mainly directed at men.
- Cadis must be trained on women’s rights, and standards and principles associated with gender equality.

#### 10. Sexual Offences Act, 2013

The proposed amendment of Section 3(3) of the Sexual Offences Act, 2013 should be accompanied by extensive awareness-raising on marital rape and its long-lasting impacts on women.

#### 11. Food Act, 2005, Breastfeeding Promotion Regulations, 2006

The Breastfeeding Promotion Regulations should be maintained in their present form with a focus on implementation to protect women and children during postnatal care.

#### 12. Public Service Regulations and General Orders of the Civil Service, 2012

- The proposed sexual harassment policy should include the protection of female public sector workers and take account of derogatory and stereotypical attitudes and practices towards them, with accompanying sanctions.
- The proposed sexual harassment policy should be disseminated among all public service staff, and measures put in place to monitor implementation and measure impact.

#### 13. Temporary special measures

The Government should conduct civic education programmes to educate people on the positive effects of including women in decision-making at all levels and in all sectors.

#### 14. Judicial decision-making

Since judicial precedent could have damaging effects on the rights of women, continuous legal training of judicial officers at all levels is needed to reinforce international norms and standards related to gender equality, and the role that judicial activism can play in the full and effective realization of women's rights.

## Conclusion

This report recognises that The Gambia is substantially compliant with its international obligations as enshrined in the CEDAW, Maputo Protocol and other relevant instruments relating to the promotion and protection of the rights of women and girls. This was done through the enactment of the Children's Act 2005, Women's Act 2010, Sexual Offences Act 2013 and the Domestic Violence Act 2013. However, despite the enactment of these laws, existing laws in The Gambia, including the Constitution, still require thorough review to ensure consistency with The Gambia's international obligations, and the progressive reforms contained in these new laws. It is for this reason that this mapping report of national laws in The Gambia was commissioned, to ascertain compliance of existing laws with The Gambia's international obligation to protect women and girls from discrimination.

The analysis in the report shows various steps which need to be taken by the Government of The Gambia to bring its laws in line with the provisions of the CEDAW, the Maputo Protocol, SDGEA, the recommendations of the CEDAW Committee and other applicable instruments to eliminate all forms of discrimination against women and girls. The report has shown that a total of 9 laws must be repealed in whole or in part, 10 laws must be amended or revised, and 2 new laws must be enacted to ensure full compliance with these instruments.

Towards this end, the Attorney General's Chambers and Ministry of Justice has tabled a Bill entitled Women (Amendment of Discriminatory Laws) Bill before the National Assembly to implement the recommendations entailed in this Report. The Bill includes most of the legislation outlined for amendment or repeal in the Report. This is an indication of the strong political will of the Government of The Gambia to end all forms of

discrimination against women and girls in The Gambia. The Bill did not deal with some of the recommended amendments such as those relating to the Lunatics' Detention Act, the Prisons Act and the Criminal Code, as those are being dealt with under other legal review processes. However, the effect of these proposed amendments may be limited by the fact that section 33 (5) (c) of the 1997 Constitution still gives primacy to personal law and permits discrimination within its realm. The effect of this provision, if retained in the laws of The Gambia, may render futile all the progressive laws and reforms embarked on by The Gambia for the protection of women and girls from discrimination. This can only be averted by the progressive review of the applicable personal law and by making it clear that its application is subject to the fundamental rights provisions relating to the protection from all forms of discrimination.

Despite all the reforms embarked on by The Gambia, it is pertinent to note that the deeply rooted patriarchal culture of the people of The Gambia continues to impede the effective implementation of progressive laws for the protection of women and girls. This is therefore one of the key challenges identified in the report. Lack of adequate and sustained sensitisation and awareness on the importance of these legislations and their benefits to the lives of women and girls also contributes to the problem of enforcement.

It is also hoped that the Government of The Gambia, in addition to repealing and amending existing legislations, would invest resources in adopting and implementing the other recommendations stated in the report, particularly sensitising and educating its population and law enforcement personnel on the rights of women and girls in line with the 14 policy recommendations..

## APPENDIX 1:

# SUMMARY OF RECOMMENDATIONS

Law under consideration	Action to be taken
<b>Repeals</b>	
The Constitution of The Gambia, 1997	Section 33(5)(c), a claw back clause denying women protection from discrimination in matters of personal law
Christian Marriage Act, 1862	Sections 10,11,12 to remove an apparent justification for child marriage
Married Women's Property Act, 1885	Delete "feme sole" in insert "unmarried women"
Lunatic Detention Act, 1917	Repeal and replace in entirety with legislation in line with the Convention on the Rights of Persons with Disabilities
Criminal Code, 1933	Sections 140, 141, 142 to reverse a denial of a woman's right to seek abortion
Forced Labour Act, 1934	Repeal in entirety
Civil Marriages Act, 1938	Section 8, to stipulate 18 years as age of marriage without exception
Nationality and Citizenship Act, 1965	Section 9(3), to remove different standards for achieving citizenship
Skin Bleaching (Prohibition) Act (Decree no.65, 1995)	Repeal in entirety
Women's Act, 2010	Sections 21 (1), 42, 43(1), 44, 45 to remove discrimination in matters of personal law

Law under consideration	Action to be taken
<b>Revise/Amend</b>	
The Constitution of The Gambia, 1997	Chapter 4, Section 26, 27, 30 to promote gender equality across all sectors
Christian Marriage Act, 1862	Include provisions against deprivation of women and girls in testamentary dispositions
Births, Deaths and Marriage Registration Act, 1886	Sections 16, 17 to remove barriers in the ability of women to register the birth of their children
Maintenance Orders (Facilities for Enforcement) Act, 1921	Extend jurisdictional focus beyond the United Kingdom
Prisons Act, 1953	Revise in line with Bangkok Rules
Social Security and Housing Finance Corporation Act, 1981	Recognize unpaid care work
Matrimonial Causes Act, 1986	Include domestic violence as ground for divorce
Education Act, 1992 and Regulations, 1963	Include gender as a protective category against discrimination and address sexual harassment
Tourism Offences Act, 2003	Section 13 for consistency with Section 28 of Trafficking in Persons Act
Children's Act, 2005	Address remaining discriminatory provisions e.g. the rights of children born out of wedlock
The Labour Act, 2007	Align with relevant provisions of the Women's Act
Sharia Law Recognition Act, 1905	The repeal of Section 33 (5) (c) of the Constitution should be followed by a revision of the law to ensure the application of gender equality principles
Legal Aid Act, 2008	Include provisions on protection of vulnerable women and girls and establish a gender unit in the National Agency for Legal Aid
Women's Act, 2010	Address other forms of harmful practices and ensure equitable distribution of matrimonial property
Evidence Act, 1994	Section 180 (2) (a) (b) for alignment with Section 7 of Sexual Offences Act, 2013
District Tribunal Act, 1993	Include provisions on mandatory equal representation on tribunals
Sexual Offences Act, 2013	Section 3(3) to criminalize rape in marriage
Domestic Violence Act, 2013	Insert provision to ensure that out of court settlements do not prevent victims from pursuing their right to protection
Public Service Regulations and Gender Orders of the Civil Service, 2012	Insert provisions on prohibition of direct and indirect discrimination and temporary special measures

Law under consideration	Action to be taken
<b>Enact new laws</b>	
Family Code	Gender sensitive rules on marriage, divorce and property distribution
Law on Cadi Courts	Regulation of Muslim inheritance
<b>Policy measures</b>	
Constitution of The Gambia, 1997	Section 30: promote universal basic education, equal representation in Cadi Courts and other areas of public life
Birth, Deaths and Marriages Registration Act, 1886	Promote timely and efficient universal birth registration
Muslim Marriage and Divorce Act, 1941	Create awareness and accelerate implementation
Education Act, 1992 and Regulations, 1963	Address and prevent sexual harassment in all settings
The Children's Act, 2005	Address and prevent child marriage
Trafficking in Persons Act, 2007	Provision of legal aid and psychosocial support
Labour Act, 2007	Ratify and comply with all relevant ILO Conventions
Legal Aid Act, 2008	Make legal aid more accessible to marginalized and excluded women and girls
Women's Act, 2010 and Sexual Offences Act, 2013	Increase awareness on women's rights
Food Act, 2005, Breastfeeding Promotion Regulations, 2006	Invest in post-natal care
Public Service Regulations and General Orders of the Civil Service, 2012	Design and implement a sexual harassment policy for the public service
Judicial decision-making	Create awareness on women's rights among judges and promote gender-sensitive judicial activism

## APPENDIX 2:

# MEMBERS OF THE REVIEW COMMITTEE

Name	Institution	Position
Ms. Matilda Mendy	Ministry of Justice	Principal State Counsel
Ms. Bafou Amina Jeng	Ministry of Justice	State Counsel
Ms. Bintou Gassama	Ministry of Women, Children and Social Welfare	Deputy Permanent Secretary
Ms. Isatou Dea Sawaneh	National Women's Council and Bureau	Councillor
Ms. Haddy Dandeh Jabbie	Female Lawyers Association-Gambia	President
Ms. Fatima Zahra Jarjue	Think Young Women	Programme and Finance Assistant
Ms. Tabu Njie-Sarr	The Gender Platform	Coordinator
Mr. Fallu Sowe	Network Against Gender Based Violence	Coordinator
Ms. Sarjo Camara	ActionAid International The Gambia	Project Manager Women's Economic Initiatives
Ms. Ndey Ngoneh Jeng	TORODO Chambers	Researcher and Pupil Legal Practitioner

### APPENDIX 3:

# RATIFICATION OF GLOBAL AND REGIONAL INSTRUMENTS BY THE GAMBIA

Instrument	Date of ratification
<b>International human rights standards</b>	
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	28 Sep 2018
International Covenant on Civil and Political Rights	22 Mar 1979 (a)
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty	28 Sep 2018
Convention for the Protection of All Persons from Enforced Disappearance	28 Sep 2018
Convention on the Elimination of All Forms of Discrimination against Women	16 Apr 1993
International Convention on the Elimination of All Forms of Racial Discrimination	29 Dec 1978 (a)
International Covenant on Economic, Social and Cultural Rights	29 Dec 1978 (a)
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	28 Sep 2018
Convention on the Rights of the Child	08 Aug 1990
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	27 Sep 2019
Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	08 Apr 2010
Convention on the Rights of Persons with Disabilities	06 Jul 2015 (a)

Instrument	Date of ratification
<b>ILO Conventions</b>	
C029 - Forced Labour Convention, 1930 (No. 29)	04 Sep 2000
C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)	04 Sep 2000
C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)	04 Sep 2000
C100 - Equal Remuneration Convention, 1951 (No. 100)	04 Sep 2000
C105 - Abolition of Forced Labour Convention, 1957 (No. 105)	04 Sep 2000
C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	04 Sep 2000
C138 - Minimum Age Convention, 1973 (No. 138)	04 Sep 2000
C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)	03 Jul 2001
<b>Regional human rights standards</b>	
African Charter on Human and People's Rights	08/06/1983
Protocol to The African Charter on Human and People's Rights on The Rights of Women in Africa	25/05/2005
Protocol on The Statute of The African Court of Justice and Human Rights	11/07/2018
Protocol to The African Charter on Human and Peoples' Rights on The Establishment of An African Court on Human and Peoples' Rights	30/06/1999

# ENDNOTES

- 1 At the time of undertaking this analysis, the 1997 Constitution was under review by the Constitutional Review Commission of The Gambia. The Draft Constitution of 2019 however does not significantly deviate from the 1997 version used as a basis for this analysis.
- 2 As elaborated in UN Women, 2019, Equality in Law for Women and Girls by 2030: A Multistakeholder Strategy for Accelerated Action.
- 3 This stakeholders workshop took place in Banjul, The Gambia on 23 July 2019.
- 4 World Bank country profiles, found at: [https://databank.worldbank.org/views/reports/reportwidget.aspx?Report\\_Name=CountryProfile&Id=b45ofd57&tbar=y&dd=y&inf=n&zm=n&country=GMB](https://databank.worldbank.org/views/reports/reportwidget.aspx?Report_Name=CountryProfile&Id=b45ofd57&tbar=y&dd=y&inf=n&zm=n&country=GMB). Last visited 15 July 2020.
- 5 Residual laws refer to the remaining laws outside the realm of personal law relating to marriage, divorce, inheritance and customary land tenure. They are derived from the received common law of England, and applicable and enforceable in conventional courts, with the exception of statutory laws enacted by the National Assembly of The Gambia.
- 6 See the Charter of the United Nations, Preamble, 24 October 1945, 1 UNTS XVI.
- 7 See UN Women, Convention on the Elimination of All Forms of Discrimination against Women, "Introduction", available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>. Last visited 15 July 2020.
- 8 In particular, Article 14 (2) (c) provides for the protection of "the reproductive rights of women by authorising medical 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."
- 9 The domestication of ILO Conventions is considered a major step in ensuring equality and zero tolerance for discrimination in the workplace, in line with Articles 11 and 13 of CEDAW and the Maputo Protocol, respectively.
- 10 See Committee on the Elimination of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of the Gambia, 28 July 2015, CEDAW/C/GMB/CO/4-5, paragraphs 8-9.
- 11 These are the Optional Protocol on the sale of children, child prostitution and child pornography, (General Assembly (Resolution 54/263 of 25 May 2000, entered into force on 18 January 2002); the Optional Protocol on the involvement of children in armed conflict (General Assembly resolution 54/263 of 25 May 2000, entered into force 12 February 2002); and the Optional Protocol on a communications procedure (General Assembly resolution 66/138 of 19 December 2011).
- 12 Chapter 20:01 Volume 4 Laws of the Gambia, 2009.
- 13 See: <https://www.britannica.com/topic/feme-sole>. Last visited 15 July 2020.
- 14 See the Preamble to the Convention.
- 15 See the Cadi appeals panel decision in the case of *Haruna Camara v. Matida Jarju* (2012–2015) in the Gambia Sharia Law Reports, p145.





