

**PROTECTING THE RIGHTS OF CHILDREN IN TROUBLE WITH THE LAW:
A CASE STUDY OF SOUTH AFRICA AND THE GAMBIA**

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DEDICATION

This work is dedicated to my late father Ebrima Wally Saine, my mother Juma Drammeh, my daughter Khadeejah Firdaus, my brother Momodou Lamin Saine, my two sisters Sukai and Amie and all those children in police custody or in prisons who suffer from abuses and violation of their rights by officials in the criminal justice system. Your voices will be heard and your rights will be protected.

ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment
CCA	Child Care Act
CLAA	Criminal Law Amendment Act
CPA	Criminal Procedure Act
CRC	Convention on the Rights of the Child
CSA	Correctional Services Act
CYPA	Children and Young Persons Act
DSW	Department of Social Welfare
ECHR	European Court on Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
NCCR	National Commission on Children's Rights
NGO	Non Governmental Organisation
NPASC	National Programme of Action Steering Committee
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
PSA	Probation Services Act
SAHRC	South African Human Rights Commission
SAJHR	South African Journal of Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
WTO	World Trade Organisation

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CHAPTER 1: INTRODUCTION

1.1 Background for the research

Children are the greatest resource of a country and thus need protection. However, they are the 'unwanted children' of the system when in trouble with the law. They are sometimes direct victims of abuse by officials in the criminal justice system, but more broadly, they are neglected due to Governments' failure to provide protection for them despite the fact that there are clear international standards setting out how they should be treated. In many cases, children are commingled with adults, abused, held in unsafe conditions, denied due process, access to education, religious services, basic sanitary services and other important contacts with their community.¹ Most of the human rights abuses of the children in trouble with the law are kept from public view.²

In the Gambia the problems associated with violations of rights of children in trouble with the law is also prevalent. The Gambia is a party to international and regional instruments protecting rights of children including those in trouble with the law.³ However, most of the children held in police custody are physically and mentally abused. There are no separate cells for children in police stations. Child offenders are also held in prisons for long periods of time without trial.⁴ There is no legal aid except when charged with a capital offence.⁵ Out of the three national prisons, only the Jeswang prison has a juvenile detention centre that only accommodates male juveniles.⁶ Children can also be sentenced to death if they are convicted of murder.⁷

¹ Human Rights Watch 'World Report 2001: Children's rights- children in trouble with the law' <<http://www.hrw.org/wr2k1/children/child4.html>> (accessed on 19 March 2005).

² Human Rights Watch World Report 2000: 'Prisons' <<http://www.hrw.org/wr2k/prisons/html>> (accessed on 19 March 2005).

³ The Gambia ratified the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and welfare of the Child (ACRWC) in 1990 and 2000 respectively.

⁴ This information is known through the author's personal experience as a state prosecutor.

⁵ Sec 24 (3) of the Constitution of the Republic of the Gambia 1997.

⁶ Prisons in the Gambia: Report of the Special Rapporteur on prisons and conditions of detention in Africa series IV no. 5 (1999) 12 <http://www.penalreform.org/download/rs/gambia_english.pdf> (accessed on 11 May 2005).

Historically, children charged with crimes in South Africa were also treated in the same way as adult offenders. In the late 1980's and early 1990's, it was common for children to be arrested and detained in prisons for long periods of time awaiting trials.⁸ In 1994, South Africa became a democratic country with a constitution protecting among other things, the rights of children. It also ratified the CRC and the ACRWC.⁹ However, the situation for children in trouble with the law especially those in detention have not changed a lot for the better. They continue to suffer from cruel, inhumane and degrading treatment and punishment at times due to the high incidence of police brutality and inadequate enforcement of legislation to ensure their protection.¹⁰ Until now, there is no separate statute or procedure dealing with children charged with offences.¹¹ However, a lot of effort is being made by the government trying to foster the reform of the juvenile justice system by protecting both the rights of these children on one hand and that of the public on the other.¹² This is to ensure that it complies with its constitutional and international obligations.

It is for this historical as well as the developments in this area that South Africa is chosen as a comparison to assess the level of compliance with its international obligations as a country in democratic transition. The Gambia is also chosen as a case study because juvenile justice is not given the attention it deserves nationally.

1.2 Statement of the research problem

It is the responsibility of every government to protect the fundamental rights and freedoms of its citizenry and to ensure that the rule of law and justice prevails at all times. However, children accused of committing crimes are more susceptible to human

⁷ Concluding Observations of the Committee on the Rights of the Child, Gambia, UN Doc. CRC/C/15/Add.165 (2001) para 68.

⁸ A Skelton 'Children, young persons and the criminal procedure' in JA Robinson (ed) *The law of children and young persons in South Africa* (1997) 161.

⁹ South Africa ratified the CRC and the ACRWC in 1995 and 2001 respectively.

¹⁰ Concluding Observations of the Committee on the Rights of the Child: South Africa. 23/02/2000, CRC/C/15/Add.122 (Concluding Observations/Comments), paras 21 & 42.

¹¹ A Skelton 'Developing a juvenile justice system for South Africa: International instruments and restorative justice' in G Bradfield et al (eds) *Acta Juridica* (1996) 180.

¹² Address by Dr. A.M. Omar, Minister of Justice to the international workshop on juvenile justice 3 November 1997 <<http://www.info.gov.za/speeches/index.htm>> (accessed on 11 May 2005).

rights abuses and violations of their legal rights while in detention either in police cells, prisons or authorised detention centres.¹³ They mostly suffer from both the agents of the state¹⁴ as well as from inmates.¹⁵ These violations often take place in closed doors and society being primarily concerned with keeping offenders locked up rather than about their conditions and human rights being respected, the cries of these children to be treated with dignity and worth go unnoticed despite the constitutional and international guarantee of their rights.

The problem therefore is first to examine what rights do children in trouble with the law have under international law in general and specifically within the African human rights system with special emphasis on the rights of children deprived of their liberty.¹⁶ Secondly, to examine how these international instruments are given effect domestically and whether there are challenges encountered in realising these rights. These are the main issues that this research intends to grapple with using South Africa and the Gambia as case studies¹⁷ with a view to making recommendations for better protection of the rights of this category of children.

1.3 Hypothesis

First, this research presumes that there have been efforts in South Africa and the Gambia to enact laws to realise the protection of rights of children in trouble with the law in line with their international obligations but they are not adequate. Second, where the law exists, the mechanisms for protection are not so effective or they are non-existent. Third, that as a result of inadequate laws and ineffective protection mechanisms, the rights of children in trouble with the law are not well protected thus resulting in the violation of the rights of many of these children in both countries with impunity.

¹³ A Skelton (ed) *Children and the law* (1998) 45.

¹⁴ D Pinnock et al 'New juvenile justice legislation for South Africa: Giving children a chance' occasional paper series 3-94 (1994) <<http://web.uct.ac.za/depts/sjrp/publicat/newjust.htm>> (accessed on 19 July 2005).

A Skelton 'Juvenile justice reform: Children's rights and responsibilities versus crime control' in CJ Davel (ed) *Children's rights in a transitional society* (1999) 90.

¹⁶ These include those awaiting trial and those sentenced to imprisonment.

¹⁷ The case studies are used merely as a working framework for analysis of the topic at hand. Though they may reflect the trends of what obtains in many countries especially in Africa, the author does not claim them to be conclusive of the same.

It is also presumed that most of the violation takes place while in detention either in police custody or in the prisons awaiting trial or after sentence. It is for this reason that the research will mainly focus on the rights of children deprived of their liberty.

1.4 Research objective

First, the objective of the research is to do a comparative assessment of the laws put in place in these countries to protect the rights of children in trouble with the law in accordance with their international obligations. Second, it seeks to enquire into the problems and challenges in addressing the problem at hand. Third, it will by way of recommendations suggest ways to better protect the rights of these children and who the role players should be.

1.5 Significance of the study

Despite the fact that the international community has accepted that the rights of children in trouble with the law must be protected, state parties and their agents still continue to ignore this call. This research is therefore significant as it seeks to investigate the extent to which South Africa and the Gambia tried to realise the rights of children in trouble with the law. It will be the first of its kind for the Gambia and will therefore contribute immensely to the reformation of child justice administration in the country in order to adequately protect the rights of these children. South Africa is also lagging behind in the area of child justice despite its achievements in the area of human rights and democracy in the last ten years. This research seeks to enquire what have they done in this area and what are the challenges being faced. The research will further contribute to child justice literature from an African perspective and the conclusions and recommendations made will be useful to other African states that wish to embark on reform. Finally, it will raise awareness of the problem of child justice in the Gambia and the need for reform because it has received very little attention from the Government.

1.6 Research methodology

The research method will be based on literature review of primary and secondary sources. These include official international and regional human rights treaties, pieces of national legislation and case law. Secondary sources are books, articles from the Internet, reports, international rules and standards and local newspapers.

1.7 Literature review

From the literature review, the subject matter has not been dealt with anywhere using the Gambia as a case study. This research will be the first of its kind for the country. Regarding South Africa, studies commissioned on specific issues like prison conditions in South Africa by Defence for Children International revealed that during apartheid, large number of black children were imprisoned together with their mothers, assaulted and tortured by police, locked in over crowded cells. This study only gave an exposure of some of the problems of the criminal justice system as it then was.¹⁸ The Community Law Centre, University of Western Cape wrote an article on the Project Committee on Juvenile Justice (Project 106), which highlights the role of the Law Commission in the process of creating a new legislative and procedural system for children who are in trouble with the law in line with international standards.¹⁹ This process resulted in drafting a Child Justice Bill which if enacted will create a new framework for child justice administration in South Africa. In *Children's Rights* volume two, Prof. Julia Sloth-Nielsen also reviewed the trends in the implementation of children's rights in South Africa since the advent of the interim constitution. However, her work looked on children's rights as a whole. Even though she covered juvenile justice, she only concentrated on juvenile whipping and detention and it was not covered in detail.²⁰ In another work entitled *Child justice and law reform*, Prof. Sloth-Neilsen gave a detailed account of the content of the Child Justice Bill.²¹ It is an appraisal from the perspective of the report of the law commission, the proposals made in the Bill and the problems it seeks to correct if enacted into law. Advocate Ann Skelton has also written a lot on child justice in South Africa and the need for reform but most of her writings are centred on the concept of

¹⁸ F McLachlan 'Children in prison in South Africa: A study commissioned by Defence for Children International' (1985) vol.1 no. 2 *South African Journal on Human Rights* 185.

¹⁹ J Sloth-Neilsen 'Towards a new child justice system' (1999) Article 40 archives vol. 1 <http://www.communitylawcentre.org.za/children/1999art40/vol1_no1_new.php> (accessed on 12 March 2005).

²⁰ J Sloth-Neilsen 'The contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa' in MDA Freeman (ed) *Children's Rights Volume (2004) II* (2004) 321.

²¹ J Sloth-Neilsen 'Child justice and law reform' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 383.

restorative justice as a tool to deal with the juvenile justice administration as opposed to the concept of punishment.²²

Therefore, all the above works differ with the author's because this investigation focuses on the legal rights of children in trouble with the law as provided in the international instruments, the level of implementation of these laws nationally and the problems and challenges encountered in implementing them.

1.8 Limitation of study

Considering the methodology of this research, there are some limitations because information and statistics on human rights violations of children in trouble with the law are very difficult to come by. They happen mostly within closed doors and are perpetrated by agents of the state. Therefore, without conducting interviews on victims or field research in the countries under study, any information or statistics on the subject will be based primarily on books, government sources or from sources of specific international organisations.

The scope of the research is also limited in volume. It will only highlight the main areas of the rights of children deprived of their liberty and does not elaborate in detail other aspects of protection of the rights of children in trouble with the law in South Africa and the Gambia. It does not also discuss in depth the Child Justice Bill of South Africa but will make reference to it where necessary.

1.9 Overview of chapters

This research consists of four chapters. The first chapter is the introduction. It will give the basis and structure of the research which will include a general overview of the problem in the two countries under study. In the second chapter, it will explore the relevant international and African normative framework that protects the rights of children in trouble with the law and the obligations of states towards these children. However, the main focus will be the CRC and the ACRWC because they are the two main human rights instruments providing specific protection for children's rights in all spheres. The third chapter will be a comparative analysis of the rights of children

²² Skelton (n 15 above 93).

deprived of their liberty as provided in the municipal laws of South Africa and the Gambia *vis á vis* the minimum standards set in the CRC and ACRWC. It will discuss the following issues namely definition of a child, age of criminal responsibility, the best interest, detention as a last resort and for the shortest possible time, Separation from adult detainees, role of parents, establishment of separate criminal procedures, right to legal representation and assistance, and sentencing options. It will also examine the problems and challenges for implementation. The fourth chapter will conclude and make recommendations on how best to implement the laws and who should be the role players in ensuring that the rights of these children are well protected.

CHAPTER 2: INTERNATIONAL AND AFRICAN LEGAL FRAMEWORK PROTECTING THE RIGHTS OF CHILDREN IN TROUBLE WITH THE LAW

2.1 Introduction

Children in every country of the region are facing immense problems, one of which is the denial of juvenile justice.²³ The protection provided by the United Nations Declaration on Human Rights (UDHR) has very broad implications including the rights of children.²⁴ However, the recognition of children's rights, particularly those in trouble with the law is a relatively new development in international law.²⁵ Neither the 1924²⁶ nor the 1959²⁷ declarations on the rights of children included provisions on juvenile justice. The International Covenant on Civil and Political Rights (ICCPR) was the first international treaty that recognised the special conditions of children within the administration of justice.²⁸ The other treaties protecting children in trouble with the law in Africa are the Convention on the Rights of the Child (CRC)²⁹, the African Charter on the Rights and Welfare of the Child (ACRWC)³⁰ and the African Charter on Human and Peoples' Rights (The African Charter).³¹

²³ M Sharma 'Juvenile justice systems in South Asia: The gap between the international standard and national implementation' *Juvenile Justice Information Pack: Penal Reform International* (2000) 1.

²⁴ Art 2.

²⁵ Sharma (n 23 above) 2.

²⁶ Geneva Declaration of the Rights of the Child of 1924, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

²⁷ Declaration of the Rights of the Child proclaimed by General Assembly resolution 1386 (XIV) of 20 November 1959.

²⁸ Sharma (n 23 above).

²⁹ CRC was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and it entered into force 2 September 1990, in accordance with article 49.

³⁰ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) and entered into force Nov. 29 1999.

³¹ African Charter on Human and Peoples' Rights (Banjul Charter) adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) and entered into force 21 October 1986. All AU members have ratified the treaty.

This chapter will discuss the nature of the rights provided in these international and African human rights treaties as regards child justice,³² the duty imposed on states to respect and implement these rights and the available remedies when violated by the state or its agents.

2.2 The international legal framework

2.2.1 International Covenant on Civil and Political Rights

The ICCPR³³ explicitly sets out the standards for the treatment of children in trouble with the law. It provides that children accused of crimes shall be separated from adults when arrested and put in detention.³⁴ This provision shall help to protect children from negative influences of the correctional environment and also minimise contact with hardened adult criminals and promote their diversion and rehabilitation.³⁵ The child is also accorded the right to speedy trial if charged with an offence.³⁶ Therefore, the long periods of detention experienced by most children clearly violates their legal rights to a speedy trial. The trial procedures should consider the age of the child and promote rehabilitation.³⁷ This means that a child offender must not be subjected to the same procedures as adults when the circumstances so require. The child must also be protected against publicity.³⁸

³² For the purpose of this research, a juvenile is a person under the age of 18. This is in line with rule 11(a) of the UN Rules for the Protection of Juveniles Deprived of their Liberty (JDL).

³³ ICCPR was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. It entered into force 23 March 1976, in accordance with Article 49.

³⁴ Art 10 (2) (b).

³⁵ B Bekink & D Brand 'Constitutional protection of children' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 192.

³⁶ n 34 above.

³⁷ Art 14 (4).

³⁸ Art 14 (1).

Regarding convicted children, the state has a duty to subject them to a penitentiary system that involves segregation from adults and it must be appropriate to their age and status. The objective of which is to foster reformation and rehabilitation.³⁹

The ICCPR further requires state parties to provide special protection to every child without discrimination by virtue of his status as a minor.⁴⁰ They must adopt special measures to protect children in addition to their obligation in article 2.⁴¹ Each state must determine the measures of protection it will adopt in the light of the protection needs of children within its jurisdiction.⁴² Therefore all state parties irrespective of their level of development are bound to fulfil these obligations.⁴³

The Human Rights Committee (HRC)⁴⁴ was established to monitor the implementation of the ICCPR. States parties are therefore obliged to submit a mandatory initial report⁴⁵ and subsequent periodic reports.⁴⁶ The HRC also has a mandate to receive individual complaints for violations of the rights protected in the ICCPR by the state or its agents if the state has ratified the Optional Protocol.⁴⁷ Though the ICCPR is not comprehensive enough, nevertheless it recognises the rights of children in trouble with the law. It sets out responsibilities which the state parties must meet and has provided a mechanism to monitor its implementation.

³⁹ Arts 10 (3) and 14 (4).

⁴⁰ Art 24 (1).

⁴¹ General Comment No.17: Rights of the Child (art 24): 07/04/89 CCPR General Comment No. 17. (General Comments) para 1.

⁴² n 41 above para 3.

⁴³ Art 2.

⁴⁴ Art 28.

⁴⁵ Art 40 (1) (a) and 40 (2).

⁴⁶ Art 40 (1) (b).

⁴⁷ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976. See arts 1 and 2.

2.2.2 Convention on the Rights of the Child

The CRC protects the rights of children in all spheres and emphasises a holistic approach to children's rights. This means that all rights contained in the CRC are indivisible and related.⁴⁸ It also has specific provisions protecting the rights of children deprived of their liberty and administration of child justice.

The CRC defines a child as any person under 18.⁴⁹ It further requires state parties to establish a minimum age below which a child could not be held criminally responsible.⁵⁰ The objective of this provision is to ensure that not all children are subjected to the criminal justice system due to their age and level of maturity. However, state parties may come up with different age limits some of which may not consider the child's level of maturity mentally. It is submitted that the Beijing Rules provide guidance to state parties in this regard as rule 4.1 provides that the minimum age shall not be fixed at too low an age level.⁵¹ Guidance could also be obtained from the recommendations of the CRC Committee and best practices from other states.

The CRC further protects children from unlawful deprivation of their liberty. No child should be arrested and detained unlawfully. Where the arrest is lawful, detention must be used as a last resort and for the shortest appropriate period of time.⁵² Article 40 (4) requires states parties to utilise other alternatives to detention. However, in many countries the list of non-custodial options in practice is very limited.⁵³ The CRC did not define what amounts to 'shortest appropriate period of time' but it has been interpreted

⁴⁸ K Someda 'International instruments in the field of juvenile justice' a paper prepared for the Kenya-UNAFEI joint seminar, plenary session 5 16 August 2001 6
<<http://www.unafei.or.jp/english/pages/jointkenya.htm>> (accessed on 29 August 2005).

⁴⁹ Art 1. However, the age bracket may be lower in states where majority is reached earlier.

⁵⁰ Art 40 (3) (a).

⁵¹ For a detailed discussion see Sloth-Neilson (n 21 above) 395.

⁵² Art 37 (b).

⁵³ UNICEF Innocenti Digest 'Juvenile Justice' 12
<<http://www.unicef-icdc.org/publications/pdf/digest3e.pdf>> (accessed on 5 September 2005).

as the period within which the custodial treatment may be expected to secure the rehabilitation of the child concerned.⁵⁴

A child deprived of his liberty must also be treated with humanity and respect which must conform to his status as a child.⁵⁵ He or she must be separated from detained adults and has the right to have contact with family.⁵⁶ This reinforces the right to treatment with dignity and respect as guaranteed under the ICCPR.⁵⁷ However, the right to separation may not apply in exceptional circumstances where it will not be in the best interest of the child.⁵⁸ It is submitted that this decision must be made by a judge after having all the facts presented to him and it should also be subjected to review.

A child deprived of his liberty must have access to prompt legal and other assistance and the right to challenge the legality of the detention before a court of law.⁵⁹ This right is very important at the pre-trial stage.⁶⁰ Therefore, once a child is arrested and detained, he or she must have access to legal counsel and other assistance immediately.

The CRC prohibits torture, cruel or degrading treatment or punishment of children.⁶¹ Thus, no child deprived of his liberty should be subjected to any form of torture, inhumane or degrading treatment when detained either in police custody or in prison or any authorised detention centre.

⁵⁴ As above.

⁵⁵ Art 37 (c). See also art 40 (1).

⁵⁶ As above.

⁵⁷ Art 10 (2) (b).

⁵⁸ Art 37 (c).

⁵⁹ Art 37 (d).

⁶⁰ The African Commission explains that the right to legal representation must be exercised from the time the person is in detention and not only during trial. See *Courson v Equitorial Guinea* (2000) AHRLJ 93 (ACHPR 1997) at 96 para 22.

⁶¹ Art 37 (a). The HRC in explaining the content of this right states 'the assessment of what constitutes inhuman or degrading treatment depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim.' See *Antti Vuolanne v. Finland*, Communication No. 265/1987 (7 April 1989), UN Doc.Supp. No. 40 (A/44/40) at 249 (1989) the HRC at para 9.2. See also *Bati and others v Turkey*- 33097/96;57834/00 [2004] ECHR 246 (3 June 2004), *Rivas v France* – 59584/00 [2004] ECHR 131 (1 April 2004).

A child in trouble with the law is also entitled to basic human rights guarantees.⁶² Judicial proceedings and institutional placements shall be avoided wherever possible provided that their human rights and legal safeguards are fully respected.⁶³ All these are minimum guarantees and must therefore be accorded to all children deprived of their liberty.

The CRC further obligates states parties to ensure that legislative and other measures are put in place to guarantee the rights provided above.⁶⁴ They should also ensure that children deprived of their liberty are treated in a manner consistent with the promotion of their sense of dignity and worth as well as their rehabilitation, reintegration and assumption of a constructive role in society.⁶⁵

Like the HRC, the CRC Committee was established to monitor the implementation of the CRC.⁶⁶ It also has a mandatory state reporting mechanism.⁶⁷ This mechanism is not very effective because there are no sanctions if a state fails to report or if it fails to implement the Committee's recommendations. In addition, there is no individual complaint mechanism as provided under the Optional Protocol of the ICCPR. Therefore the child victim only has recourse to domestic remedies which are sometimes inadequate and ineffective.⁶⁸

2.2.3 The UN rules and guidelines on juvenile justice

In addition to the CRC and other relevant UN human rights treaties. The UN has also developed rules and guidelines relating to various aspects of juvenile justice administration. These include the 1985 UN Standard Minimum Rules for the

⁶² Art 40 (2) (b) (i) - (vii).

⁶³ Art 40 (3) (b).

⁶⁴ Art 40 (3).

⁶⁵ Art 40 (1).

⁶⁶ Art 43.

⁶⁷ Art 44.

⁶⁸ The CRC Committee has emphasised the child's right to effective remedies domestically and the duty of state parties to fulfil it. See General Comment No. 5 (2003): GENERAL CRC/GC/2003/5 27 November 2003 General implementation of the Convention on the Rights of the Child at para 24.

Administration of Juvenile Justice (the Beijing Rules),⁶⁹ the 1991 UN Rules for the Protection of Juveniles Deprived of their Liberty (the JDL),⁷⁰ the 1990 UN Minimum Rules for Non-Custodial Measures (the Tokyo Rules)⁷¹ and the 1990 UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines).⁷² These instruments are not binding treaties on states but they are detailed guidelines which are important in interpreting and realising the rights of children concerned as provided in the treaties. The most pertinent to the protection of the rights of children deprived of their liberty are the JDL, the Beijing Rules and the Tokyo Rules.

The JDL was adopted after it was widely recognised that the 1955 Standard Minimum Rules for the Treatment of Prisoners were insufficiently child-oriented.⁷³ It contains detailed recommendations concerning the treatment of children placed in custodial institutions and matters relating to their management.⁷⁴ It sets out universal principles under which children can be deprived of their liberty with emphasis on deprivation as a last resort.⁷⁵ The conditions of detention should be consistent with respect for human rights.⁷⁶ The rules are also gender sensitive and require gender specific facilities and services.⁷⁷ It also sets standards for the qualifications of staff dealing with juveniles⁷⁸ and limitations on permissible punishments.⁷⁹ Though, these rules are only

⁶⁹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice adopted by General Assembly resolution 40/33 of 29 November 1985.

⁷⁰ United Nations Rules for the Protection of Juveniles Deprived of their Liberty adopted by General Assembly resolution 45/113 of 14 December 1990.

⁷¹ United Nations Minimum Rules for Non- Custodial Measures adopted by General Assembly resolution 45/110 of 14 December 1990.

⁷² United Nations Guidelines for the Prevention of Juvenile Delinquency adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990.

⁷³ Someda (n 49 above 9).

⁷⁴ n 70 above part IV (rules 19-79).

⁷⁵ As above rule 1.

⁷⁶ As above rule 12.

⁷⁷ As above rule 28.

⁷⁸ As above part V (rules 81-87).

⁷⁹ As above rules 63 -71.

recommendations most of them have already been incorporated in the CRC and are binding on state parties.

The Beijing Rules also provide guidance to states for the protection of children's rights and respect for their needs.⁸⁰ It sets out guiding principles for adjudication and disposition including the least possible use of institutionalisation and it prioritises research.⁸¹ The Rules are also gender sensitive and advocate for a fair treatment of girls and requires gender specific facilities and services.⁸² Although the Beijing Rules predate the CRC, most of the fundamental principles and concepts have been incorporated into the CRC. The unincorporated rules serve as interpretative tools on the content of the existing rights.

The Tokyo Rules further provide a set of basic principles to promote the use of non-custodial measures as alternatives to imprisonment.⁸³ It stresses greater community involvement in the administration of criminal justice.⁸⁴ Selection of a non-custodial measure must be based on an assessment of established criteria.⁸⁵ The dignity of the offender and his right to privacy must be protected at all times.⁸⁶ The non custodial measures must also be subject to review.⁸⁷ These measures are in three stages namely, pre-trial stage, trial and sentencing stage and post sentencing stage.⁸⁸ States should also make use of social enquiry reports which shall provide information and recommendations that are relevant to the sentencing procedure.⁸⁹ The judicial authority in making its decision, must consider the rehabilitative needs of the offender, the

⁸⁰ n 69 above rule 5.

⁸¹ As above rules 1, 2, 3 and 17.

⁸² As above rules 13.5, 26.2 and 26.4.

⁸³ n 71 above rule 1.1.

⁸⁴ As above rule 1.2.

⁸⁵ As above rules 3.2.

⁸⁶ As above rules 3.9 and 3.11.

⁸⁷ As above rule 3.5.

⁸⁸ As above rule 2.1 and 2.3.

⁸⁹ As above rule 7.1.

protection of society and the interests of the victim.⁹⁰ States are required to implement these measures domestically in order to reduce the use of imprisonment and other custodial measures.⁹¹

2.3 The African legal framework

2.3.1 African Charter on Human and Peoples' Rights

The African Charter is the first binding African human rights instrument that seeks to protect the individual and group rights of Africans. It also has a provision which obligate African states to protect the rights of children as provided in other international human rights instruments.⁹² Therefore, African states have a legal obligation to protect the rights of children deprived of their liberty in accordance with the CRC⁹³ and the ACRWC⁹⁴ or any other relevant human rights instrument. In addition, children are also entitled to the rights protected in the African Charter as individuals.

The African Commission is mandated to monitor the implementation of the African Charter.⁹⁵ State parties are required to submit initial and periodic reports on the progress made in realising the rights provided in the Charter.⁹⁶ In doing so, they must also report on how they have fulfilled the obligations under article 18 (3). The African Charter further guarantees the right of individuals to bring cases on the basis of the Charter before the municipal courts⁹⁷ and the African Commission.⁹⁸

⁹⁰ As above rule 8.1.

⁹¹ As above rule 9.1.

⁹² Art 18 (3) African Charter.

⁹³ As of 1 September 2005 all the AU member states except Somalia have ratified the CRC <<http://www.ohchr.org/english/countries/ratification/11.htm>> (accessed on 8 September 2005).

⁹⁴ As of 15 July 2005, 39 AU member states have signed and 37 AU member states have ratified the ACRWC <<http://www.africa-union.org/home/Welcome.htm>> (accessed on 8 September 2005).

⁹⁵ Art 30.

⁹⁶ Art 62.

⁹⁷ Art 7 (1). See also A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 30.

⁹⁸ Art 56.

2.3.2 African Charter on the Rights and Welfare of the Child

Despite the existence of the CRC, the African states adopted the ACRWC in order to provide a more comprehensive protection for the African child. Like the CRC, it also has provisions protecting the rights of children in trouble with the law but at the same time places greater emphasis than the CRC on the responsibility of the child to respect the human rights and fundamental freedoms of other members of society.⁹⁹

The ACRWC defines a child as any person less than 18.¹⁰⁰ This definition is in line with the CRC and the meaning of a juvenile in the JDL.¹⁰¹ It further requires state parties to establish a minimum age below which a child could not be presumed to have the capacity to infringe the law.¹⁰²

The right to be separated from detained adults is also guaranteed when the child is deprived of liberty.¹⁰³ Unlike the CRC, there are no exceptions to the separation rule. This means that every child in detention must be separated from adult detainees even if arrested jointly with them. However, alternatives to detention must always be the priority and confinement as a last resort.¹⁰⁴

A child deprived of his liberty has a right to benefit from all aspects of due process of law. These include presumption of innocence,¹⁰⁵ access to prompt legal and other assistance,¹⁰⁶ provision of clear and prompt information about the nature of the charges

⁹⁹ Save the Children 'Juvenile justice: The great debate' in C Petty and M Brown (eds) *Justice for children: Challenges for policy and practice in sub-Saharan Africa* (1998) 8.

¹⁰⁰ Art 2. Unlike the CRC, it gives no room for state parties to lower the age bracket.

¹⁰¹ Rule 11 (a).

¹⁰² Art 17 (4). See also n 50 above.

¹⁰³ Art 17 (2) (b).

¹⁰⁴ The Kampala Declaration on Prison Conditions in Africa 19 -21 September 1996 Recommendations 2 and 3 on remand prisoners. <www.chr.up.ac.za/hr_docs/african/docs/other/other15.doc> (accessed on 30 September 2005). See also JDL (n 75 above) and Tokyo Rules (n 83 above).

¹⁰⁵ Art 17 (2) (c) (i).

¹⁰⁶ Art 17 (2) (c) (iii). See also *Courson v Equitorial Guinea* (n 60 above).

in a language that is understood,¹⁰⁷ speedy trial and right of appeal¹⁰⁸ and the right to have his or her privacy respected throughout the proceedings.¹⁰⁹ All these are minimum human right guarantees and must be accorded to the child without any discrimination.

ACRWC provides the right to special treatment of a child offender in a manner consistent with the child's dignity and worth.¹¹⁰ It also guarantees the right to be protected against torture, inhumane or degrading treatment and punishment when deprived of liberty.¹¹¹ This provision also reinforces the protection guaranteed under the CRC and Convention against Torture (CAT).¹¹²

It also provides for the rehabilitation and social reintegration of children which must take place during the trial and after conviction.¹¹³ This is a crucial aspect of the child justice system which is often overlooked.

The African Committee of Experts on the Rights and Welfare of the Child (the Committee) has the mandate to promote and protect the rights and welfare of the child.¹¹⁴ It is an independent body from the African Commission. It could also receive and examine state reports¹¹⁵ and individual complaints.¹¹⁶ This is a fundamental difference between the mandate of the CRC Committee and this body. The child victim

¹⁰⁷ Art 17 (2) (c) (ii).

¹⁰⁸ Art 40 (2) (b) (v).

¹⁰⁹ Art 17 (2) (d).

¹¹⁰ Art 17 (1).

¹¹¹ Art 17 (2) (a). The African Commission reiterates in its jurisprudence that this protection is absolute. See *Huri -Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) at 278 para 41.

¹¹² CAT was adopted and opened for signature, ratification and accession by General assembly resolution 39/46 of 10 December 1984 and entered into force 26 June 1987 in accordance with article 27(1). See arts 1, 2 and 5 (3).

¹¹³ Art 17 (3).

¹¹⁴ Arts 32 and 42.

¹¹⁵ Art 43 (1) (a) and (b).

¹¹⁶ Art 44.

in Africa can have recourse to the Committee if the domestic remedies are inadequate or unavailable.

2.4 Conclusion

The rights of children deprived of their liberty have been provided for in international and African human rights instruments and are binding on all the state parties to these instruments. The ICCPR, the CRC, the African Charter and the ACRWC all laid down minimum standards for the protection of these rights by state parties which, if implemented to the letter will remedy the consistent and regular violation of the rights of these children. Guidance could also be drawn from the various UN rules and guidelines adopted for that purpose. In addition, both the CRC and ACRWC provide that their provisions do not affect 'any provisions that are more conducive to the realisation' of children's rights.¹¹⁷ Therefore, if the national laws or the CRC or the ACRWC provides for a higher level of protection it supersedes the others.

However, implementation of these international standards requires the establishment of legislative and other measures as well as allocation of adequate human, material and financial resources by the state parties before they can be realised.¹¹⁸

Lastly, state parties also have an obligation to report to the supervisory bodies established for the monitoring of these instruments regularly and implement their recommendations.

¹¹⁷ Arts 41 CRC and 1 (2) ACRWC.

¹¹⁸ Art 4.

CHAPTER 3: PROTECTION OF THE RIGHTS OF CHILDREN IN TROUBLE WITH THE LAW IN SOUTH AFRICA AND THE GAMBIA

3.1 Introduction

South Africa and the Gambia have both ratified the CRC and ACRWC. This means that they have undertaken to respect, promote and fulfil the rights enshrined therein and also to bring their national laws and policies in line with these instruments.¹¹⁹ The CRC was one of the first international human rights instrument ratified by the new South African Government in 1995. This could be linked to the fact that the plight of children under apartheid rule enjoyed wide international coverage.¹²⁰ The Gambia's initial report to the CRC Committee also stated child protection and justice as one of its priority concern.¹²¹ This chapter will analyse the status and application of international law in these two countries. Second, how the rights of children deprived of their liberty as provided in these binding legal instruments are given effect domestically and the problems and challenges of implementation.

3.2 The status and application of international law in South Africa

The relationship between international law and South African domestic law is provided for under sections 231 and 232¹²² of the Constitution.¹²³ Section 231(2) provides that an international agreement binds the republic only after it has been approved by the National Assembly and the National Council of Provinces. Section 231(4) further states that an international agreement shall become law in South Africa when it is enacted into law by national legislation except for self-executing provisions of the agreement. This means that South Africa generally has a dualist approach whereby an international instrument require parliamentary approval for ratification and once ratified it must be

¹¹⁹ F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 215. See also General Comment No. 5 (n 68 above) para 1.

¹²⁰ M Oliver 'The status of international children's rights instruments in South Africa' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 197.

¹²¹ CRC-Gambia Initial Report- GENERAL.CRC/C/3/Add.61 28 September 2000 5 para 5.

¹²² It provides that customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament.

¹²³ Act 108 of 1996.

domesticated before it can have the force of law nationally. However, self executing provisions of an international agreement shall have direct application once ratified unless it contravenes the Constitution or a national legislation.

Section 231(5) also binds South Africa to international agreements which were entered into before the 1996 Constitution entered into force. The CRC was ratified in 1995 but its obligations and responsibilities are binding on the state. However, for the CRC and the ACRWC to become part of South African law, there must be legislation to that effect.¹²⁴

Does this mean that unless the Child Justice Bill is passed into law, children deprived of their liberty in South Africa cannot claim the rights in the CRC and the ACRWC? It is submitted that pursuant to section 39 of the Constitution, provisions of the CRC and the ACRWC can be relied on by the courts when interpreting the Bill of Rights.¹²⁵ Therefore, where constitutional rights of children deprived of their liberty are violated, the courts can seek guidance from these international instruments to interpret those rights. This was further explained in *S v Grootboom*.¹²⁶

Section 233 further states that when interpreting any legislation; a court must prefer an interpretation which is consistent with international law to which is inconsistent with it. In *S v Makwanyane*,¹²⁷ the Constitutional Court stated that international law include both binding and non-binding international law.

Therefore, the CRC and ACRWC bind South Africa but their provisions do not have direct application domestically unless they attain the status of customary international law.¹²⁸ However, the courts can still make reference to them and other relevant

¹²⁴ A Child Justice Bill is drafted to give effect to the provisions of the CRC dealing with child justice.

¹²⁵ Sec 39 (1) (b). For discussion see J Dugard 'The role of international law in interpreting the Bill of Rights' (1994) vol. 10 no.1 *South African Journal on Human Rights* 212.

¹²⁶ *Government of the Republic of South Africa v Grootboom and others* CCT 11/00 para 26. The constitutional court said 'the relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.'

¹²⁷ *S v Makwanyane* 1995 (3) SA 391 (CC) para 55.

¹²⁸ Lloyd argues that ' the CRC is deem to have become customary international law since it is the most widely ratified convention and states will be required to adhere to it whether they are parties or not.' See n 97 above 13.

international instruments when interpreting the Bill of Rights. This includes both binding and non binding international law.¹²⁹ Similarly, when interpreting statutory legislation affecting rights of children deprived of their liberty the court must adopt interpretations that are consistent with the CRC, ACRWC and other relevant international instruments.

3.3 The status and application of international law in the Gambia

The Constitution of the Gambia 1997 also serves as the fundamental law of the country. It provides for what constitute laws of the Gambia.¹³⁰ However, unlike the South African Constitution, there is no specific provision regulating the relationship between international law and the Gambia's national laws as well as application of the former domestically.

The Gambia's legal system is based on English common law traditions.¹³¹ It follows the dualist approach as a common law rule.¹³² Therefore, parliamentary approval is required before any international instrument is ratified and once granted it is binding on the Gambia. Thereafter, it must be specifically transformed into municipal law by an Act of National Assembly before it can have the force of law locally.¹³³ This requirement is also implicit in section 7(d) of the Constitution. However, unlike the South African Constitution, there is no distinction between self executing and non self executing treaties. Thus, all treaties must be locally enacted before they become part of domestic law.¹³⁴

¹²⁹ For instance, the UN rules and guidelines on juvenile justice can also be considered by the courts.

¹³⁰ Sec 7.

¹³¹ WTO 'Trade and investment regimes: The Institutional framework' WT/TPR/S/127 12 para 3 <http://www.wto.org/english/tratop_e/tpr_e/s127-2_e.doc> (accessed on 23 September 2005).

¹³² M Shah Alam 'Enforcement of international Human Rights Law by domestic courts' 4 <<http://www.aals.org/international2004/Papers/alam.pdf>> (accessed on 23 September 2005). See also AO Adede 'Domestication of international obligations' (2001) <<http://www.kenyaconstitution.org/docs/07d017.htm>> (accessed on 23 September 2005).

¹³³ MN Shaw *International law* (1997) 105. This position is also similar to the South African constitutional requirement.

¹³⁴ The CRC and the ACRWC were given the force of law nationally in June 2005 when the Children's Act was passed.

Section 216 (3) of the Constitution also obligates the state to be guided by international human rights instruments in making policies for the protection of fundamental rights and freedoms. Section 211(b) further empowers the courts to have regard to these state policies in interpreting any laws based on them. It is submitted that since these policies must comply with international human rights instruments, by implication, the courts can also be guided by these human rights instruments when interpreting the rights protected under the Bill of Rights and any other legislation.

In addition, the Bangalore Principles¹³⁵ acknowledges that it is proper for national courts to have regard to international obligations which a country undertakes whether or not they have been domesticated for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.¹³⁶ Though these principles do not bind states it is submitted that they serve as 'soft law' and should be applied by courts in the Gambia since the 1997 Constitution provides no clear guide.

The Constitution is equally silent on the application of customary international law. Generally, customary international law is considered as part of common law to the extent that they are not conflicting with statutes and are therefore directly applicable in domestic courts.¹³⁷ It is submitted that pursuant to the common law principles, customary international law shall be law in the Gambia in accordance with section 7 (c) of the Constitution.

In conclusion, the CRC and ACRWC bind the Gambia and they can be invoked in the national courts because they have been domesticated. Customary international law also has direct application nationally. Unlike in South Africa, the Constitution of the Gambia does not expressly provide for reference to international law when interpreting the Bill of

¹³⁵ The Bangalore Principles were released as a summary of issues discussed at a Judicial Colloquium on The Domestic Application of International Human Rights Norms, held in Bangalore, India from 24 - 26 February 1988. Reprinted in Commonwealth Secretariat Developing Human Rights Jurisprudence vol. 3 151 and in 1 African Journal of International and Comparative Law/RADIC (1989) 345 <http://www.chr.up.ac.za/hr_docs/african/docs/other/cwn1.doc> (accessed on 24 September 2005).

¹³⁶ Principle 7. See also principles 4, 5, 6 and 8. In *Garrison v The Attorney General* (1992) the court had recourse to the provisions of the UDHR and the African Charter to determine conformity of municipal law with international law. See (n 121 above) 13 para 49.

¹³⁷ Shah Alam (n 132 above) 4 and Shaw (n 133 above) 105-106.

Rights or any other legislation. However, the courts can do so when interpreting any law based on policies protecting fundamental rights and freedoms.

3.3 Protection of the rights in the South African Constitution

The human rights of children are protected by the Bill of Rights under the 1996 Constitution of South Africa. These rights can be divided into two groups namely, the general and specific rights of children. Section 28 deals specifically with the rights of children including those deprived of their liberty. The content of section 28 also reflects the essence of the CRC. In addition, sections 12 and 35 provide further protection to these children.

The Constitution defines a child as any person less than 18 years.¹³⁸ This means that any person below 18 is entitled to the protection under section 28 without any discrimination.¹³⁹ This is in line with the requirements of the CRC¹⁴⁰ and the ACRWC¹⁴¹ which is binding on South Africa.

It also states that the best interests of the child are of paramount importance in every matter concerning the child.¹⁴² This echoes one of the most important principles of the CRC and the ACRWC.¹⁴³ This must be the guiding principle on any decision in respect of children deprived of their liberty. Some writers have criticised this provision on the ground that it is too broad and vague and has failed to provide a reliable and determinate standard.¹⁴⁴ However in the *Fitzpatrick* case Goldstone J stated that the

¹³⁸ Sec 28 (3).

¹³⁹ Sec 9 (3) provides that no one must be discriminated against based on age, sex, race, gender, disability, birth, language, culture, religion, ethnic or social origin among other things.

¹⁴⁰ Art 1.

¹⁴¹ Art 2.

¹⁴² Sec 28 (2).

¹⁴³ Art 3 CRC and art 4 ACRWC.

¹⁴⁴ J De Waal et al cited in B Bekink & D Brand 'Constitutional protection of children' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 194.

best interest rule should not be given exhaustive content. The standard should be flexible in order to cater for the needs of specific children in specific circumstances.¹⁴⁵

The Constitution provides that every child should be protected from maltreatment, neglect, abuse or degradation.¹⁴⁶ This provision prohibits the maltreatment of children at any period of time including when deprived of their liberty. It should also be read with the rights in section 12 of the Constitution which the child is also entitled as an individual.¹⁴⁷

The Constitution also provides that children in trouble with the law must not be detained except as a measure of last resort and for the shortest appropriate period of time only.¹⁴⁸ Like the CRC, it did not provide any guide as to what amounts to a 'measure of last resort'. It is submitted that alternative measures must be employed to deal with the child and detention must always be the last option when these measures are not appropriate in the circumstances. In the event the child is detained then it must not be for longer than necessary.¹⁴⁹

The Constitution further provides for separation of a child detainee from adult detainees. He or she must also be treated in a manner and kept in conditions appropriate to his or her age and maturity.¹⁵⁰ This is in line with the international standards.¹⁵¹

The child also has the right to free legal assistance in criminal proceedings at the expense of the state if substantial injustice would otherwise result.¹⁵² Skelton argues that

¹⁴⁵ *Minister for Welfare and Population Development V Fitzpatrick and Others* [2000] 7 BCLR 713 (CC) 18. Similarly, the CRC Committee did not provide any criteria but states that 'in every decision or action consideration must be made on how it will affect the child's rights and interests'. See General Comment No. 5 (n 68 above) para 12, art 3 (1).

¹⁴⁶ Sec 28 (1) (d).

¹⁴⁷ The relevant clauses are 12 (c), (d) and (e) which expressly prohibit all forms of violence, torture, cruel, inhumane and degrading treatment against any person including children.

¹⁴⁸ Sec 28 (1) (g).

¹⁴⁹ CRC (n 54 above), JDL (n 75 and 76 above) and Tokyo Rules (n 83-86 above).

¹⁵⁰ n 148 above.

¹⁵¹ ICCPR (n 34 above), CRC (n 56 and 65 above) and ACRWC (n 103 and 110 above).

¹⁵² Sec 28 (1) (h) and Sec 35 (3) (g) further provides the right to free legal representation in criminal proceedings and it applies equally to children and adults.

in most cases where a child under 18 is on trial substantial injustice will occur if he or she does not have a lawyer.¹⁵³ However, it is important that law enforcement officers and the court inform these children about their rights to legal representation and legal assistance.

Children in trouble with the law are further protected under sections 12 and 35 of the Constitution. Section 12 specifically provides protection against physical restraints such as detention and imprisonment. It guarantees both procedural and substantive rights of persons deprived of their liberty. Thus the state is obliged to furnish reasons for deprivation of the liberty of every child and no child shall be detained without due process of law.¹⁵⁴ Furthermore, it protects against torture, cruel, inhumane and degrading treatment including the death penalty and corporal punishment.¹⁵⁵

Section 35 also provides for the basic rights accorded to every person who is arrested, detained or accused of a crime. A child deprived of liberty must be released from detention if the interest of justice permits but subject to reasonable conditions.¹⁵⁶ This must be read with section 28 (g) which provides for detention of a child as a last resort. The child must also have the right to challenge the lawfulness of the detention.¹⁵⁷ It is argued that the above mentioned rights do not replace the statutory and common law rules and principles of criminal procedure but the latter must now comply with the provisions of the Bill of Rights and the rest of the Constitution.¹⁵⁸

¹⁵³ Skelton (n 13 above) 154. See also E Skinnider 'The responsibility of states to provide legal aid' The International Centre for Criminal Law Reform and Criminal Justice Policy: A paper prepared for the legal aid conference in Beijing China March 1999 9 <<http://www.icclr.law.ubc.ca/Publications/Reports/beijing.pdf>> (accessed on 15 August 2005).

¹⁵⁴ J De Waal et al *The Bill of Rights Handbook* (2001) 247.

¹⁵⁵ In *S v Makwanyane* 1995 (3) SA 391 (CC) the Constitutional Court decided that the death penalty amounts to inhumane and degrading treatment and thus it was outlawed. Similarly in *S v Williams* 1995 (3) SA 632 (CC) the court outlawed the judicially imposed corporal punishment.

¹⁵⁶ Sec 35 (1) (f).

¹⁵⁷ Sec 35 (2) (d).

¹⁵⁸ De Waal (n 154 above) 585.

The Constitution does not expressly provide for the promotion of child's physical and psychological recovery as well as social reintegration. However, this can be remedied because it provides for the consideration of international law when interpreting the Bill of Rights.¹⁵⁹ Thus, where there is inadequate protection, the courts can be guided by some of the provisions in the international instruments discussed above.

3.4 Protection of the rights in the Gambian Constitution

The Constitution of the Gambia 1997 has a Bill of Rights which seeks to protect fundamental rights and freedoms of people in the Gambia. Section 29 deals specifically with the rights of children in addition to their entitlement to the other rights as individuals.

The Constitution did not expressly define a child. However, section 39 (1) states that 'every citizen of the Gambia being eighteen years or older and of sound mind shall have the right to vote for the purposes of elections.' Section 26 also states 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 and to vote and stand for elections.' From these provisions it can be inferred that full age is eighteen years under the Constitution. Therefore, any person below the age of eighteen can be considered a child.

Section 29 (3) provides for the separation of child offenders from adult detainees in custody. Unlike section 28 of the South African Constitution, it did not adequately protect the rights of children deprived of their liberty in accordance with international standards. However, reference can be made to other provisions of the Constitution which children are also entitled to as individuals.

Section 19 provides protection against unlawful deprivation of liberty to every person including children. Deprivation of liberty must be in accordance with law and the person must appear in court within 72 hours. He or she must also be informed of his arrest within three hours and if not tried within a reasonable time must be released

¹⁵⁹ Sec 39 (1) (b).

conditionally or unconditionally. In practice, these requirements are not strictly observed by the police.¹⁶⁰

Section 21 of the Constitution also provides protection against torture or inhumane degrading punishment or other treatment. This protection is absolute and under no circumstances should a child be subjected to torture when in police custody or in the prison. However, corporal punishment and whipping are used within the juvenile justice system and it was a concern raised by the CRC Committee.¹⁶¹

Section 24 (3) provides for the basic rights accorded to every person who is arrested, detained or accused of a crime. These include the right to be presumed innocent, the right to be informed of the charge, to be given adequate time to prepare his defence, to examine and call witnesses, interpreter, to remain silent and the right to legal representation at the person's own expense.

The right to legal aid at the state's expense is only limited to persons who are charged with offences that carry capital punishment.¹⁶² This means that children deprived of their liberty would only be provided legal aid if charged with capital offences. There are very few children accused of serious offences¹⁶³ but they are not provided with legal aid.¹⁶⁴ The majority of children charged with less serious offences are not entitled to legal aid. This limitation prevents the child from getting assistance at the time of arrest and detention to challenge the competence of the detention resulting in long detention periods for many children without trial. It also impacts negatively on the child's fair trial rights.

¹⁶⁰ n 6 above 38.

¹⁶¹ n 7 above paras 32, 33 67, 68 (a) and (g).

¹⁶² Sec 24 (3) (d). Due to financial reasons, the Gambia entered a reservation to art 14 (3) (d) of the ICCPR which requires provision of legal assistance during a criminal trial to persons who cannot afford it. But no reservation was made to the CRC.

¹⁶³ n 121 above para 205.

¹⁶⁴ *State v LK* (case no. K 77/04 unreported). The child was accused of murder. He was arrested in January 2003 but was never brought to trial nor provided with counsel. He languished in the juvenile wing until September 2004 when he was released on bail by a Magistrate after his mother brought an application for *habeas corpus*.

Lastly, section 124 of the Constitution requires courts to deliver timely decisions. This guarantees the right to speedy trial by the courts. The right of appeal from the subordinate courts to the superior courts is also guaranteed.¹⁶⁵

3.5 State obligations and enforcement mechanisms

Section 7 (2) of the South African Constitution requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. These obligations include both positive and negative duties on the part of the state and apply to all rights. However, the extent and scope of the duty on each right depends on the nature and content of the right. The rights of children deprived of their liberty fall within the ambit of civil rights and can be enforced both by judicial¹⁶⁶ and non judicial procedures¹⁶⁷.

Similarly, section 17(1) of the Constitution of the Gambia also requires all organs of the executive and its agencies and the legislature to respect and uphold the fundamental human rights and freedoms enshrined in the Bill of Rights (Chapter IV). Therefore, the state has a duty to respect, promote and fulfil the rights enshrined therein including the rights of children deprived of their liberty. These rights must be accorded to all children without any form of discrimination.¹⁶⁸ They can also be enforced judicially when violated.¹⁶⁹

3.6 Other statutory protection of the rights in South Africa and the Gambia

The laws relating to the child justice in South Africa are scattered in many different pieces of legislation. These include the Criminal Procedure Act (CPA),¹⁷⁰ the Correctional Services Act (CSA),¹⁷¹ the Probation Services Act (PSA)¹⁷² and the Child

¹⁶⁵ Secs 132 (2), 130 (3) and 128 (2).

¹⁶⁶ Sec 38.

¹⁶⁷ Sec 184 (1).

¹⁶⁸ Sec 33.

¹⁶⁹ Sec 17 (1).

¹⁷⁰ Act 51 Of 1977.

¹⁷¹ Act 8 Of 1959 as amended by the Correctional Services Amendment Act 17 of 1994 and Act 111 of 1998.

Care Act (CCA)¹⁷³. On the other hand, the newly enacted Children’s Act (the Act)¹⁷⁴ incorporates all laws relating to children in the Gambia including child justice administration.¹⁷⁵

3.6.1 Definition of a child and age of criminal responsibility

Section 1 of the South African CSA, CCA and PSA define a child as any person less than 18 years as provided in the Constitution. However, the age of criminal responsibility is seven years.¹⁷⁶ This has been increased to 10 years in the new Child Justice Bill but it is still criticised by the CRC Committee.¹⁷⁷ Section 2 (1) of the Gambia’s Children’s Act also defines a child as a person under the age of 18 year. This is also implicit in the Constitution.¹⁷⁸ The age of criminal responsibility is 12 years under the Act.¹⁷⁹ This is in compliance with the recommendations of the CRC Committee to increase the age of criminal responsibility from seven years.¹⁸⁰

3.6.2 Best interest of the child

The Constitution of South Africa provides for the application of the best interest principle in all matters affecting children but it has been criticised for its broadness.¹⁸¹ Similarly,

¹⁷² Act 116 Of 1997 as amended by the Probation Services Act 35 of 2002.

¹⁷³ Act 74 of 1983.

¹⁷⁴ The Children’s Act 2005 was passed on the 23 June 2005. Sec 241 of the Act repealed the Children and Young Persons Act (CYPA) (Cap 45) which regulated juvenile justice administration in the Gambia. It was enacted to strengthen the institutional and legislative framework relating to the protection of the rights of children in line with Gambia’s international obligations.

¹⁷⁵ Part XVII.

¹⁷⁶ Sloth-Neilsen (n 21 above) 397.

¹⁷⁷ n 10 above para 17. See also Sloth-Neilsen (n 21 above) 396.

¹⁷⁸ Secs 26 and 39 (1).

¹⁷⁹ Sec 209. This provision has done away with the common law rebuttable presumption of *doli incapax*.

¹⁸⁰ n 7 above para 68 (b).

¹⁸¹ n 142 and 144 above.

section 3 (1) of the Gambia's Children's Act also provides that the best interest of the child shall be the paramount consideration by any court, institution, person or other body in determining any question concerning the child. Unlike the South African Constitution, section 3 (2) provides a criteria and guidelines which must be considered in determining what is in the best interest of the child. It is submitted that this criteria shall not be exhaustive and the courts, institutions, persons or other bodies shall be free to consider other relevant issues in order to effectively cater for the specific needs of every individual child in specific circumstances.

3.6.3 Detention as a last resort and for the shortest possible time

Section 71 of the South African CPA provides for the release of children after arrest by the police or court bail and be placed in a place of safety or under the supervision of a probation officer or a correctional official. A child may also be placed into the care of the person in whose custody he or she is, if the person undertakes to bring him or her to court at a specified time and place.¹⁸² These provisions allow for children accused of crimes to be released rather than being placed in detention especially when accused of non serious offences.

The PSA also provides for the mandatory assessment of a child in detention after his arrest and prior to his first appearance in court.¹⁸³ This will assist the judge in deciding whether to continue to detain the child or release him to his parents or guardian.

Further, section 29 of the CSA prohibits the detention of children accused of a crime but where detention is necessary, it must not be more than 24 hours for a child under 14 years and 48 hours for a child over 14 but not yet 18 years without appearing before a judge. The latter must also be provided with reasons for the child's detention.¹⁸⁴ Similarly, detention in prisons pending trial in South Africa is only allowed for children over 14 and less than 18 years charged with serious offences.¹⁸⁵ Unlike the Gambia, the

¹⁸² Sec 72 (1) (b).

¹⁸³ Sec 4B and Sec 4 (1) (j).

¹⁸⁴ Sec 29 (1), (2), (3) (a) CSA. This distinction is not provided in the Gambian Children's Act. It applies to all children.

¹⁸⁵ Sec 29 (5) (a) of the Correctional Services Amendment Act 14 of 1996. It excludes children under 14 and they must be brought before a judge within 24 hours.

duration of the detention is not indicated however, the child must be brought before a judge every 14 days for review of the order.¹⁸⁶ The child must also be given a speedy trial whilst in detention.¹⁸⁷

The CPA also requires the investigating officer to inform the parent or guardian when the child is arrested. He or she should also notify a probation officer or an available correctional official.¹⁸⁸ This will help to facilitate the process of locating the parents as well as provision of report on the social conditions of the child. Section 74 further requires the police to warn the parent of an accused child to attend court proceedings.¹⁸⁹

The Gambia's Children's Act also provides that detention pending trial shall be used as a measure of last resort and for the shortest possible period of time. It requires the use of alternative measures which include close supervision, placement with a family member or in educational setting or home approved by a social welfare or probation officer.¹⁹⁰

The Act also provides that a child who is arrested by the police and cannot be taken to the Children's Court immediately shall be released on bond or on his own recognisance or on recognisance entered into by his parent's or responsible person unless the offence is a serious one or his release is not in his best interest.¹⁹¹

¹⁸⁶ As above. This provision was introduced to protect children in detention. However, in practice the court rolls have been choked with remand appearances, few of which result in the release of the child. See Department of Justice and Constitutional Development *Child Justice Bill: Budget and Implementation Plan* October (2002) 13.

¹⁸⁷ Sec 29 (5A) (d).

¹⁸⁸ Secs 50 (4) and (5). However, sec 74 (2) requires the arresting officer to do the notification.

¹⁸⁹ This is very important and in the child's best interest as it will provide an opportunity for the child to be released to the parent or guardian after the first appearance in court. However, in situations where the child's parent or guardian is not known or the search for the parent may cause unreasonable delay, it is submitted that the probation officer or correctional officer can take charge of the child.

¹⁹⁰ Sec 212 (2).

¹⁹¹ Sec 210 (4).

Where a child is detained, the period of detention must not be more than 72 hours without appearing before the Children’s Court.¹⁹² During the first court appearance, the judge shall make an order for the release of the child on bail unless there is a serious danger in the release of the child.¹⁹³ If bail is refused, the court shall record its reasons and inform the child of his right to appeal to the High Court.¹⁹⁴ It shall also order for the child’s remand in a secure home to be named in the order.¹⁹⁵ A secure home shall not include a prison¹⁹⁶

The Children’s Act further provides that a child awaiting trial for very serious offences¹⁹⁷ shall not be detained for more than six months and not more than three months for any other offence.¹⁹⁸ This provision seeks to minimise the potential of children languishing in detention for years awaiting trial. It will also help speed up the trials for these children.

A child in detention shall also be given all the care, protection and all necessary individual assistance including social, educational, vocational, psychological, medical and physical assistance that he or she may require having regard to his or her age, sex and personality.¹⁹⁹ These protective measures are necessary to ensure the social and psychological recovery of the child.

Lastly, the police have a duty to inform the parents, guardians and the police child welfare unit of the arrest.²⁰⁰ They shall not ‘harm’²⁰¹ the child but must respect his legal status and promote the child’s best interest and well-being.²⁰²

¹⁹² Sec 210 (5).

¹⁹³ Sec 211(1).

¹⁹⁴ Sec 211(2).

¹⁹⁵ Sec 212 (1). See also secs 212 (4) and (5).

¹⁹⁶ Sec 212 (8).

¹⁹⁷ Sec 219 (1).

¹⁹⁸ Sec 212 (7).

¹⁹⁹ Sec 212 (3). See also JDL guidelines (n 76 and 77) above.

²⁰⁰ Sec 210 (1) (a).

²⁰¹ Sec 210 (8) defines harm to include ‘the use of harsh language, physical violence, exposure to the environment and any consequential physical, psychological or emotional injury or hurt.’

3.6.4 Separation from adult detainees

The CSA requires the child to be separated from adult detainees when in detention²⁰³ and if a female she must be under the care of a woman.²⁰⁴ Further, it requires the Minister in charge of correctional services to bring the conditions of child detainees awaiting trial in line with relevant internationally recognised human rights standards and norms.²⁰⁵ Similarly, the Gambia's Children's Act also provides that the child must be separated from adult detainees when in custody and a female child detainee must be under the custody of a female officer.²⁰⁶ However, in reality this protection is not implemented as required.

3.6.5 Role and responsibility of parent or guardian

The South African CPA requires a parent or guardian to attend court proceedings²⁰⁷ and to assist the child.²⁰⁸ It has been argued that the parent can assist both at the pre-trial stage and during the court proceedings.²⁰⁹ However, the parent's ability to adequately safeguard the child's legal rights during the proceedings is questionable since the parent is likely as the child to be ignorant of the child's legal rights and may also feel intimidated.²¹⁰

²⁰² Sec 210 (1) (c).

²⁰³ Sec 29 (6).

²⁰⁴ Sec 29 (7). This is in line with rule 28 of JDL.

²⁰⁵ Sec 29 (5B).

²⁰⁶ Secs 210 (6) and (7).

²⁰⁷ Sec 74.

²⁰⁸ Sec 73 (3).

²⁰⁹ Skelton (n 8 above) 168.

²¹⁰ IP Khatiwada 'A research report on ensuring fair trial in cases of children in conflict with the law (Nepalese perspective) September 2004 – June 2005' <www.humanrights.dk/uopload/application/d53c36d1/ishwar.pdf> (accessed on 24 September 2005).

The Children's Act of the Gambia also provides that parent may attend the proceedings²¹¹ and may be entitled to participate if the court sees fit.²¹² This means that the court will have to determine whether the participation of the parent is useful or not in the circumstances. The court may also compel the parent or guardian to attend or dispense with their attendance if not in the interest of the child.²¹³

In addition, it requires the presence of a parent or guardian when the child is being interviewed by the police except where it is not in the best interest of the child.²¹⁴ Where the parent or guardian cannot be contacted or are not available, a social welfare officer, probation officer or an authorised person shall be present unless it is not in the best interest of the child.²¹⁵ It is submitted that one of the above mentioned persons; in particular a legal representative must always be present at the time of interview because the child may need assistance and guidance on his legal rights.

3.6.6 Special criminal procedures

The CRC and ACRWC require the establishment of special procedures applicable specifically for children which must consider his age and promote rehabilitation. In addition to the constitutional protection, the CPA of South Africa has special rules relating to criminal proceedings of children. Section 153 (4) provides for the conduct of cases involving children in camera allowing only the accused, his or her parents or guardian or person in *loco parentis* and legal representative to be present. Further, section 154 (3) prohibits the publication of any information which reveals or may reveal the identity of an accused child. Failure to comply with this prohibition would attract penalties. Other protection measures regarding detention have also been discussed above.

²¹¹ Sec 216 (1).

²¹² Sec 217 (3). This does not affect the child or his counsel's right to ask questions.

²¹³ Sec 216 (2) and (3).

²¹⁴ Sec 210 (2). This requirement is not provided for in the South African laws. The parent is only required to be notified of the arrest.

²¹⁵ Sec 210 (3).

There are no separate criminal courts for children in South Africa.²¹⁶ However, the CCA provides for the establishment of a Children's Court.²¹⁷ This court is not directly part of the criminal justice system but it has implications on the administration of child justice. A child accused of a crime and does not have parents or is in need of care and safety may be transferred to the Children's Court to determine whether he or she is in need of care.²¹⁸ The proceedings are held in another room other than a court room in camera.²¹⁹ It takes the form of an inquiry and no conviction or sentence is given at the end.²²⁰ The objective is to provide protection and care to a child in need of it irrespective of the offence charged with and it offers an opportunity for diversion from the criminal justice system to a place of safety.²²¹

In the Gambia, the Children's Act expressly provides for the establishment of special procedures²²² for trial in the Children's Court.²²³ The proceedings must be informal by way of an enquiry rather than adversarial and the child must express his opinion.²²⁴ This is very important as it will enable to child to feel at ease and be able to participate meaningfully in the proceedings. The child's privacy shall also be respected throughout the proceedings and the latter must be held in camera or by video link where necessary.²²⁵ Only the accused child, his or her parent or guardian, parties to the case,

²¹⁶ This requirement is implicit in art 40 (3) (a) of the CRC.

²¹⁷ Sec 5.

²¹⁸ Secs 11 (1) and 14 (4). Skelton also argues that where conviction has already been entered the court may still refer the case to the children's court because the test is not the seriousness of the offence but whether the child falls within a child under section 11 of the CCA. See A Skelton *Children in trouble with the law: A practical guide* (1993) 14.

²¹⁹ Sec 8 (1) and (2).

²²⁰ Skelton (n 8 above) 169.

²²¹ Sec 28. Children are sometimes detain in prisons to await trial or sentence thus a child in need of care should not be placed in a prison where he or she will not receive the care that she or he deserves.

²²² This is different from the situation in South Africa where children are subjected to the same procedures as adults except that some special provisions are made specifically for them.

²²³ Sec 72 (1). However, the transitional provision regarding children in detention did not provide for the continued use of the procedures in the CYPA pending the establishment of the Children's rules. This may pose a problem as to what procedure applies now since the whole CYPA has been repealed pursuant to section 241of the Act.

²²⁴ Sec 72 (1) (c) and (e).

²²⁵ Sec 72 (1) (b).

social worker, probation officer, officers of the court, the legal representative and any other person authorised by the court must be present.²²⁶ Section 73 also prohibits the publication of any information that may lead to the identification of the child and it attracts a very stiff penalty when contravened.

In addition, the Act further provided for the establishment of a Children's Court²²⁷ which shall be staffed permanently with first class magistrates.²²⁸ The Court shall have jurisdiction to hear all criminal cases affecting children except the offence of treason and where the child is jointly charged with adults.²²⁹ However in the latter case,²³⁰ the trial court shall consider his age and the provisions of this Act.²³¹ The child shall also be remitted to the Children's Court for an appropriate order to be made if the offence is proved against him or if he admits the charge.²³²

3.6.7 Right to legal representation

The CPA provides that a child deprived of his liberty is entitled to legal representation and must be allowed to get one or be provided with one at the state's expense.²³³ This is equally protected in the South African Constitution and it must be provided in all cases where the interest of justice so requires. It is therefore the duty of the police and the court to enforce this right for the children.

In the Gambia, the child's rights to fair hearing and compliance with due process must also be observed.²³⁴ Despite the limited constitutional guarantee for legal aid, section 72

²²⁶ Sec 72 (2).

²²⁷ Sec 68. This is in line with CRC's requirement for state parties to enact laws and establish procedures applicable specifically to children in trouble with the law.

²²⁸ Sec 69.

²²⁹ Sec 213 and sec 70 (1) (a).

²³⁰ Secs 229 and 230.

²³¹ Sec 231(2).

²³² Sec 231(1).

²³³ Sec 29 (5A) (c).

²³⁴ Sec 214 (1).

(1) (f) of the Children’s Act provides that a child has the right to legal representation and legal aid at the state’s expense. This provision is not qualified by any other provision in the Act.²³⁵ It is submitted that legal aid shall therefore be made available to every child accused of an offence and cannot afford a lawyer. If the child refuses the state appointed lawyer, the court has a duty to explain to the child his right to legal representation and the assistance he or she would be given. The child also has the right to appeal any decision made against him or her and shall be so informed by the court.²³⁶

3.6.8 Sentencing provisions

The South African PSA provides for mandatory pre-sentence reports by the probation officer.²³⁷ It further provides for the promotion of diversion programmes and the concept of restorative justice.²³⁸ However, it has been argued that the definition of restorative justice in the PSA is not entirely congruent with that of current literature because it puts an immediate focus on reconciliation rather than making right the wrongs caused by the criminal incident which is the central issue for restorative justice.²³⁹

In addition, the CPA also provides a number of alternative sentences for child convicts in South Africa. A child can be cautioned and discharged or sentenced to a suspended prison sentence or to postponement of sentence conditionally or unconditionally.²⁴⁰ These options are suitable mostly for less serious offences and for first offenders. A child can also be placed under the supervision of a probation officer or correctional official or a suitable person or sent to a reform school.²⁴¹ Placement under a probation officer will

²³⁵ It is in line with the CRC, ACRWC and the Dakar Declaration and Recommendation on Right to Fair Trial and Legal Assistance in Africa 9 – 11 September 1999: Declaration 8 and 10. See C Heyns (ed) *Human Rights Law in Africa* vol. 1 (2004) 587. See also UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988, Principle 17.

²³⁶ Secs 72 (1) (g) and 232.

²³⁷ Sec 4 (1) (k) and sec 1.

²³⁸ Sec 4 (1) (i). See also art 40 (4) CRC, art 17 (3) ACRWC, Tokyo rules (n 83 above).

²³⁹ M Batley ‘Outline of relevant policies’ in T Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* Institute for Security Studies Monograph Series No 111 (2005) 121.

²⁴⁰ Sec 297 (1).

²⁴¹ Sec 290 (1).

help divert the child from the prison and will allow him to be within the community with an opportunity for rehabilitation. The reform schools also seem to be an alternative to prison but it is a place of confinement.

Correctional supervision such as house arrest, community services and compulsory attendance of a designed course are also forms of alternative sentences under the CPA. Skelton argues that the option of a house arrest should only be reserved for serious offences when there are no other suitable options because it is very taxing for a child.²⁴²

However, mandatory imprisonment is still an option for child convicts in South Africa. Though the CPA Amendment Act²⁴³ exempted children under the age of 16 from its ambit,²⁴⁴ but it does not exclude children between 16 and 17.²⁴⁵ In case of the latter, the onus is on the state to give compelling reasons why the minimum sentence should be imposed and if the court agrees, it must state its reasons on the record of proceedings.²⁴⁶ The court in *S v Mofokeng*²⁴⁷ explained this provision to mean that it is not obliged to impose mandatory sentences to children in the same way as it would for adults.²⁴⁸ Similarly, in *S v Nkosi*²⁴⁹ the court held that life imprisonment is an appropriate sentence for children but it should only be imposed in exceptional circumstances. Though this reasoning of the court allows for discretion in imposing imprisonment sentences on children however, there is a possibility of children between 16 and 17

²⁴² Skelton (n 8 above) 175.

²⁴³ Act 105 of 1997.

²⁴⁴ Sec 51 (6).

²⁴⁵ Sec 51 (3) (a).

²⁴⁶ Sec 51 (3) (b).

²⁴⁷ *S v Mofokeng & another* 1999 (1) SACR 502 (W) at 520.

²⁴⁸ Per Stegmann J at 520 'the court is not obliged to pronounce the minimum sentence imposed by parliament, but it is left free to sentence them in accordance with its own discretion, according to the ordinary criteria usually applicable to the determination of a fair sentence'. See also *S v Blaauw* (case no SS 159/2000 unreported), *S v Daniels & others* (case no RC 75/01 unreported) and *S v K & another* (case no SS 50/99 unreported).

²⁴⁹ *S v Nkosi* 2002 (1) SARC 135 (W) at 142.

being subjected to a sentence of life imprisonment in some circumstances.²⁵⁰ The death penalty²⁵¹ and corporal punishment²⁵² are also prohibited for children.

In the Gambia, section 222 of the Children's Act also requires the social worker or probation officer to prepare a pre-sentencing social background report which shall be considered by the court before making an order for sentence. The report shall be made known to the child and his legal representative. The court may also request additional oral report by the social worker if necessary. This requirement is mandatory and thus will help the court in arriving at the best sentencing option in every child's case.

Sentencing a child to imprisonment, the death penalty and corporal punishment is also prohibited.²⁵³ Section 220 (1) provides the various alternative orders that the court can make even if the child has committed a very serious offence. The court can however make a detention order in some circumstances but it shall be as a matter of last resort when there is no appropriate alternative order and when the gravity of the offence so warrants.²⁵⁴ The detention shall be to a detention centre other than a prison.²⁵⁵

3.7 The problems and challenges for implementing the laws

3.7.1 No separate statute or procedures for children

The CRC require state parties to enact laws and establish procedures applicable specifically to children in trouble with the law.²⁵⁶ However, there is no separate statute or

²⁵⁰ This possibility is still maintained in the Child Justice Bill. See 'frequently asked questions' <<http://www.childjustice.gov.za/faq.htm>> (accessed on 14 August 2005).

²⁵¹ Sec 1 of Criminal Law Amendment Act 105 of 1997. See also n 163 above.

²⁵² Abolition of Corporal Punishment Act 33 of 1997. See also n 163 above.

²⁵³ Secs 218 (1) and 220 (9).

²⁵⁴ Sec 220 (2) and (4). There is a tendency that some magistrates will only consider the gravity of the offence to warrant a custodial sentence even if the child could have been given a more appropriate sentence. Therefore the provision of pre-sentence social enquiry reports must be strictly enforced to assist the magistrate in making the appropriate sentence.

²⁵⁵ Secs 220 (6) and (7).

²⁵⁶ Art 40 (3).

procedures for children accused of crimes in South Africa.²⁵⁷ Children are generally subjected to the same criminal procedures as adults with special provisions.²⁵⁸ This has affected the protection of the rights of children deprived of their liberty. Most of the law enforcement officers are not conversant with provisions in all the different pieces of legislation nor are they aware of the different role players.²⁵⁹ On the other hand, the Gambia has met this requirement with the enactment of the Children's Act 2005 but the challenge is how to ensure that the rights protected therein are enforced to the letter.

3.7.2 Incompatibility of the national laws

State parties are required to bring their domestic legislation in conformity with the principles and provisions of the CRC.²⁶⁰ South Africa has failed to meet this requirement in some respects. The CLAA makes provision for mandatory prison terms including life imprisonment in respect of the commission of certain offences. Children who are 16 years and over convicted of serious offences can be given long jail term or life sentences in some circumstances. This is contrary to the principle of using deprivation of liberty as a last resort and for the shortest possible time. It also gives the child no chance of rehabilitation or return back to the community.²⁶¹ Once released the child is further

²⁵⁷ The Child Justice Bill provides for a separate procedure for children in trouble with the law in line with international and constitutional standards but it is still not passed into law. Thus, the applicable law is what has been discussed above.

²⁵⁸ J Sloth-Neilsen 'Children's rights and law reform in South Africa: An update from the juvenile justice front' <<http://www.dci-au.org/html/sa.html>> (accessed on 17 July 2005). For discussion see (n 21 above) 389.

²⁵⁹ F Steyn 'Impediments in the management of young offenders in the Free State' Article 40 archives volume 3 no. 1 March 2001 <http://www.communitylawcentre.org.za/children/2001art40/vol3_no1_young.php#young> (accessed on 19 July 2005).

²⁶⁰ The Gambia has harmonised its laws with the CRC and ACRWC.

²⁶¹ Sec 73 (6) (a) of CSA 111 of 1998.

subjected to parole supervision and possible recall to prison for the rest of his life.²⁶² The detention of children who are 14 years and over in prisons whilst awaiting trial has no time bound. Children risked being detained for longer than necessary as it only requires the renewal of the order after every fortnight. A child can also be placed in prison even when they are in need of care and a place of safety.²⁶³

3.7.3 Minimum age for criminal responsibility

The age limit for criminal responsibility in South Africa is also among the lowest in the world.²⁶⁴ Though the CRC and the ACRWC do not specify what the age limit should be, the CRC Committee has expressed disapproval of the age limit set by many countries²⁶⁵ including South Africa.²⁶⁶ It has increased the minimum age from seven to 10 years in the Child Justice Bill, but the CRC Committee still considers this limit too low. According to Sloth-Neilsen, one of the reasons why the age is relevant is to enable the child participate meaningfully in the criminal proceedings, to be able to endure the daunting experience of going to court and comprehend the proceedings, to be able to appreciate and take advice from his or her legal representative as well as give meaningful instructions to him. If the child is so young that he or she is not able to do the above then it may in the end negate the possibility of fair trial.²⁶⁷ On the other hand, the Gambia has increased its age limit from seven to 12 years.

3.7.4 Lack of adequate facilities for children

²⁶² D Van Zyl Smit 'Sentencing children convicted of serious crimes' <http://www.communitylawcentre.org.za/children/2001article40/vol3_no4_serious.php> (accessed on 16 August 2005).

²⁶³ Sec 1 CCA.

²⁶⁴ n 176 above.

²⁶⁵ B Abramson 'Juvenile justice: The "unwanted child" of state responsibilities, An analysis of the concluding observations of the Committee on the Rights of the Child in regard to juvenile justice from 1993 to 2000' International network on juvenile justice, Defence for Children International <www.dci-au.org/html/unwanted.html> (accessed on 13 August 2005).

²⁶⁶ n 10 above para 17. For discussion see Sloth-Neilsen (n 21 above) 393.

²⁶⁷ n 21 above 396.

State parties are also required to establish authorities and institutions specifically for children in trouble with the law.²⁶⁸ However, in South Africa, children ordered to be placed in safe houses by the children's court are often kept in prisons temporarily due to insufficient and inadequate services especially for non whites.²⁶⁹ The CSA was amended to outlaw the incarceration of children in prison while awaiting trial.²⁷⁰ However, it was almost impossible to implement because alternative welfare facilities to keep these children were either not available or not adequately secured to house them and many children placed therein absconded resulting in a political crisis.²⁷¹ It was also not well coordinated.²⁷² At the Provincial level, alternative care institutions or facilities are non-existent in some areas and in areas where they exist; they are inadequate and insecure for children.²⁷³ South Africa was also criticised in this respect by the HRC when it examined its report in 2000 and implored the Government to improve the situation.²⁷⁴

In the case of the Gambia, the infrastructure and institutions to implement the laws are also not yet fully in place despite the enactment of the Children's Act. It was only in March 2000 that a separate wing for male juveniles was established in one of the national prisons.²⁷⁵ Female juveniles are still mixed with adult females in prisons and the separation in police stations and in other prisons are not implemented due to lack of infrastructure and finance.²⁷⁶ The challenge therefore is for the government to establish secure homes, rehabilitation centres and safe houses staffed with qualified personnel to deal with these children as required under the Act.

3.7.5 Lack of adequate trained personnel

²⁶⁸ Art 40 (3).

²⁶⁹ Skelton (n 218 above) 15.

²⁷⁰ Sec 29.

²⁷¹ Skelton (n 15 above) 98.

²⁷² As above.

²⁷³ Department of Constitutional Development (n 186 above) 21. See also n 259 above.

²⁷⁴ n 10 above paras 42 (d) and (e).

²⁷⁵ Department of Social Welfare: 2004-2008 National Policy for Children supported by (UNICEF)/ the Gambia 2003 para 4.69.

²⁷⁶ n 121 above para 205.

The CPA of South Africa requires a mandatory pre-sentence report to be produced by the probation officer before a sentence is passed by a judge.²⁷⁷ However, there are practical problems of delays and provision of poor quality reports due to the limited number of probation officers.²⁷⁸ In the cases of *S v J and Others*²⁷⁹ and *S v N and Another*,²⁸⁰ the High Courts of Cape Provincial and Ciskei respectively, stressed the importance of the pre-sentence report and subsequently set aside sentences imposed on two children without such reports by the magistrate courts.

Most of the social workers and probation officers also appear unprofessional in court due to inadequate formal training on court work.²⁸¹ They experience difficulties in justifying sentence recommendations in court.²⁸² Police officials are also not trained to promote child friendly services nor do they know who to contact when a child is arrested and detained.²⁸³ All these go against the effective protection of the rights of children deprived of their liberty.

Lack of trained personnel also hampers implementation in the Gambia.²⁸⁴ There are very limited numbers of social workers and probation officers at the Department of Social Welfare (DSW) and they do not have adequate training due to insufficient allocation of funds to DSW.²⁸⁵ There are no more than three probation officers in the entire country. As a result, they are not able to provide adequate support for the effective discharge of

²⁷⁷ This is in line with international standards. See Tokyo Rules (n 90 above).

²⁷⁸ n 239 above 120.

²⁷⁹ *S v J and Others* 2000 (2) SACR 310 (C).

²⁸⁰ *S v N* 2005 (1) SACR 201 (CKH).

²⁸¹ n 259 above.

²⁸² As above.

²⁸³ As above.

²⁸⁴ n 7 above para 10.

²⁸⁵ n 275 above para 4.41. See also 'Country profile: Gambia' <www.vsocanada.ca/attachments/gambia.pdf> (accessed on 29 September 2005).

their duties nationwide.²⁸⁶ Training of more social workers and probation officers is needed.

Child welfare units have been established in all police stations but there are very limited numbers of police officers who are trained in child welfare.²⁸⁷ In addition, any police officer can arrest a child and since they are not trained in dealing with children they treat them like any accused person.²⁸⁸

The Gambia's judiciary also depends on foreign lawyers and judges who are appointed based on contract.²⁸⁹ There are no judges or lawyers that have special training on child justice issues and thus are not aware of the international legal safe guards accorded to children in trouble with the law.²⁹⁰ Therefore the challenge is how to provide well trained judges in child law to adequately run the Children's' Courts country wide.

3.7.8 Legal assistance

Provision of legal assistance is not guaranteed in all cases in South Africa. It is only in very serious cases where the current system tends to provide legal aid.²⁹¹ There has also been little or no specialisation of lawyers for children charged with crimes. However, the Department of Justice has recently commenced a partnership process with the Legal Aid Board to train legal representatives countrywide.²⁹²

²⁸⁶ n 121 above para 208.

²⁸⁷ Author's experience as a prosecutor working with the police.

²⁸⁸ With the assistance of UNICEF, the Ministry of Interior has circulated after arrest procedures for children to all police stations but there is no evidence that these procedures are followed by the police.

²⁸⁹ B Muritala 'Human Rights: Gambian lawyers, judges want to take their places' *Daily Observer* 26 May 2005
<http://www.observer.gm/enews/index.php?option=com_content&task=view&id=560&Itemid=60> (accessed on 29 September 2005).

²⁹⁰ n 7 above para 66. The CRC Committee was concerned about the absence of juvenile judges.

²⁹¹ Department of Constitutional Development (n 186 above) 15.

²⁹² As above 14.

Similarly, the Gambia does not have a well established legal aid system. Most children are only made aware of their right to legal representation after appearing before a judge.²⁹³ A state appointed lawyer is only provided if charged with a capital offence. This will have to be extended to other offences too as provided in the Children's Act. There are also practical problems because there is no legal aid board or public defender's office in the country due to lack of state funding.²⁹⁴ All these problems impact negatively on the child's rights to legal assistance and fair trial.

3.7.9 Prioritisation and resource allocation

Child justice administration is considered the 'unwanted child' of every administration.²⁹⁵ Thus adequate financial resources are usually not provided. The current budgetary allocations in South Africa are not adequate and do not specifically target child justice.²⁹⁶ However, an innovative cost benefit analysis was done for the Child Justice Bill to ensure effective implementation once it is enacted into law. This analysis has also revealed the need for adequate funds for effective administration of child justice in South Africa in accordance with its international obligations.

Similarly, the current budgetary system in the Gambia does not provide specific funds for child justice administration.²⁹⁷ In addition, no prior economic cost implication and cost

²⁹³ Author's experience as a state prosecutor.

²⁹⁴ As above. This goes against the UN Basic Principles on the Role of Lawyers 1990 which require states to provide sufficient funding for legal assistance. See paras 3 and 6.

²⁹⁵ n 265 above.

²⁹⁶ The budget speeches for 2004 and 2005 provided lump sum amount for court administration, services to children and women and the criminal justice system as a whole. The main target was not child justice administration. See <<http://www.treasury.gov.za/documents/budget/2004/speech/speech.pdf>> and <<http://www.mg.co.za/ContentImages/198164/speech.pdf>> (accessed on 1 September 2005).

²⁹⁷ In the 2003, 2004 and 2005 budget speech, no provision of resources is made for juvenile justice administration. See <<http://www.statehouse.gm/budgetspeech2003/6.htm>> <<http://www.statehouse.gm/budgetspeech2004/section5.htm>> <<http://www.statehouse.gm/bdgtspeech2005/section6.htm>> (accessed on 1 September 2005).

benefit analysis was done to determine the capacity of the Government to implement the Children's Act. The challenge now is how to implement the Act by providing adequate financial and other resources.

3.7.10 Poor coordination and implementation mechanisms

The Department of Welfare is said to be responsible for the provision of safe houses for children in South Africa.²⁹⁸ However, due to poor coordination among the various institutions and weak implementation mechanisms, children are mostly kept in prisons and police cells for long periods whilst awaiting trial.²⁹⁹ Studies have also shown that despite the many options to release children arrested, the setting of bail for children to unaffordable amounts is widespread thus resulting in the incarceration of many who cannot satisfy the bail conditions.³⁰⁰

In 1998, a National Committee on Juvenile Justice was established in the Gambia to serve as an advisory body to Government on the prevention and management of child offences.³⁰¹ However, this body is not well publicised nor is it functioning effectively. There is also poor coordination and linkages among the various institutions responsible for child justice administration.³⁰²

3.8 Conclusion

²⁹⁸ E Pelser & J Rauch 'South Africa's criminal justice system: Policy and priorities' a paper presented at the South African sociological association (SASA) annual congress, *Globalisation, Inequality and Identity*, 1-4 July 2001 para 4.5 < <http://www.csvr.org.za/papers/papepjr.htm>> (accessed on 19 July 2005).

²⁹⁹ The extent of the problem is not known but there were two cases in Durban and Cape Town respectively where South African Prisoners Organisation (SAPOHR) and a member of parliament had to intervene on behalf of children imprisoned for long periods. For discussion see Z Madotyeni 'Enforcing children's rights through litigation' Article 40 archives volume 2 no. 3 September 2000. <http://www.communitylawcentre.org.za/children/2000art40/vol2_no3_enforcing.php#enforcing> (accessed on 19 July 2005).

³⁰⁰ Skelton (n 8 above) 165.

³⁰¹ n 121 above para 206.

³⁰² n 275 above para 7.1.

A lot has been done in South Africa in terms of legislative amendments and constitutional guarantees to protect the rights of children deprived of their liberty. However, a lot still remains to be done in order to fully comply with its international obligations especially in the area of implementation. There is the urgent need to enact the Child Justice Bill³⁰³ and also the provision of adequate, material, financial and human resources in the administration of child justice as a whole and protection of the rights of the children deprived of their liberty in particular. The National Programme of Action Steering Committee (NPASC) should also play a more proactive role as lead agency in the implementation process and coordination among the various agencies and department is also important. There are also challenges to overcome having regard to the history of South Africa but this is no excuse for non implementation.

The Gambia's new legal framework also provides a comprehensive approach to child justice administration in line with international standards. However, the mechanisms for implementation of these rights are either not in place or they are inadequate. In order to effectively realise these rights, the Government must give priority to this area and allocate adequate resources to all the relevant institutions, identify lead coordinating agency, improve the infrastructure and human resource capacity through training. The

³⁰³ The Child Justice Bill will revolutionise completely the child justice system. It establishes a criminal justice process for children, which aims to protect children's rights in accordance with the Constitution and international instruments. It increases the age of criminal responsibility from 7 to 10 years and clearly sets out the powers and duties of the police and probation officers. It stresses the importance of diversion and provides for a comprehensive diversion system involving the family and professional workers. It also advocates for use of restorative justice rather than on punishment especially in sentencing. An innovative provision is the mandatory preliminary inquiry to assess the child and determine whether he or she can be diverted. It also provides for a separate child justice court. Alternative methods to detention and legal representation are also provided. Finally, it stresses the importance of an effective monitoring structure to ensure the implementation of the law. However, it does not provide for care and protection for children in prison but reference is made to the CSA in that case. For detailed and updated information on the Bill see < <http://www.childjustice.org.za/TabledBill.htm> > (accessed on 1 September 2005).

Constitution also needs to be amended to codify the status and application of international law nationally.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

This paper concludes that international human rights law in general and specific children instruments provide protection to children in trouble with the law including those deprived of their liberty but they are not of much effect unless they are given teeth within the domestic structures of state parties.

To this end, South Africa has made great efforts in terms of legislative amendments and constitutional guarantees to protect the rights of children in trouble with the law within its

ten years of democratic rule. However, it has not complied fully with its international obligations. The solution does not only lie in the enactment of legislation and formulation of good policies but also the implementation of the laws and policies to the letter by all stakeholders. This is not an easy task and there are a lot of challenges to overcome. However, this is no excuse for non implementation since it has agreed to respect and protect these rights by ratifying the international instruments.

The Gambia's Children's Act also provides extensive protection of the rights of children in trouble with the law in line with international standards. However, the reality in the treatment of children deprived of their liberty falls short of these protection measures. The mechanisms for implementation of these rights are either inadequate or non-existent. The Government must therefore prioritise and allocate adequate resources to all the relevant institutions to facilitate effective implementation of the Act. Owing to its limited financial, material and human resources, this may be a Herculean task for the Government but it has agreed to respect and protect these rights by ratifying the international instruments and must make efforts to meet its obligations towards these children with the assistance of its developmental partners and the international community.

4.2 Recommendations

4.2.1 National governments and institutions

Firstly, national governments should harmonise their domestic laws with the CRC and ACRWC. The South African Government must therefore enact the Child Justice Bill into

law without any further delay. This Bill aims to bring South Africa's laws in line with its international obligations.

There is the need to establish institutions and authorities which will specifically cater for the rehabilitation and reintegration of children in trouble with the law into society. These should be manned by competent and experienced staff. This could be realised with the assistance of development partners, the international community and NGOs specialising in related fields.

Training for all those involved with children within the justice system is also a necessity. These include judges, lawyers, social workers, probation officers, law enforcement officials and prosecutors. The training should be regular and continuous to ensure effective implementation of the laws.

There should be a national coordinating body to ensure the effective implementation of the laws and policies. Regarding the Gambia, efforts to establish the National Commission on Children's Rights (NCCR) should be given a priority.³⁰⁴ The NCCR must be an independent statutory oversight body answerable to the National Assembly. It shall ensure the effective coordination and implementation of the Children's Act and other relevant human rights instruments relating to children. The NPASC of South Africa should also play a more proactive role as lead agency in the implementation process as well as coordinate the activities of the various agencies and departments responsible for administration of child justice.

The establishment of quasi judicial monitoring bodies are also very important for the protection of rights of children in trouble with the law.³⁰⁵ The SAHRC is mandated to promote, monitor and assess the observance of human rights in the country.³⁰⁶ It also has the power to investigate and take steps to secure appropriate redress where human

³⁰⁴ NGO alternative report to Gambia Government's initial report on the implementation of the Convention on the Rights of the Child 16 <<http://www.crin.org/docs/resources/treaties/crc.28/Gambia.pdf>> (accessed on 19 July 2005). See also n 7 above para 14.

³⁰⁵ General Comment No. 2 (2002) GENERAL CRC/GC/2002/2 15 November 2002 The role of independent national human rights institutions in the promotion and protection of the rights of the child para 1.

³⁰⁶ S184 (1).

rights have been violated.³⁰⁷ Therefore the SAHRC must be strengthened to ensure that human rights violations of children in trouble with the law and deprived of their liberty are reported, investigated and appropriate redress provided to the victims. Perpetrators must also be punished accordingly. In the Gambia, the proposed NCCR should also have a mandate to receive complaints and investigate violations of the rights of children and provide redress for the victims. On the other hand, the mandate of the Ombudsman could be extended to allow it to receive complaints of human rights violations including children, investigate them and provide appropriate redress to victims.

Governments should honour their reporting obligations to the CRC and the ACRWC Committees. They should send regular reports to these bodies to enable them review their level of implementation. In their reports, child justice administration should be given adequate attention as this is not always the case. Recommendation from these bodies must also be implemented.

In order to deal with the problem of child offenders and minimise child crimes, the Governments have to address the root causes of the social ills affecting children. This means effective implementation of the other rights such as provision of compulsory and free education, policies to tackle poverty, housing and access to employment for their families and programmes for crime prevention. There should also be a greater involvement of society in addressing these problems.

There should be regular collection of accurate data on child justice administration and crime prevention nationally. This will give an indication of the problem in the country and thus facilitate a balanced allocation of resources in the respective areas. This should be accompanied by regular review of the process to assess the progress made as well as determine future allocation of resources.

Due to the level of poverty in Africa, there is need for the establishment of legal aid boards within the Ministries of Justice where private lawyers and paralegals can register to make legal aid accessible. In the long term, independent public defender's office or legal aid bureaus must be established. Legislation to regulate this body must also be

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S184 (2).

enacted. Partnerships could also be forged with University law clinics, National Bar Associations and NGOs providing legal services.

4.2.2 Regional bodies

The ACRWC Committee should play a more proactive role in disseminating its reporting guidelines and reminding states of their duty to submit reports. Since no state has yet reported to the ACRWC Committee, the African Commission in accordance with article 62 must require states to provide comprehensive information about implementation of article 18 (3) which deals with protection of rights of children including children in trouble with the law.

4.2.3 International community

The international community also has the responsibility of sharing the resource burden with the states. The UN, OHCHR, UNICEF, UNODC, the International Network on Juvenile Justice and other relevant inter governmental and international organisations must provide technical, advisory and financial assistance to states for the promotion and protection of the rights of children in trouble with the law and crime prevention. South Africa and the Gambia must utilise the assistance provided by these organisations.

4.2.4 Civil society and human rights advocates

Civil society organisations and NGOs must play an active role in ensuring that the rights of children in trouble with the law are equally protected. They should monitor the implementation of states obligations under the CRC and the ACRWC and make issues of child justice administration public. Conduct national awareness raising programmes and lobby for inclusion of human rights education in the school curriculum and in particular the CRC and ACRWC.

They should also complement national governments' efforts in areas where they have expertise by providing technical support. In countries like South Africa where the concept of standing is flexible, NGOs should where necessary use the national courts to enforce the rights of these children by providing legal and other assistance to children and their

advocates. In addition, the complaints mechanism of the ACRWC Committee must be activated if necessary.

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ANNEXURES

CONSTITUTION OF THE SECOND REPUBLIC OF THE GAMBIA

*Adopted on 8 August 1996, entered into force in January 1997,
last amended in 2001*

In the name of God, the Almighty,

We the people of The Gambia have accomplished a great and historic task. We have had our say on how we should be governed. For this Constitution contains our will and resolve for good governance and a just, secure and prosperous society.

Our hopes and aspirations as a people were reflected in the enthusiasm and zeal with which we embarked on the task of nation building on the attainment of independence. The self-perpetuating rule of the recent past, however, soon gave rise to the abuse of office and related vices which negated the total welfare of the Gambian people. The sovereign people of The Gambia therefore endorsed the change of government on 22 July 1994 to rectify such evils.

This Constitution provides for us a fundamental law, which affirms our commitment to freedom, justice, probity and accountability. It also affirms the principle that all power emanate from the sovereign will of the people.

The fundamental rights and freedoms enshrined in this Constitution, will ensure for all time respect for and observance of human rights and fundamental freedoms for all, without distinction as to ethnic considerations, gender, language or religion. In acknowledging our fundamental rights we also affirm our duties and responsibilities as citizens of this country.

This Constitution guarantees participatory democracy that reflects the undiluted choice of the people. The functions of the arms of government have been clearly defined, their independence amply secured with adequate checks and balances to ensure that they all work harmoniously together toward our common good.

As we usher in the Second Republic and beyond, we give ourselves and generations of Gambians yet unborn this Constitution as a beacon of hope for peace and stability in our society and the good governance of The Gambia for all time.

In this spirit, we continue to pledge our firm allegiance to our beloved country and pray that the Great God of Nations will keep us all ever true to The Gambia.

CHAPTER I: THE REPUBLIC

1. The Republic

(1) The Gambia is a sovereign secular Republic.

(2) The sovereignty of The Gambia resides in the people of The Gambia from whom all organs of government derive their authority and in whose name and for whose welfare and prosperity the powers of government are to be exercised in accordance with this Constitution.

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CHAPTER II: THE CONSTITUTION AND THE LAWS

4. Supremacy of the Constitution

This Constitution is 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.

5. Enforcement of the Constitution

(1) A person who alleges that -

(a) any act of the National Assembly or anything done under the authority of an Act of the National Assembly; or

(b) any act or omission of any person or authority,

is inconsistent with or is in contravention of a provision of this Constitution, may bring an action in a court of competent jurisdiction for a declaration to that effect.

(2) The court may make orders and give directions as it may consider appropriate for giving effect, or enabling effect to be given, to such a declaration and any person to whom any order or direction is addressed shall duly obey and carry out the terms of the order or direction.

(3) The failure to obey or carry out any order made or direction given under subsection (2) shall constitute the offence of violating the Constitution and -

(a) shall in the case of the President or Vice-President, constitute a ground for his or her removal from office in accordance with section 67; and

(b) any other person who is convicted of that offence shall be liable to the penalty prescribed by an Act of the National Assembly.

6. Defence of the Constitution

(1) Any person who -

(a) by himself or herself or in concert with others, by any violent or other unlawful means, suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act, or

(b) aids and abets in any manner any person referred to in paragraph (a), commits the offence of treason and shall, on conviction, be liable to the penalty prescribed by an Act of the National Assembly for that offence.

(2) All citizens of The Gambia have the right and the duty at all times to defend this Constitution and, in particular, to resist, to the extent reasonably justifiable in the circumstances, any person or group of persons seeking or attempting by any violent or unlawful means to suspend, overthrow or abrogate this Constitution or any part of it.

(3) A person who resists the suspension, overthrow or abrogation of this Constitution as provided in subsection (2), commits no offence.

7. The laws of The Gambia

In addition to this Constitution, the laws of The Gambia consist of –

- (a) Acts of the National Assembly made under this Constitution and subsidiary legislation made under such acts;
- (b) 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;
- (c) the existing laws including all decrees passed by the Armed Forces Provisional Ruling Council;
- (d) the common law and principles of equity;
- (e) customary law so far as it concerns members of the communities to which it applies;
- (f) the *Shari'a* as regards matters of marriage, divorce and inheritance among members of the communities to which it applies.

...

CHAPTER IV: PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

17. Fundamental rights and freedoms

(1) The fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by all organs of the executive and its agencies, the legislature and, where applicable to them, by all natural and legal persons in The Gambia, and shall be enforceable by the courts in accordance with this Constitution.

(2) Every person in The Gambia, whatever his or her race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status, shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter, but subject to respect for the rights and freedoms of others and for the public interest.

18. Protection of the right to life

(1) No person shall be deprived of his or her life intentionally, except in the execution of a sentence of death imposed by a court of competent jurisdiction in respect of a criminal offence for which the penalty is death under the laws of The Gambia, as they have effect in accordance with subsection (2), and of which he or she has been lawfully convicted.

(2) As from the coming into force of this Constitution, no court in The Gambia shall be competent to impose a sentence of death for any offence unless the sentence is prescribed by law and the offence involves violence, or the administration of any toxic substance, resulting in the death of another person.

(3) The National Assembly shall within ten years from the date of the coming into force of this Constitution review the desirability or otherwise of the total abolition of the death penalty in The Gambia.

(4) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his or her life in contravention of this section if he

or she dies as a result of the use of force to such extent as is reasonably justifiable in the circumstances of the case, that is to say -

- (a) for the defence of any person from unlawful violence or for the defence of property;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) for the purpose of suppressing a riot, insurrection or mutiny;
- (d) in order to prevent the commission by that person of a criminal offence; or
- (e) if he or she dies as a result of a lawful act of war.

19. Protection of the right to personal liberty

(1) Every person shall have the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as established by law.

(2) Any person who is arrested or detained shall be informed as soon as is reasonably practicable and in any case within three hours, in a language he or she understands, of the reasons for his or her arrest or detention and of his or her right to consult a legal practitioner.

(3) Any person who is arrested or detained -

- (a) for the purpose of bringing him or her before a court in execution of the order of a court; or
- (b) upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under the laws of The Gambia, and who is not released, shall be brought without undue delay before a court and, in any event, within seventy-two hours.

(4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his or her having committed or being about to commit an offence, he or she shall not thereafter be further held in custody in connection with those proceedings or that offence save upon the order of a court.

(5) Any person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then without prejudice to any further proceedings which may be brought against him or her, he or she shall be released either unconditionally or upon reasonable conditions, including, in particular, such conditions as are reasonably necessary to ensure that he or she appears at a later date for trial or proceedings preliminary to trial.

(6) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation from that other person or from any other person or authority on whose behalf that other person was acting.

20. Protection from slavery and forced labour

(1) No person shall be held in slavery or servitude.

(2) No person shall be required to perform forced labour.

(3) For the purposes of this section, the expression "forced labour" does not include -

- (a) any labour required in consequence of a sentence or order of a court;

- (b) labour required of any person while he or she is lawfully detained that, though not required in consequence of the sentence or order of the court, is reasonably necessary in the interests of hygiene for the maintenance of the place in which he or she is detained;
- (c) any labour required of a member of a defence force in pursuance of his or her duties as such or, in the case of a person who has conscientious objections to service as a member of any naval, military or air force, any labour which that person is required by law to perform in place of such service;
- (d) any labour required during a period of public emergency or in the event of any other emergency or calamity which threatens the life or well-being of the community, to the extent that the requiring of such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purposes of dealing with that situation; or
- (e) any labour reasonably required as part of reasonable and normal communal or other civic obligations.

21. Protection from inhuman treatment

No person shall be subject to torture or inhuman or degrading punishment or other treatment.

22. Protection from deprivation of property

(1) No property of any description shall be taken possession of compulsorily, and no right over or interest in any such property shall be acquired compulsorily in any part of The Gambia, except where the following conditions are satisfied -

- (a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning, or the development or utilisation of any property in such manner as to promote the public benefit;
- (b) the necessity therefore is such as to afford reasonable justification of the causing of any hardship that may result to any person having an interest in or right over the property; and
- (c) provision is made by law applicable to that taking of possession or acquisition-
 - (i) for the prompt payment of adequate compensation; and
 - (ii) securing to any person having an interest in or right over the property, a right of access to a court or other impartial and independent authority for the determination of his or her interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any to which he or she is entitled, and for the purpose of obtaining prompt payment of that compensation.

(2) Nothing in this section shall be construed as affecting the making of any law in so far as it provides for the taking or acquisition of property -

- (a) in satisfaction of any tax, rate or due;
- (b) by way of penalty for breach of law, whether under civil process or after conviction of criminal offence;
- (c) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;
- (d) by way of the vesting or administration of trust property, enemy property, *bona vacantia*, or the property of persons adjudged or otherwise declared bankrupt or insolvent, or persons of unsound mind;
- (e) in the execution of judgments or orders of courts;

- (f) by reason of such property being in a dangerous state or liable to cause injuries to the health of human beings, animals or plants;
 - (g) in consequence of any law with respect to the limitation of actions; or
 - (h) for so long as such taking of possession may be necessary for the purpose of any examination, investigation, trial or inquiry, or in the case of land, the carrying out thereon –
 - (i) of work of soil conservation or the conservation of other resources; or
 - (ii) of agricultural development or improvement which the owner or occupier of the land has been required and has without reasonable or lawful excuse refused or failed to carry out, except so far as that provision, or as the case may be the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society.
- (3)** Nothing in this section shall be construed as affecting the making or operation of any law for the compulsory taking in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property where that property interest or right is held by a body corporate which is established directly by any law and in which no monies are provided by an Act of the National Assembly.
- (4)** Where a compulsory acquisition of land by or on behalf of the government involves the displacement of any inhabitant who occupies the land under customary law, the government shall resettle the displaced inhabitants on suitable alternative land with due regard to their economic well-being and social and cultural values.
- (5)** Any such property of whatever description compulsorily taken possession of, and any interest in or right over property of any description compulsorily acquired in the public interest for a public purpose, shall be used only in the public interest or for the public purposes for which it is taken or acquired.
- (6)** Where any such property as is referred to in subsection (5) is not used in the public interest or for the public purpose for which it was taken or acquired, the person who was the owner immediately before the compulsory taking or acquisition, as the case may be, shall be given the first option of acquiring that property, in which event he or she shall be required to refund the whole or such part of the compensation as may be agreed upon between the parties thereto; and in the absence of any such agreement such amount as shall be determined by the High Court.

23. Privacy

- (1)** No person shall be subject to interference with the privacy of his or her home, correspondence or communications save as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights and freedoms of others.
- (2)** Searches of the person or the home of individuals shall only be justified -
- (a) where these are authorised by a competent judicial authority;
 - (b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest and such procedures as are prescribed by an Act of the National Assembly to preclude abuse are properly satisfied.

24. Provisions to secure protection of the law and fair play

(1) Any court or other adjudicating authority established by law for the determination of any criminal trial or matter, or for the determination of the existence or extent of any civil right or obligation, shall be independent and impartial; and

- (a) if any person is charged with a criminal offence, then, unless the charge is withdrawn; or
- (b) where proceedings are commenced for the determination or the existence of any civil right or obligation,

the case shall be afforded a fair hearing within a reasonable time.

(2) All proceedings of every court and proceedings relating to the determination of the existence or the extent of civil rights or obligations before any other authority, including the announcement of the decision of the court or other authority, shall be held in public:

Provided that the court or other authority may, to such extent as it may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or interlocutory civil proceedings, or to such extent as it may be empowered or required by law to do so in the interest of defence, public safety, public order, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings, exclude from its proceedings persons other than the parties thereto and their legal representatives.

(3) Every person who is charged with a criminal offence -

- (a) shall be presumed innocent until he or she is proved, or has pleaded, guilty;
- (b) shall be informed at the time he or she is charged, in a language which he or she understands and in detail, of the nature of the offence charged;
- (c) shall be given adequate time and facilities for the preparation of his or her defence;
- (d) shall be permitted to defend himself or herself before the court in person or, at his or her own expense, by a legal representative of his or her own choice;
Provided that where a person is charged with an offence which carries a punishment of death or imprisonment for life, that person shall be entitled to legal aid at the expense of the state;
- (e) shall be afforded facilities to examine in person or by his or her legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his or her behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
- (f) shall be permitted to have without payment the assistance of an interpreter if he or she cannot understand the language used at the trial of the charge; and, except with his or her own consent, the trial shall not take place in his or her absence unless he or she so conducts himself or herself as to render the continuance of the proceedings in his or her presence impractical and the court has ordered him or her to be removed and the trial to proceed in his or her absence.

(4) When a person is tried for any criminal offence, the accused person or any person authorised by him or her in that behalf shall, if he or she requires and subject to the payment of such reasonable fee as may be prescribed by law, be given within a reasonable time, and in any event within thirty days after the end of the trial, a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

(5) No person shall be charged with or held to be guilty of a criminal offence on account of any act or omission which did not at the time it took place constitute such an

offence, and no penalty shall be imposed for any criminal offence which is more severe in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.

(6) No person who shows that he or she has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other offence of which he or she could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal or revision proceedings relating to the conviction or acquittal:

Provided that nothing in any law shall be held to be inconsistent with or in contravention of this subsection by reason only that it authorises any court to try a member of a defence force for a criminal offence notwithstanding any trial or conviction of the member under service law, but any court so trying such a member and convicting him or her shall, in sentencing him or her to any punishment, take into account any punishment awarded him under service law.

(7) No person shall be tried for a criminal offence if he or she shows he or she has been pardoned for that offence.

(8) No person charged with a criminal offence shall be compelled to give evidence at the trial.

(9) A person charged with a criminal offence in the High Court shall have the right to elect to be tried by a jury.

(10) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of -

- (a) subsection (3)(a), to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;
- (b) subsection (3)(e), to the extent that the law in question imposes reasonable conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds.

25. Freedom of speech, conscience, assembly, association and movement

(1) Every person shall have the right to -

- (a) freedom of speech and expression, which include freedom of the press and other media;
- (b) freedom of thought, conscience and belief, which shall include academic freedom;
- (c) freedom to practice any religion and to manifest such practice;
- (d) freedom to assemble and demonstrate peaceably and without arms;
- (e) freedom of association, which shall include freedom to form and join associations and unions, including political parties and trade unions;
- (f) freedom to petition the executive for redress of grievances and to resort to the courts for the protection of his or her rights.

(2) Every person lawfully within The Gambia shall have the right to move freely throughout The Gambia, to choose his or her own place of residence within The Gambia, and to leave The Gambia.

(3) Every citizen of The Gambia shall have the right to return to The Gambia.

(4) The freedoms referred to in subsections (1) and (2) shall be exercised subject to the law of The Gambia in so far as that law imposes reasonable restrictions on the exercise of the rights and freedoms thereby conferred, which are necessary in a

democratic society and are required in the interests of the sovereignty and integrity of The Gambia, national security, public order, decency or morality, or in relation to contempt of court.

26. Political rights

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

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

27. Right to marry

(1) Men and women of full age and capacity shall have the right to marry and found a family.

(2) Marriage shall be based on the free and full consent of the intended parties.

28. Rights of women

(1) Women shall be accorded full and equal dignity of the person with men.

(2) Women shall have the right to equal treatment with men, including equal opportunities in political, economic and social activities.

29. Rights of children

(1) Children shall have the right from birth to a name, the right to acquire a nationality and subject to legislation enacted in the best interests of children, to know and be cared for by their parents.

(2) Children under the age of sixteen years shall be entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or be harmful to their health or physical, mental, spiritual, moral or social development.

(3) A juvenile offender who is kept in lawful custody shall be kept separately from adult offenders.

30. Right to education

All persons shall have the right to equal educational opportunities and facilities and with a view to achieving the full realisation of that right -

- (a) basic education shall be free, compulsory and available to all;
- (b) secondary education, including technical and vocational education, shall be made generally available and accessible to all by every appropriate means, and in particular, by progressive introduction of free education;
- (c) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular, by progressive introduction of free education;
- (d) functional literacy shall be encouraged or intensified as far as possible;

- (e) the development of a system of schools with adequate facilities at all levels shall be actively pursued.

31. Rights of the disabled

- (1) The right of the disabled and handicapped to respect and human dignity shall be recognised by the state and society.
- (2) Disabled persons shall be entitled to protection against exploitation and to protection against discrimination, in particular as regards access to health services, education and employment.
- (3) In any judicial proceedings in which a disabled person is party, the procedure shall take his or her condition into account.

32. Culture

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and to the condition that the rights protected by this section do not impinge on the rights and freedoms of others or the national interest, especially unity.

33. Protection from discrimination

- (1) All persons shall be equal before the law.
- (2) Subject to the provisions of subsection (5), no law shall make any provision which is discriminatory either of itself or in its effect.
- (3) Subject to the provisions of subsection (5), no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or public authority.
- (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 privileges or advantages which are not accorded to persons of another such description.
- (5) Subsection (2) shall not apply to any law in so far as that law makes provision -
- (a) with respect to persons who are not citizens of The Gambia or to qualifications for citizenship;
 - (b) with respect to the qualifications prescribed by this Constitution for any office;
 - (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.
- (6) Subsection (3) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (5).
- (7) The exercise of any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by the

Constitution or under any other law shall not be enquired into by any court on the grounds that it contravenes the provisions of subsection (3).

34. Declaration of state of public emergency

(1) The President may, at any time, by Proclamation published in the *Gazette*, declare that -

- (a) a state of public emergency exists in the whole or any part of The Gambia;
- (b) a situation exists which, if it is allowed to continue, may lead to a state of public emergency.

(2) A declaration made under this section shall lapse at the expiration of a period of seven days, or if the National Assembly is not then in session twenty-one days, beginning on the day on which the Proclamation is published in the *Gazette* unless, before the expiration of that period, it has been approved by a resolution of the National Assembly supported by the votes of not less than two-thirds of all the members thereof.

(3) A declaration made under subsection (1) may at any time be revoked by the President by Proclamation which shall be published in the *Gazette*.

(4) A declaration made under subsection (1) that has been approved by a resolution of the National Assembly shall, subject to subsection (3), remain in force so long as that resolution remains in force and no longer.

(5) A resolution of the National Assembly passed for the purpose of this section shall remain in force for ninety days or such shorter period as may be specified therein:

Provided that -

(a) any such resolution may be extended from time to time by a further resolution supported -

- (i) in the case of a first extension, by the votes [*incomplete – ed*]
- (ii) in the case of a subsequent extension, the votes of not less than three quarters of all the members of the National Assembly,

but no extension shall exceed ninety days from the date of the resolution effecting the extension; and

(b) any such resolution may be revoked at any time by a resolution supported by the vote of the majority of all the members of the National Assembly.

(6) Any provision of this section that a declaration shall lapse or cease to be in force at any particular time shall be without prejudice to the making of a further declaration under this section whether before or after that time.

35. Derogation of fundamental [rights under] emergency powers

(1) An Act of the National Assembly may authorise the taking, during any period of emergency, of measures that are reasonably justifiable for dealing with the situation that exists in The Gambia.

(2) Nothing contained in or done under the authority of such an Act shall be held to be inconsistent with or in contravention of sections 19, 23, 24 (other than subsections (5) to (8) thereof) or 25 of this Constitution to the extent that it is reasonably justifiable in the circumstances arising or existing during a period of public emergency for the purpose of dealing with the situation.

36. Persons detained under emergency powers

- (1)** Where a person is detained by virtue of or under any Act of the National Assembly referred to in section 35, the following provisions shall apply -
- (a) he or she shall, as soon as reasonably practicable, and in any case not later than twenty four hours after the commencement of detention, be furnished with a statement in writing specifying in detail the grounds upon which he or she is detained; and the statement shall be read, and, if necessary, interpreted to the person who is detained in a language which he or she understands;
 - (b) the spouse, parent, child or other available next-of-kin of the person detained shall be informed by the authority effecting the detention and shall be permitted access to the person concerned at the earliest practicable opportunity, and in any case not later than twenty-four hours after the commencement of the detention;
 - (c) where none of the persons mentioned in paragraph (b) can be traced or none of them is willing and able to see the person detained, the person who is detained shall be informed of this fact within twenty four hours of the commencement of the detention and he or she shall be informed of his or her right to name and give particulars of some other person who shall have the same right of access to the person who is detained as any of the persons mentioned in paragraph (b);
 - (d) not more than fourteen days after the commencement of his or her detention, the authority which effected the same shall give notice in the *Gazette* stating that he or she has been detained and giving particulars of the provision of law under which the detention is authorised;
 - (e) not more than thirty days after the commencement of his or her detention, and after that at intervals of not more than ninety days during the continuance of his or her detention, the case of the person concerned shall be reviewed by a tribunal as provided in subsection (2);
 - (f) the person who is detained shall be afforded every possible facility to consult a legal practitioner of his or her choice who shall be permitted to make representation to the tribunal appointed to review the case;
 - (g) at the hearing before the tribunal appointed for the review of his or her case, the person detained shall be entitled to appear in person or by a legal practitioner of his or her choice and at his or her own expense.
- (2)** A tribunal appointed to review the cases of persons who have been detained shall be composed of three persons being, or qualified to be appointed as, judges of the High Court.
- (3)** A tribunal composed of the same members shall not review more than once the case of a particular person who has been detained.
- (4)** On review by a tribunal of the case of a person who has been detained, the tribunal may order the release of the person or it may uphold the detention; and the authority by which the detention was ordered shall act in accordance with the decision of the tribunal for the release of any person.
- (5)** No person may be detained under or by virtue of an Act of the National Assembly referred to in section 35 during any state of emergency in excess of a total of one hundred and eighty two days (whether such days are consecutive or not) and, on the expiry of that period, any person who has been so detained shall be entitled to invoke the provisions of section 19 (right to personal liberty).
- (6)** In every month during the period in which a state of public emergency is in force and in which there is a sitting of the National Assembly, a Secretary of State authorised by the President shall make a report to the National Assembly of the number of persons detained by virtue of or under an Act of the National Assembly to which section 35 refers and the number of cases in which the authority which ordered the detention has acted in accordance with the decisions of the tribunal as provided in subsection (4).

(7) For the avoidance of doubt, it is hereby declared that where the declaration of a state of public emergency is revoked or otherwise ceases to be in force, any person who is in detention or in custody by virtue of or under an Act of the National Assembly to which section 35 refers, other than a person sentenced to imprisonment by a court for an offence against such a law for a term which has not then expired, shall be released immediately without further order.

37. Enforcement of protective provisions

(1) If any person alleges that any of the provisions of sections 18 to 33 or section 36(5) of this Chapter has been, is being, or is likely to be contravened in relation to himself or herself by any person he or she may apply to the High Court for redress.

(2) An application may be made under this section in the case of a person who is detained by some other person acting on the detained person's behalf.

(3) An application under this section shall be without prejudice to any other action with respect to the same matter which is lawfully available.

(4) If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of the said sections 18 to 33 or section 36(5), that court may, and shall if any party so requests, refer the question to the High Court, unless, in the opinion of the subordinate court, the raising of the question is merely frivolous or vexatious.

(5) The High Court shall -

(a) hear and determine any application made by any person pursuant to subsection (1) or (2);

(b) determine any question arising in the case of any person which is referred to it in pursuance of subsection (4);

and may, in addition to the powers conferred on it by section 5 (which relates to defence of the Constitution) make such order, issue such writ, and give such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of the said sections 18 to 33 or section 36(5) to the protection of which the person concerned is entitled:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(6) The High Court shall consider every application and reference referred to it in pursuance of this section and, having heard arguments by or on behalf of the parties, shall pronounce its decision on the question in open court as soon as may be, and in the case of reference under subsection (4), not later than thirty days after the conclusion of the final addresses of the parties.

(7) An Act of the National Assembly may confer on the High Court such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by this section.

(8) The rights, duties, declarations and guarantees relating to the fundamental rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding other rights which may be prescribed by Acts of the National Assembly as inherent in a democracy and intended to secure the freedom and dignity of man.

38. Interpretation of Chapter IV

(1) In this Chapter, save where the context otherwise requires –

“a period of public emergency” means any period during which The Gambia is at war or a declaration is in force under section 34;

“contravention” in relation to any requirement, includes a failure to comply with that requirement, and cognate expressions shall be construed accordingly;

“court” means any court of law in The Gambia other than a district tribunal or, save as provided in subsection (2), a court constituted under service law;

“defence force” means any naval, military or air force of The Gambia;

“member” in relation to a defence force, includes persons who, under the law regulating the discipline of that force, are subject to that discipline;

“owner” includes any person deprived of any right or interest pursuant to section 22;

“service law” means the law regarding the discipline of a defence force or of the Police Force or the Prison Service or any disciplined volunteer force.

(2) In relation to an offence against service law, a reference to “court” –

(a) in sections 18 to 20, subsections (2), (3), (4), (6) (but not the proviso thereto) of section 24, subsection (3) of section 25, subsection (8) of section 33 and subsection (2) of section 37 includes a reference to a court constituted by or under service law;

(b) in sections 19 and 20 and subsection (8) of section 33, includes an officer of a defence force and of the Police Force.

(3) Reference in sections 18, 19 and 22 to a “criminal offence” shall be construed as including references to an offence against service law and such references in subsections (4) to (9) of section 24 shall, in relation to proceedings before a court constituted by or under service law, be similarly construed.

(4) In relation to any person who is a member of an armed force raised otherwise than under the law of The Gambia and lawfully present in The Gambia, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter.

...

CHAPTER V: REPRESENTATION OF THE PEOPLE

PART 1: The Franchise

39. The right to vote and be registered

(1) Every citizen of The Gambia being eighteen years or older and of sound mind shall have the right to vote for the purpose of elections of a President and members of the National Assembly and shall be entitled to be registered as a voter in a National Assembly constituency for that purpose.

(2) Every citizen of The Gambia who is a registered voter shall be entitled to vote in a referendum held in accordance with this Constitution or any other law.

(3) Every citizen of The Gambia being of the age of eighteen years or older and of sound mind shall be entitled, in accordance with the provisions of this Chapter and any Act of the National Assembly providing for such elections, to vote in elections for local government authorities and traditional rulers in the area in which he or she is ordinarily resident.

40. Secret ballot

All public elections and all referenda voting shall be by secret ballot.

...

PART 2: The Independent Electoral Commission

42. The Commission

(1) There shall be an Independent Electoral Commission for The Gambia which shall be part of the public service.

...

45. Electoral laws

An Act of the National Assembly may make further provisions for the purposes of this part.

...

PART 7: Political Parties

60. Political parties

(1) No association, other than a political party registered under or pursuant to an Act of the National Assembly, shall sponsor candidates for public elections.

(2) No association shall be registered or remain registered as a political party if –

(a) it is formed or organized on an ethnic, sectional, religious or regional basis;

(b) its internal organisation does not conform with democratic principles; or

(c) its purpose is to subvert this Constitution or the rule of law.

(3) An Act of the National Assembly shall make provisions for the better implementation of this section.

...

CHAPTER VI: THE EXECUTIVE

PART 1: The President

...

67. Misconduct by the President

(1) The President may be removed from office in accordance with this section on any of the following grounds –

(a) abuse of office, wilful violation of the oath of allegiance or the President's oath of office, or wilful violation of any provision of this Constitution, or

...

CHAPTER VII: NATIONAL ASSEMBLY AND LEGISLATION

...

PART 3: Legislative and other powers of the National Assembly

100. The legislative power

- (1) The legislative power of The Gambia shall be exercised by Bills passed by the National Assembly and assented to by the President.
- (2) The National Assembly shall not pass a Bill –
- (a) to establish a one party state;
 - (b) to establish any religion as a state religion; or
 - (c) to alter the decision or judgment of a court in any proceedings to the prejudice of any party to those proceedings, or deprive any person retroactively of vested or acquired rights, but subject thereto, the National Assembly may pass Bills designed to have retroactive effect.

...

CHAPTER VIII: THE JUDICATURE

PART 1: The Courts of The Gambia

120. The courts and the judicial power

- (1) The Courts of The Gambia are:
- (a) The Superior Courts comprising:
 - (i) the Supreme Court;
 - (ii) the Court of Appeal;
 - (iii) the High Court and the Special Criminal Court; and
 - (b) the Magistrates Court, the Cadi Court, District Tribunals and such lower courts and tribunals as may be established by an Act of the National Assembly.
- (2) The judicial power of The Gambia is vested in the courts and shall be exercised by them according to the respective jurisdictions conferred on them by law.
- (3) In the exercise of their judicial functions, the courts, the judges and other holders of judicial office shall be independent and shall be subject only to this Constitution and the law, and, save as provided in this Chapter, shall not be subject to the control or direction of any other person or authority.

...

PART 2: The Superior Courts

A: The Supreme Court

...

127. Original jurisdiction

- (1) The Supreme Court shall have an exclusive original jurisdiction -
- (a) for the interpretation or enforcement of any provision of this Constitution other than any provision of sections 18 to 33 or section 36(5) (which relate to fundamental rights and freedoms);

- (b) on any question whether any law was made in excess of the powers conferred by the Constitution or any other law upon the National Assembly or any other person or authority;

...

(2) Where any question referred to in paragraphs (a), (b) or (d) of subsection (1) arises in any proceedings in any other court, that court shall stay its proceedings and refer the matter to the Supreme Court for its determination, and such other court shall give effect to any decision of the Supreme Court in the matter.

...

C: The High Court

132. Jurisdiction of High Court

- (1) Save as provided in section 127, the High Court shall have original jurisdiction –
- (a) to hear and determine all civil and criminal proceedings;
 - (b) to interpret and enforce the fundamental rights and freedoms as provided in section 18 to 33 and section 36(5), and in the exercise of such jurisdiction, the Court shall have all such power and authority as may be conferred by this Constitution or any other law.

...

CHAPTER X: THE OMBUDSMAN

163. National Assembly to establish office of the Ombudsman

(1) Subject to the provisions of this Constitution, an Act of the National Assembly shall within six months of the coming into force of this Constitution establish the office of Ombudsman and provision for his or her functions and duties -

...

165. Independence of Ombudsman

(1) Subject to the provisions of this chapter, in the exercise of his or her functions, the Ombudsman and a deputy Ombudsman shall not be subject to the direction or control of any other person or authority but subject only to the Constitution and the law.

(2) All departments, authorities and other public bodies which are subject to investigation by the Ombudsman shall accord such assistance as he or she may require for the protection of the independence, dignity and effectiveness of the Ombudsman in the performance of his or her functions.

...

CHAPTER XI: THE PUBLIC SERVICE

PART 1: Offices in the public service

...

169. Protection of public servants

- (1) No public servant shall be –
- (a) victimised or discriminated against either directly or indirectly for having discharged his or other duties faithfully and according to law; or
 - (b) be removed from office or reduced in rank or otherwise punished without just cause.

...

CHAPTER XIV: LAND COMMISSION

...

192. Land Commission

There shall be established a Land Commission whose composition, functions and powers shall be prescribed by an Act of the National Assembly.

...

CHAPTER XVII: THE NATIONAL COUNCIL FOR CIVIC EDUCATION

198. National Council for Civic Education

There shall be established a National Council for Civic Education whose composition, functions and powers shall be prescribed by an Act of the National Assembly.

199. Functions of the Council

- (1) The functions of the National Council for Civic Education shall be –
- (a) to create and sustain within society an awareness of the principles and objectives of this Constitution as the fundamental law of The Gambia;
 - (b) to educate and encourage the public to defend this Constitution against all forms of abuse and violence;
 - (c) to formulate, from time to time, for the consideration of the government, programmes at national and district levels aimed at realising the object of this Constitution;
 - (d) to formulate, implement and oversee programmes aimed at inculcating in the citizens of The Gambia awareness of their civic and fundamental rights, duties and responsibilities;
 - (e) to educate the citizens of The Gambia about international, regional and sub-regional matters relevant to The Gambia; and

- (f) such other function as an Act of the National Assembly may prescribe.
- (2) An Act of the National Assembly may provide for the establishment of district branches of the Council.
- (3) In the exercise of its functions, the Council shall be apolitical and, save as may be provided by an Act of the National Assembly, shall not be subject to the direction or control of any other person or authority.

...

CHAPTER XVIII: COMMISSIONS OF ENQUIRY

207. Freedom and responsibility of the media

- (1) The freedom and independence of the press and other information media are hereby guaranteed.
- (2) An Act of the National Assembly may make provisions for the establishment and operation of the press and other information media.
- (3) The press and other information media shall at all times, be free to uphold the principles, provisions and objectives of this Constitution, and the responsibility and accountability of the government to the people of The Gambia.

208. Responsibility of state owned media

All state owned newspapers, journal, radio and television shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinion.

209. Limitations on rights and freedoms

The provisions of sections 207 and 208 are subject to laws which are reasonably required in a democratic society in the interest of national security, public orders, public morality and for the purpose of protecting the reputations, rights and freedoms of others.

210. National Media Commission

An Act of the National Assembly shall within one year of the coming into force of this Constitution make provision for the establishment of a National Media Commission to establish a code of conduct for the media of mass communication and information and to ensure the impartiality, independence and professionalism of the media which is necessary in a democratic society.

CHAPTER XX: DIRECTIVE PRINCIPLES OF STATE POLICY

211. Application of the directive principles of state policy

The principles of state policy in this Chapter shall form part of the public policy of The Gambia for the establishment of a just, free and democratic state. 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 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; and
- (b) the courts are entitled to have regard to these principles in interpreting any laws based on them.

212. National integration and unity

- (1) All organs of the state shall strive towards the realisation of national unity, peace and stability.
- (2) Every effort shall be made to integrate the people of The Gambia and foster loyalty to The Gambia without discrimination.
- (3) All the people of The Gambia shall be entitled to their ethnic, religious and cultural values which do not disturb the unity or cohesion of the state.

213. National sovereignty and independence

- (1) The state and all citizens of The Gambia shall endeavour to protect and enhance national sovereignty including social, political, and economic independence and territorial integrity.
- (2) The state shall pursue policies which avoid undue dependence on other nations and institutions.

214. Political objectives

- (1) The Gambia shall be a democratic state dedicated to freedom, peace, progress, prosperity and justice.
- (2) The people shall express their will and consent as to who shall govern them and how they shall be governed, through regular, free and fair elections of their representatives.
- (3) The state shall be guided by the principles of decentralisation and the devolution of governmental functions and powers to the people at appropriate levels of control to facilitate democratic governance.
- (4) In the composition of the government women shall be fairly represented.
- (5) The government, with due regard to the principles of an open and democratic society, shall foster accountability and transparency at all levels of government.

215. Economic objectives

- (1) The state shall endeavour to create an economic environment that maximises the rate of economic growth and employment and secures the maximum welfare and prosperity for all persons in The Gambia.
- (2) The state shall endeavour to keep inflation under control.

- (3) Recognising that the most secure democracy is one that assures the basic necessities of life for its people, the state shall endeavour to establish an efficient, dynamic and self-reliant economy whose underlying principles shall include ensuring:
- (a) ample and equal opportunity for all citizens and a pronounced role for the private sector, and the encouragement of private initiative;
 - (b) that persons bear their fair share of social and national responsibilities including their responsibility to contribute to the development of the country; and
 - (c) a balanced development of all parts of The Gambia, improvement in the quality of life in rural communities and redressing economic imbalances between rural and urban communities.
- (4) The state shall pursue a policy of:
- (a) giving adequate priority to those sectors of the economy which promote national prosperity;
 - (b) promoting the development of agriculture and related industry;
 - (c) encouraging and protecting beneficial foreign investment;
 - (d) protecting the environment of the nation for posterity; and
 - (e) co-operation with other nations and bodies to protect the global environment.
- (5) The state shall endeavour to ensure equal opportunity and full participation for women in the economic development of the country.

216. Social objectives

- (1) The state shall endeavour to secure and promote a society founded on the principles of freedom, equality, justice, tolerance, probity and accountability.
- (2) The state shall pursue policies to protect the rights and freedoms of the disabled, the aged, children and other vulnerable members of society and to ensure that such persons are provided just and equitable social opportunities.
- (3) The state, in pursuing policies in subsection (2), shall be bound by the fundamental rights and freedoms in the Constitution and shall be guided by international human rights instruments to which The Gambia is a signatory and which recognise and apply particular categories of basic human rights to development processes.
- (4) The state shall endeavour to facilitate equal access to clean and safe water, adequate health and medical services, habitable shelter, sufficient food and security to all persons.
- (5) The state shall encourage and promote the establishment and maintenance of contributory schemes that shall provide economic security for all citizens.
- (6) The state shall endeavour to ensure safe systems of working conditions for persons who are employed and to provide that such persons are entitled to adequate rest, leave and leisure.
- (7) The state shall endeavour to ensure that adequate sports facilities are established throughout The Gambia and that sports are promoted as a means of fostering national integration, health and self-discipline and international friendship and understanding.

217. Educational objectives

- (1) The state shall endeavour to provide adequate educational opportunities at all levels of study for all citizens.
- (2) The state shall pursue policies to ensure basic education for all citizens and shall endeavour to provide adequate resources so that such tuition for basic education shall be free for all citizens.
- (3) The state shall endeavour to provide skills training centres.

(4) The state shall take measures to create an adult literacy programme, rehabilitative vocational training for the disabled, and continuing education programmes.

218. Cultural objectives

The state and all the people of The Gambia shall strive to protect, preserve and foster the languages, historic sites, cultural, natural and artistic heritage of The Gambia.

219. Foreign relations

The state shall endeavour to ensure that in international relations it:

- (a) promotes and protects the interests of The Gambia;
- (b) seeks the establishment of a just and equitable international economic and social order;
- (c) fosters respect for international law, treaty obligations and the settlement of international disputes by peaceful means; and
- (d) is guided by the principles and goals of international and regional organisations of which The Gambia is a signatory.

220. Duties of a citizen

(1) The exercise and enjoyment of rights and freedoms are inseparable from the performance of duties and obligations, and accordingly, every citizen shall:

- (a) promote the prestige and good reputation of The Gambia and respect the symbols of The Gambia;
- (b) uphold and defend the Constitution;
- (c) foster national unity and live harmoniously with others;
- (d) respect the rights, freedoms and legitimate interests of others and refrain from acting in a manner detrimental to the welfare of other persons;
- (e) serve The Gambia by working conscientiously in his or her chosen occupation;
- (f) protect and preserve public property and expose and combat misuse and waste of public funds and property;
- (g) contribute to the well-being of the community in which the citizen lives;
- (h) be loyal to The Gambia and contribute to its defence when necessary;
- (i) co-operate with the appropriate agencies in the maintenance of law and order; and
- (j) protect and conserve the environment of The Gambia.

(2) It shall be the duty of every citizen to abide by and conform with the provisions set out in subsection (1), but such duties shall not, of themselves, render any person liable to proceedings of any kind in any court.

...

CHAPTER XXII: AMENDMENT OF THE CONSTITUTION

226. Alteration of this Constitution

(1) Subject to the provisions of this section, an Act of the National Assembly may alter this Constitution.

(2) Subject to subsection (4), a bill for an Act of the National Assembly under this section shall not be passed by the National Assembly or presented to the President for assent unless –

- (a) before the first reading of the Bill in the National Assembly, the Bill is published in at least two issues of the *Gazette*, the latest publication being not less than three months after the first, and the Bill is introduced into the National Assembly not earlier than ten days after the latest publication; and
- (b) the Bill is supported on the second and third readings by the votes of not less than three quarters of all the members of the National Assembly.
- (3) If the President fails to assent within thirty days to a Bill passed by the National Assembly in accordance with subsection (2), the Bill shall be returned to the Speaker who shall refer it to the Independent Electoral Commission. The Independent Electoral Commission shall cause a referendum to be held on the Bill in accordance with subsection (4) and, if the Bill is supported on such a referendum by the majority provided for in that subsection, it shall again be presented to the President for his assent.

...

SCHEDULE 2: TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

...

Legal Proceedings

- (13) (1) No member of the Armed Forces Provisional Ruling Council, any person appointed Minister by the Armed Forces Provisional Ruling Council, or other appointees of the Armed Forces Provisional Ruling Council shall be held liable or answerable before a Court or authority or under this Constitution or any other law, either jointly or severally, for an act or omission in the performance of his or her official duties.
- (2) After the coming into force of this Constitution, it shall not be lawful for any court or tribunal to entertain any action or take any decision or make any order or grant any remedy or relief in any proceedings instituted against the Government of The Gambia or any person acting under the authority of the Government of The Gambia, or against any person or persons acting in concert or individually to assist or bring about the change in government which took place on the twenty second day of July 1994, in respect of any act or omission relating to, or consequent upon:
 - (a) the overthrow of the government in power before the formation of the Armed Forces Provisional Ruling Council;
 - (b) the suspension or abrogation of the Constitution of The Gambia 1970;
 - (c) the establishment of the Armed Forces Provisional Ruling Council; or
 - (d) the establishment of this Constitution.
- (3) For the avoidance of doubt, it is declared that no action taken or purported to have been taken in the exercise of the executive, legislative or judicial power by the Armed Forces Provisional Ruling Council or a member thereof, or by any person appointed by the Armed Forces Provisional Ruling Council in the name of the Armed Forces Provisional Ruling Council except judges of the Supreme Court or the Court of Appeal, shall be questioned in any proceedings whatsoever and, accordingly, it shall not be lawful for any court or tribunal to make any order or grant any remedy or relief in respect of any such act.
- (4) The provisions of subparagraph (3) shall have effect notwithstanding that any such action as is referred to in that subparagraph was not taken in accordance with any procedure prescribed by law.

(5) It shall not be lawful for any court or tribunal to entertain an action instituted in respect of an act or omission against a person acting or omitting to act on the instructions or authority of the Armed Forces Provisional Ruling Council, or a member thereof, and alleged to be in contravention of any law whether substantive or procedural, in existence before or during the administration of the Armed Forces Provisional Ruling Council.

...

(15) *Abrogation of 1970 Constitution*

The Constitution of The Gambia 1970 (Act No1 of 1970) is hereby abrogated.

(16) *Substitution of life imprisonment for death penalty*

Where any law makes provision for a sentence of death in any case other than that provided for in section 18(2), the law shall have effect as if imprisonment for life were substituted for that penalty.

(17) *Paragraphs not to be amended*

The National Assembly shall have no power to pass a Bill to amend or repeal this paragraph or paragraph 11, 12, 13 or 14 of this Schedule.

...

CHILDREN'S ACT, 2005

PASSED ON THE 23RD JUNE 2005

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SCHEDULE: REPEALS AND AMENDMENTS

CHILDREN'S ACT, 2005

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 other connected purposes.

[See section 1 (2)]

ENACTED by the President and the National Assembly.

PART I – PRELIMINARY

Short title and commencement

1. (1) This Act may be cited as the Children's Act; 2005.

(2) This Act shall come into force on a date appointed by the Secretary of State by an Order published in the *Gazette*.

Interpretation

2. (1) In this Act, unless the context otherwise requires-

“authorised person” means an official or other person authorised expressly or impliedly to perform the act in question;

“care order” means a care order made under Part VII and includes an interim care order;

"child" means a person under the age of eighteen years;

“child abuse” means contravention of the rights of the child which causes physical or mental harm to the child;

“child with disability” means a child who suffers from abnormalities or loss of physiological functions, anatomic structure or psychological state and has lost in part or wholly the ability to engage in activities in a normal way and is as a result hampered in his or her normal functions in certain areas of social life;

"children in need of special protection measures" includes children with disabilities, and street children;

“competent authority” means an official or body or other person authorised expressly or impliedly by an enactment or otherwise to perform the act in question;

“Court” means a Children’s Court;

“custodian” means a person in whose care a child is physically placed;

“Department” means the Department for Social Welfare or such other Department as the Government may designate under section 66;

“detention centre” means the National Rehabilitation Centre and such other centre as may be established under section 223 for the detention, rehabilitation and re-training of children;

“exclusion order” means an order made under section 93, prohibiting a named person from having contact with a child, or with a child and persons looking after the child;

“fit person” means a person of full age who is of high moral character and integrity and of sound mind, capable of looking after a child and has been registered by the Department as being able to provide a caring home for a child;

“foster-care placement” means the placement of a child with a person who is not his or her parent or relative and who is willing to undertake the care and maintenance of the child;

“guardian” has the meaning given to it under section 179;

“harmful publication” means any book, magazine, film, picture, video or audio tape or print or other medium which is of a kind targeted at or is likely to fall into the hands of children and which consists wholly or mainly of stories told in pictures, with or without the addition of written matter or video films and cassette tapes, which contains pictures or stories which portray harmful information, such as -

- (a) the commission of crimes;
- (b) acts of violence or cruelty;
- (c) incidents of a repulsive or horrible nature;
- (d) acts or words of an immoral character; or
- (e) obscene and indecent representation,

in such a way that the work as a whole would tend to corrupt or deprave a child into whose hands it may fall;

“industrial undertaking” has the meaning given to it under section 45;

“informal sector” means the area of the economy

which is not an industrial undertaking;

“Local Government authority” has the meaning given to it in the Local Government Act, 2002;

“next friend” means a person who intervenes to assist a child to bring a legal action;

“parent” means the biological mother or father or adoptive mother or father of a child;

“parental responsibility” means all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child;

“place of safety” means a place where food, protection and accommodation is provided by a fit person to a child to whom the provisions of section 159 apply;

“publish” includes broadcast;

“residence order” means an order setting out the person with whom a child is to live;

“residential care home” means a Government or non-governmental home approved by the Department of State to provide substitute family care for a child and includes -

- (a) a babies’ home which provides care and accommodation for children aged under three years; and
- (b) a children’s home, which provides care and accommodation for children aged three and above;

“Secretary of State” means the Secretary of State responsible for children;

“secure home” means a place declared by the Secretary of State to be a secure home under section 212 or any other place declared to be a secure home under any other enactment;

“significant harm” means significant harm within the meaning of section 80;

“supervision order” means a supervision order made under Part VII and includes an interim supervision order;

“supervisor” means the person under whose supervision a child has been placed under a supervision order or an interim supervision order;

“trafficking” includes all acts and attempted acts involved in the recruitment and transportation, within or across the borders of The Gambia, purchase, sale, transfer, receipt, dealing in, trading in and harbouring of a child, which involves the use of deception, force, coercion or debt bondage, for the purpose of placing or holding the child, whether for pay or not, in domestic, sexual or reproductive servitude, exploitation or abuse or in exploitative labour or in slave-like conditions;

“welfare report” means a welfare report within the meaning of section 79.

(2) Where a Social Welfare Officer is required under this Act to write a report, that report may be written by such other person as the Department considers appropriate.

Welfare principle

3. (1) The best interest of the child shall be the paramount consideration by any court, institution, person or other body in determining any question concerning a child.

(2) A court, institution, person or any other body shall, in determining what is the best interest of a child, have regard, in particular to -

- (a) any harm that the child has suffered or is at the risk of suffering;
- (b) the ascertainable wishes and feelings of the child concerned, considered in the light of his or her age and

understanding;

- (c) the child's physical, emotional and educational needs;
- (d) the likely effect of any changes in the child's circumstances.
- (e) the child's age, sex, background and any other circumstances relevant in the matter; and
- (f) where relevant, the capacity of the child's parents or guardian or any other person involved in the care of the child in meeting the child's needs.

Child to be given protection and care necessary for his or her well-being etc.

4. (1) A child shall be given such protection and care as is necessary for his or her well-being, taking into account the rights and duties of the child's parents, legal guardians, or other individuals, institutions, services, agencies, organisations or bodies legally responsible for the child.

(2) Every person, institution, service, agency organisation and body responsible for the care or protection of children shall conform with the standards established by the appropriate authorities, particularly in the areas of safety, health, welfare, in the number and suitability of their staff and competent supervision.

PART II - RIGHTS OF THE CHILD

Application of the Constitution

5. In addition to the rights guaranteed under Chapter IV of the Constitution of the Republic of The Gambia, every child has the rights set out in this Part.

Right to survival and development

6. Every child has the right to survival and development.

Right to name

7. (1) Every child has the right to a name and, accordingly, shall be given a name on his or her birth or on such other date as is dictated by the culture of his or her parents or guardians.

	(2) The birth of every child shall be registered in accordance with the provisions of the relevant law.
Right to nationality	8. Every child has a right to acquire a nationality.
Right to health and health services, etc	9. (1) Every child has the right to enjoy the best attainable state of physical and mental health. (2) Every Government, parent, guardian, institution, service, agency, organisation or body responsible for the care of a child shall endeavour to provide for the child the best attainable state of health.
Right to privacy	10. (1) Subject to subsection (3), no child shall be subject to arbitrary or unlawful interference with his or her privacy, family life, home, correspondence, or to attacks on his or her honour or reputation. (2) Nothing in the provisions of subsection (1) affects the rights of parents and, where applicable, legal guardians, to exercise reasonable supervision and control over the conduct of their children and wards. (3) Every child has the right to the protection of the law against an interference or attack under subsection (1).
Right to parental care, protection and maintenance	11. (1) Every child has a right to enjoy parental care and protection and shall, whenever possible, have the right to reside with his or her parents. (2) No child shall be separated from his or her parents against the will of the child except when a judicial authority determines in accordance with the provisions of this Act or other law, that the separation is in the best interest of the child. (3) Every child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents on a regular basis.

(4) Every child has the right to maintenance by his or her parents or guardians in accordance with the extent of their means.

Right of a child in need of special protection measures

12. (1) Every child who is in need of special protection measures, has the right to any such measure that is appropriate to his or her physical, social, economic, emotional and mental needs and under conditions which ensure his or her dignity, promote his or her self-reliance and active participation in the affairs of the community.

(2) Every person, authority, body or institution having the care or responsibility for ensuring the care of a child in need of special protection measures shall endeavour, within the available resources, to provide the child with such assistance and facilities which are necessary for his or her education, training, preparation for employment, rehabilitation, and recreational opportunities in a manner conducive to his or her achieving the fullest possible social integration, individual development and his or her cultural and moral development.

Right of the unborn child to protection against harm etc.

13. (1) A child may bring an action for damages against a person for harm or injury caused to the child wilfully, recklessly, negligently or through neglect before, during or after the birth of that child.

(2) Subject to the provisions of any applicable personal law, if the father of an unborn child dies intestate, the unborn child is entitled to be considered in the distribution of the estate of the deceased father if the child was conceived during the lifetime of the father.

(3) If the mother of an unborn child dies intestate before the child is delivered, the unborn child is entitled to be considered in the distribution of the estate of the deceased mother.

Contractual rights of

14. (1) Except as provided in this section, no child

child

is capable of entering into any contract.

(2) All contracts, except contracts for necessities, entered into by a child for repayment of money lent or for payment of goods supplied to the child, shall be voidable.

(3) No action shall be brought against a child by a person after that child has attained the age of majority -

(a) to pay a debt contracted before majority or ratified on majority; or

(b) for any promise of contract made before majority,

whether or not there was new consideration for the promise or ratification after the child attained majority.

(4) If a child, having contracted a loan which is void, agrees after majority to pay the loan, the agreement, in whatever form it may be, is void so far as it relates to money which is payable in respect of the loan.

Right to parental property

15. Subject to the provisions of any applicable personal law, no person shall deprive a child of reasonable provision out of the estate of a parent.

Right to social activities

16. A child has the right to participate in sports, or in positive cultural and artistic activities or other leisure activities.

Right of opinion

17. A child capable of forming views has the right to express an opinion to be listened to and to participate in decisions which affect his or her well-being, the opinion of the child being given due weight in accordance with the age and maturity of the child.

Right to education

18. (1) Every child has a right to free and compulsory basic education and it shall be the

duty of Government to provide the education.

(2) Every parent or guardian shall ensure that his or her child or ward attend and complete basic education.

Harmful social and customary practices

19. No child shall be subjected to any social and cultural practices that affect the welfare, dignity, normal growth and development of the child and, in particular, those customs and practices that are—

- (a) prejudicial to the health and life of the child; and
- (b) discriminatory to the child on the grounds of sex or other status.

Child's right to stay with parents

20. (1) A child is entitled to live with his or her parents or guardians.

(2) Subject to subsection (1), where a competent authority determines in accordance with the laws and procedures applicable, that it is in the best interests of the child to separate him or her from his or her parent or parents, the best substitute care available shall be provided for the child.

Right of the child to be maintained

21. (1) It is the duty of a parent, guardian or any other person having custody of a child to maintain that child and, in particular that duty gives a child the right to -

- (a) education and guidance;
- (b) immunization;
- (c) adequate diet according to the means of the parent, guardian or other person;
- (d) clothing;
- (e) shelter; and
- (f) medical attention.

(2) It shall be the duty of any person having custody of a child to protect the child from discrimination, violence, abuse and neglect.

PART III - RESPONSIBILITIES OF PARENTS AND OF THE CHILD

Parental responsibility

22. (1) Parents have the primary responsibility for the upbringing and development of their child and have the duty to—

- (a) ensure that the best interest of the child are their basic concerns at all times;
- (b) secure, within their abilities and financial capabilities, conditions of living necessary to the child's development; and
- (c) ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

(2) Where the biological parents of a child are deceased, parental responsibility may pass on to guardians or relatives of either parent or, by way of a care order, to the manager of a residential care home, or to a foster parent or a significant other.

(3) In this section, "significant other" means a person who has a close relationship with the child or with either of his or her parents.

Responsibilities of the child

23. (1) Every child has responsibilities towards his or her family and society, The Gambia, and other legally recognised national and international communities,

(2) It is the duty of a child, subject to his or her age and ability and such other limitations as may be contained in this Act and any other law, to -

- (a) work for the cohesion of his or her

family;

- (b) respect his or her parents, superiors and elders at all times and assist them, where necessary;
- (c) subject to section 59, serve The Gambia by placing his or her physical and intellectual abilities at its service;
- (d) preserve and strengthen African and, in particular, Gambian, cultural values in his or her relations with other members of the society, in the spirit of tolerance, dialogue and consultation;
- (e) contribute to the moral well-being of the society;
- (f) preserve and strengthen social and national solidarity;
- (g) preserve and strengthen the independence and integrity of The Gambia;
- (h) respect the ideals of freedom, equality, humanness and justice for all persons; and
- (i) contribute to the best of his or her abilities, at all times and at all levels, to the promotion and achievement of African unity.

PART IV - PROTECTION OF THE RIGHTS OF THE CHILD

Heading A - Marriages and betrothals

Prohibition
of child
marriage

24. Subject to the provisions of any applicable personal law, no child is capable of contracting a valid marriage, and a marriage so contracted is voidable.

Prohibition
of child
betrothal, etc.

25. (1) No parent, guardian or any other person shall -

- (a) betroth a child to any person;
- (b) make a child the subject of a dowry transaction; or
- (c) give out a child in marriage.

(2) A betrothal or marriage in contravention of subsection (1) is voidable.

Heading B - Exportation, Seduction, Procurement and other illegal dealing

Exportation
and importation
of children

26. (1) No person shall -

- (a) export from The Gambia to any place outside The Gambia any child with intent that he or she may be, or knowing that it is likely that he or she will be forced or seduced into prostitution in that place; or.
- (b) import into The Gambia from any place outside The Gambia, any child with intent that he or she may be, or knowing that it is likely that he or she will be forced into prostitution any where in The Gambia.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment for life.

Seduction
of children

27. (1) No person shall -

- (a) by the use of deception, coercion, debt bondage or any means whatsoever, induce a child to go from one place to another to do any act with intent that the child may be, or knowing that it is likely that he or she will be, forced or seduced

to have sexual intercourse with another person; or

- (b) in order to gratify the passions of another person, procures, entices or leads away, even with his or her consent, a child for immoral purpose.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment for ten years without an option of a fine.

Abduction

28. (1) No person shall, with intent to marry or to sexually assault a child or cause a child to be married or sexually assaulted by any other person, take the child away, or detain him or her.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment for ten years without an option of a fine.

Causing or encouraging the seduction or prostitution of a child

29. (1) No person who has the custody, charge or care of a child shall cause or encourage the seduction of, sexual assault on or prostitution of, or the commission of an indecent assault on the child.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment for ten years.

(3) A person is deemed to have caused or encouraged the seduction of, sexual assault on or prostitution of, or the commission of an indecent assault on, a child if the person knowingly allows the child to consort with, or to enter or continue in the employment of, any prostitute or other person of known immoral character.

Procurement of a child

30. (1) No person shall procure a child to -

- (a) have sexual intercourse with any other

person or persons, either in The Gambia or any place outside The Gambia;

- (b) become a common prostitute, either in The Gambia, or any place outside The Gambia;
- (c) leave The Gambia with intent that he or she should become a prostitute in any place outside The Gambia; or
- (d) leave his or her usual place or abode in The Gambia, with intent that he or she may engage in prostitution either in The Gambia or any place outside The Gambia.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment for ten years.

Procurement of a child for prostitution, pornography, drug trafficking and use in armed conflict

31. (1) No person shall -

- (a) procure, use or offer a child for prostitution, or the production of pornography, or for pornographic performance;
- (b) procure, use or offer a child for the production or trafficking of drugs; or
- (c) traffick a child for the purpose of recruitment for use in armed conflict.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment for fourteen years without an option of fine.

Foreign travel which promotes child prostitution

32. (1) No person shall organise, promote or encourage foreign travel which promotes child prostitution.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a

fine of not less than two hundred thousand dalasis or imprisonment for a term not exceeding ten years, or to both the fine and imprisonment.

Unlawful detention with intent to defile

33. (1) No person shall detain a child in or on any premises in order to sexually assault him or her or to have him or her sexually assaulted by any other person.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment for ten years.

Procuring defilement of a child by threats, or fraud or administering drugs

34. (1) A person who by –

(a) false pretence, threat or intimidation of any kind procures a child to have sexual intercourse with any person or an animal, or for any person to use a sex gadget or device on the child, either in The Gambia or any place outside The Gambia; or

(b) administers to a child or causes a child to take any drug or other thing with intent to stupefy or overpower him or her in order to enable the person or any other person to have sexual intercourse with or to use a sex device or gadget on the child,

commits an offence and is liable on conviction to a fine of five hundred thousand dalasis or imprisonment for ten year or to both the fine and imprisonment.

(2) A person shall not be convicted of an offence under subsection (1) on the uncorroborated testimony of one witness.

Kidnapping and abduction of a child

35. (1) No person shall -

(a) convey a child beyond the limits of The Gambia without the consent of someone legally authorised to consent take or entice a child out of the keeping of his or

her parent or guardian without the consent of the parent or guardian, to the removal;

(b) unlawfully take a child out of the custody or protection of his or her parent or other person having lawful care or charge of the child, and against the will of the parent or other person, and it is immaterial that-

(i) the accused believed the child to be of or above the age of eighteen years, or

(ii) the child was taken with his or her own consent or at his or her own suggestion.

(c) with intent to deprive any parent, guardian, or other person who has the lawful care or charge of a child, of the possession of the child -

(i) forcibly or fraudulently take or entice away, or detain the child, or

(ii) receive or harbour the child, knowing that the child has been so taken or enticed away or detained; or

(d) knowing that a child has been kidnapped or has been abducted, wrongfully conceal or confine the child.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment not exceeding fourteen years.

(3) A person is deemed to detain a child in or on any premises when the child is in or brought to the premises with a view to -

- (a) his or her being sexually assaulted; or
- (b) detaining him or her in the premises with intent to compel or induce him or her to remain in or upon the premises, he or she withholds from him or her any wearing apparels, other property belonging to him or her or his or her travelling documents.

Kidnapping or abducting in order to commit culpable homicide

36. (1) A person shall not kidnap, abduct or by deceitful means lure a child away in order that the child may be killed.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment for life.

Buying or selling children for immoral purpose

37. (1) A person shall not sell, hire, let or otherwise obtain possession or dispose of a child with intent that the child shall be employed or used for the immoral purposes or knowing it is likely that the child will be employed or used for that purpose.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment for fourteen years.

Other offences

38. (1) A person shall not -

- (a) cause or encourage the seduction or prostitution of a child;
- (b) keep a brothel;
- (c) permit the defilement of a child in his or her premises;
- (d) allow a child to be in a brothel;
- (e) trade in prostitution;
- (f) procure, use or offer a child for the production of pornography or for

pornographic performance; or

(g) procure a child into prostitution.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment for ten years.

(3) Subject to any law relating to the transfer of convicted offenders, a person convicted under subsection (1) shall, if he or she is not a citizen of The Gambia, be deported after serving his or her term of imprisonment.

Heading C - Trafficking and Slave Dealing

Trafficking
in children

39. (1) Notwithstanding any other provision of this Act, a person shall not engage in child trafficking, or recruit, transport, transfer, harbour or receive a child by means of threat, force, or other form of coercion, abduction, fraud, deception, abuse of power or position or otherwise, for the purpose of sexual exploitation or any other form of exploitation.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment for life.

(3) It is not a defence to a charge for an offence under subsection (2) that the child consented.

Slave dealing

40. (1) A person shall not -

(a) import, export or otherwise deal or trade in, purchase, sell, transfer, take or dispose of a child as a slave;

(b) accept, receive, or detain a child as a slave;

(c) deal or trade in, purchase, sell, transfer or take a child in order or so that the

child should be held or treated as a slave;

- (d) place or receive a child in servitude as a pledge or security for debt whether then due and owing, or to be incurred or contingent, whether under the name of a pawn or by any other name the person may be called or known;
- (e) convey or induce a child to go out of the limits of The Gambia in order or so that the child should be possessed, dealt or traded in, purchased, sold, or transferred as a slave or be placed in servitude as a pledge or security for debt;
- (f) hold or possess a child as a slave; or
- (g) enter into any contract or agreement with or without consideration of doing any of the acts or accomplishing any of the purposes specified in this subsection.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment for life.

Heading D - Exploitative Labour

Prohibition of
exploitative
child labour

41. (1) A person shall not engage a child in exploitative labour.

(2) Labour is exploitative if it deprives the child of his or her health, education or development.

Prohibition of
child labour
at night

42. (1) A person shall not engage a child in night work.

(2) Night work means work between the hours of eight o'clock in the evening and six o'clock in the morning.

Minimum age
for light work

43. (1) The minimum age for the engagement of a child in light work is sixteen years.

(2) Light work means work, which is not likely to be harmful to the health or development of the child and does not affect the child's attendance at school or the capacity of the child to benefit from school work.

Prohibition of
hazardous

44. (1) A person shall not engage a child in hazardous work.

employment

(2) Work is hazardous when it poses a danger to the health, safety or morals of a child.

(3) Hazardous work includes -

- (a) going to sea;
- (b) mining and quarrying;
- (c) carrying of heavy loads;
- (d) work in manufacturing industries where chemical are produced or used;
- (e) work in places where machines are used;
and
- (f) work in places such as bars, hotels and places of entertainment where a child may be exposed to immoral behaviour.

Registration of
children
in industrial
undertakings

45. (1) Subject to section 44, an employer in an industrial undertaking shall keep a register of the children employed by him or her and of the dates of their births, if known, or of their apparent ages, if their dates of birth are not known.

(2) An industrial undertaking is an undertaking, other than one in commerce or agriculture and includes, subject to section 44, an undertaking –

- (a) in which articles are manufactured, altered, cleaned repaired, ornamented, finished, adopted for sale, broken up or

demolished, or in which materials are transformed, including undertakings engaged in ship building or in the generation, transformation or transmission of electricity or motive power of any kind; and

- (b) engaged in the transport of passengers or goods by road or rail, including the handling of goods at docks, quays, wharves, ware-houses and airports.

Application 46. For the avoidance of doubt, this Heading applies to employment in both the formal and informal sectors.

Offences under this Heading 47. A person who contravenes the provisions of this Heading commits an offence and is liable on conviction to a fine not exceeding fifty thousand dalasis or to imprisonment for a term not exceeding three years or to both the fine and imprisonment.

Enforcement in the informal sector 48. (1) A labour officer shall carry out any enquiry he or she considers necessary in order to satisfy himself or herself that the provisions of this Heading, with respect to labour by children in the informal sector, are being strictly observed.

(2) A labour officer may, for the purposes of this section, interrogate any person.

(3) If a labour officer is reasonably satisfied that the provisions of this Heading are not being complied with, he or she shall report the matter to the police who shall investigate the matter and take the appropriate steps to prosecute the offender.

Enforcements in the formal sector 49. (1) The Department is responsible for the enforcement of the provisions of this Heading in the formal sector.

(2) For purpose of this section, any person may be interrogated by an officer or any other staff of the Department authorised in that behalf.

(3) If an officer of the Department is reasonably satisfied that the provisions of this Heading are not being complied with, he or she shall report the matter to the police who shall investigate the matter and take the appropriate steps to prosecute the offender.

(4) Where the alleged offender is a member of the family of the child whose rights are being infringed under this Heading, the Department shall request a Social Welfare Officer to prepare a social enquiry report on the matter.

Heading E - Apprenticeship

Child apprentices in the informal sector

50. This Heading applies to child apprentice in the informal sector.

Minimum age for apprentices

51. The minimum age at which a child may commence an apprenticeship with a craftsperson is twelve years or after completion of basic education.

Responsibilities of craftsperson

52. The responsibilities of a craftsperson towards an apprentice under his or her care are to –

- (a) train and instruct the apprentice in a trade to the best of the ability, skill and knowledge of the craftsperson and to the best ability of the apprentice or cause the apprentice to be trained in a trade under the supervision of the craftsperson;
- (b) be responsible for any harm caused to the apprentice in the course of his or her training;
- (c) provide food for the apprentice, unless otherwise agreed;
- (d) provide a safe and healthy environment for the apprentice;

- (e) be responsible for the moral training of the apprentice; and
- (f) protect the best interest of the apprentice generally.

Apprenticeship
agreement

53. (1) The parent, relative or guardian of an apprentice shall enter into an apprenticeship agreement with the craftsperson.

(2) The agreement shall be in accordance with the custom, which pertains to the specific trade but shall not include the performance of any induction ceremony, which may conflict with the rights of the child contained in Heading D of this Part.

(3) The agreement shall contain such matters as may be agreed between the parties and may include -

- (a) provision that the parent, guardian or relative shall bear the cost of protective clothing and the basic tools for the training of the apprentice;
- (b) a duty that the craftsperson is to provide shelter for the apprentice; and
- (c) a provision that the craftsperson is to give the apprentice an allowance of not less than half the minimum national daily wage for his or her daily sustenance.

(4) The agreement shall be in writing and shall contain provisions in the best interest of the parties and the apprentice.

(5) The agreement shall immediately lapse if either party to the agreement contravenes its terms, unless there is a contrary intention in the agreement.

Duties of
apprentice

54. An apprentice shall diligently and faithfully obey and serve the craftsperson and shall –

- (a) not absent himself or herself from the apprenticeship without permission;
- (b) prevent deliberate damage to the property of the craftsperson; and
- (c) not conceal any damage to the property of the craftsperson.

Release of
apprentice

55. (1) The conditions for the release of an apprentice on the completion of his or her training shall not be exploitative and shall be in accordance with the best interest of the child under this Act.

(2) The craftsperson shall, on completion of a period of apprenticeship, issue a certificate of release to the apprentice, which shall indicate that the apprentice has completed his or her training.

(3) If the craftsperson refuses to issue the certificate of releases, without just cause, he or she commits an offence and is liable on conviction to a fine not exceeding twenty thousand dalasis or imprisonment for a term not exceeding two years or to both the fine and imprisonment.

Resolution of
disputes

56. A dispute related to an apprenticeship agreement shall be referred to the labour officer concerned by the parties to the apprenticeship agreement or the apprentice.

Application of
this Part

57. The provisions of Heading D of this Part on Exploitative Labour shall apply to this Heading.

Heading F – Other Forms of Exploitation, and Recruitment in the Armed Forces and other Security Agencies

Other forms of exploitation

58. (1) Notwithstanding the provisions of this Act, no person shall exploit a child in any other form or way that is prejudicial to the welfare of the child.

(2) A person who contravenes the provisions of subsection (1) of this section commits an offence and is liable on conviction to a fine not exceeding fifty thousand dalasis or imprisonment for a term not exceeding five years, or to both the fine and imprisonment.

Prohibition of recruitment of children into the armed forces and other security agencies

59. (1) A child shall not be recruited into any of the branches of the armed forces of The Gambia or other security agencies.

(2) The Government or any other relevant agency or body shall ensure that no child is directly involved in any military operations or hostilities.

Prohibition of importation of harmful publication

Heading G - Harmful Publication

60. (1) A person shall not import any harmful publication as defined in this Act.

(2) A person who imports any harmful publication commits an offence and is liable on conviction to a fine of not less than fifty thousand dalasis or imprisonment for a term of not less than three years or more than five years or to both the fine and imprisonment.

Penalty for publishing of harmful publication

61. (1) A person who -

- (a) prints, publishes, sells or lets on hire any harmful publication; or
- (b) has in his or her possession for the purpose of selling or letting on hire any

harmful publication,

commits an offence and is liable on conviction to a fine of fifty thousand dalasis or imprisonment for a term not exceeding three years or to both the fine and imprisonment.

(2) It is a defence for a person charged with an offence under this section to prove that he or she had not examined the contents of the publication and had no reasonable cause to suspect that the book or magazine was one to which this Act applies.

(3) A prosecution for an offence under this section shall not be instituted except by or with the consent of the Attorney General.

Power to
issue warrant
of arrest,
summon,
search, for
harmful
publication

62. (1) If an information is brought before a Magistrate that a person has committed or is suspected of committing an offence under section 60 or 61 of this Act with respect to any harmful publication, the Magistrate may issue a warrant for the arrest of that person.

(2) A Magistrate, if satisfied by the information, substantiated on oath, that there is reasonable ground for suspecting that a person charged with or suspected of committing an offence has in his or her possession or under his or her control -

- (a) copies of harmful publication; or
- (b) any plate prepared for the purpose of printing copies of any harmful publication or any photographic film prepared for that purpose,

may grant a search warrant authorising a police officer named in the warrant to enter (if necessary by force) any premises specified in the warrant and any vehicle, or shop or stall used by the person for the purpose of any trade or business, and to search the premises, vehicle, shop or stall.

(3) The police officer may on searching the premises, seize any of the following items -

- (a) any copy of the harmful publication and any other copies which the police has reasonable cause to believe to be a harmful publication; and
- (b) any plate or photographic film which the police officer has reasonable cause to believe to have been prepared for the purpose of printing copies of any harmful publication.

Power of
court to
order
forfeiture

63. (1) The court by or before which a person is convicted of an offence under section 60 or 61 may make an order for the forfeiture of any copy of the harmful publication and any plate or photographic film prepared for the purpose of printing copies of the harmful publication which has been found in his or her possession or under his or her control.

(2) The power to order forfeiture under subsection (1) shall not extend to a case where the accused person has successfully raised a defence against the charge.

(3) No order made under subsection (1) by a Magistrates Court, or a High Court, in case of an appeal from a Magistrates Court, shall take effect-

- (a) until the expiration of the ordinary time within which an appeal may be lodged, whether by giving notice of appeal or applying for a case to be stated for the opinion of the High Court; or
- (b) where an appeal is duly lodged, until the appeal is finally decided or abandoned.

(4) Before a forfeiture order is made under this section, the court shall hear the authors, copyright owner or main publisher of the harmful publication if he or she so wishes.

Heading H - Miscellaneous

Attempts

64. (1) Where a person is charged with any of the offences under this Act and the evidence establishes an attempt to commit that offence, he or she may be convicted of having attempted to commit that offence although the attempt is not separately charged and the person shall be punished as prescribed for the offence under this Act.

(2) Where a person is charged with an attempt to commit an offence under this Act, but the evidence establishes the commission of the full offence, the offender shall not be entitled to acquittal but shall be convicted of the offence and punished as provided under this Act.

Offence by
body
corporate

65. Where an offence under this Act which has been committed by a body corporate is proved to have been committed on the instigation or with the connivance of or attributable to any neglect on the part of a director, manager, secretary or other officer of the body corporate, or any person purporting to act in any such capacity, he or she, as well as the body corporate, where practicable, shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

PART V - SUPPORT FOR CHILDREN BY THE GOVERNMENT

Government
to safe-guard
children and
promote
reconciliation
between parents
and children

66. (1) It is the duty of the Government to-

- (a) safeguard, protect and promote the welfare of children; and
- (b) ensure that Local Government authorities and other Government agencies liaise with one another in matters concerning children.

(2) The Department of Social Welfare or such other Department, as the Government may

designate, is responsible for the welfare of children.

(3) The Department shall, in the exercise of its functions under this Act, be assisted by such officers of the Government, including Probation Officers and Local Government authorities, as the Department may determine.

(4) In particular, it is the duty of the Department to mediate in any situation where the rights of a child are infringed and especially with regard to the protection of a child, the child's right to succeed to the property of his or her parents and all the rights accorded to a child in Part II of this Act.

(5) The Department shall keep a register of children in need of special protection measures within its area of jurisdiction and give assistance to them whenever possible in order to enable those children grow up with dignity among other children and to develop their potential and self-reliance.

(6) The Department shall provide assistance and accommodation for any child in need who appears to it to require assistance and accommodation as a result of his or her having been lost or abandoned or seeking refuge.

(7) The Department and the Police shall make every effort, including publication through the mass media, to trace the parents or guardians of any lost or abandoned child or to return the child to the place where he or she ordinarily resides.

Duty to report
infringement of
child's rights

67. (1) It is the duty of any member of the public who has evidence that a child's right is being infringed or that a parent, guardian or any person having custody of a child who is able to, but refuses or neglects to provide the child with adequate diet, shelter, clothing, medical care or

education, to report the matter to the nearest office of the Department.

(2) The Department may, on receiving the report, summon the person against whom the report was made under subsection (1) to discuss the matter, and shall make a decision in the best interest of the child.

(3) The Department shall treat a report received under this section as confidential.

(4) Where the person against whom the report was made refuses to comply with the decision made under subsection (2), the Department shall refer the matter to the Children's Court.

(5) The Children's Court shall adjudicate the matter and may -

- (a) give any relief or order allowed by the law; and
- (b) in the case of a parent, in addition to any relief or order given under paragraph (a), order the parent to execute a bond to exercise proper care and guardianship by signing an undertaking to provide the child with any or all of the requirements of the child.

2 PART VI – CHILDREN'S COURT

Establishment
of the Children's
Court

68. There shall be a court to be known as the Children's Court in every Division, and any other Local Government administrative unit designated by the Chief Justice by notice in the *Gazette*.

Composition
of the Children's
Court

69. A Children's Court shall consist of -

- (a) a Chairperson who shall be a Magistrate, not below the grade of a Magistrate of the First Class, to be designated by the Chief Justice; and
- (b) two other persons of proven integrity

from the community, one of who shall be a woman to be appointed by the Chief Justice, on the recommendation of the Judicial Service Commission.

Jurisdiction of
the Children's
Court

70. (1) Subject to this Act, a Children's Court shall have power to hear and determine -

- (a) subject to section 213, criminal charges against a child;
- (b) all civil matters concerning a child, including adoption; and
- (c) applications relating to child care and protection.

(2) The Court shall also exercise any other jurisdiction conferred on it by this Act or any other written law.

Venue of the
Children's Court

71. A Children's Court shall, wherever possible, sit in a different building from the one normally used by other courts.

Procedure in
Children's Court

72. (1) The procedure of the Children's Court in all matters shall be in accordance with Rules of Court made by the Chief Justice for that purpose but subject to the following -

- (a) the Court shall sit as often as necessary;
- (b) the child's right to privacy shall be respected throughout the proceedings, and accordingly, proceedings shall be held *in camera* or where necessary by video links;
- (c) proceedings shall be as informal as possible, and by enquiry rather than by exposing the child to adversarial procedures;
- (d) parents or guardians of the child shall

be present whenever possible;

- (e) the child shall have a right to give an account and express an opinion;
- (f) the child shall have a right to legal representation and legal aid provided by Government; and
- (g) the right to appeal shall be explained to the child and his or her parents or guardian.

(2) Apart from members and officers of the Court and subject to subsection (1)(f), only the following persons may, at the discretion of the Court, attend a sitting of a Children's Court -

- (a) the parties to the case before the Court, witnesses and other persons directly concerned in the case;
- (b) the parent or guardian of the child before the Court;
- (c) a Social Welfare Officer;
- (d) a Probation Officer; and
- (e) any other person whom the Court authorises to be present.

Publication of
information on
child

73. (1) A person shall not publish information that may lead to the identification of a child in any matter before the Court, except by permission of the Court.

(2) A person who contravenes the provisions of subsection (1) commits an offence and is liable on conviction to a fine of five hundred thousand dalasis or imprisonment for a term not exceeding three years or to both the fine and imprisonment.

Rules of Court

74. The Chief Justice may make rules prescribing the procedure to be followed in a Children's Court

and in particular as to the recording of evidence, the manner of arriving at and recording of findings and others matters.

PART VII – CARE AND PROTECTION OF CHILDREN

Persons to report child abuse and protection cases

75. (1) A person with information on -

- (a) child abuse; or
- (b) a child in need of care and protection,

shall report the matter to the Department or the nearest Police Station.

(2) The Department and the Police shall not divulge the identity of a person who makes a report to them under subsection (1).

Meaning of care and protection

76. (1) For purposes of this Act, a child is in need of care and protection if the child -

- (a) is an orphan and is deserted by his or her relatives;
- (b) has been neglected or ill-treated by the person who has the care and custody of the child;
- (c) has a parent or guardian who does not exercise proper guidance and control over the child;
- (d) is destitute;
- (e) is under the care of a parent or guardian who, by reason of criminal or drunken habits, is unfit to have the care of the child;
- (f) is wandering and has no home or settled place of abode or visible means of subsistence;
- (g) is begging or receiving alms, whether

or not there is any pretence of singing, playing, performing, offering anything for sale or otherwise, or is found in any street, premises or place for the purpose of begging or receiving;

- (h) accompanies any person when that person is begging or receiving alms, whether or not there is any pretence of singing, playing, performing, offering anything for sale or otherwise;
- (i) frequents the company of any reputed thief or reputed prostitute;
- (j) is residing in a house or part of a house used by any prostitute for the purpose of prostitution, or is otherwise living in circumstances calculated to cause, encourage or favour the seduction or prostitution of or affect the morality of the child;
- (k) is a child in relation to whom an offence against morality has been committed or attempted or is otherwise exposed to moral or physical danger or slave dealing;
- (l) is found acting in a manner from which it is reasonable to suspect that he or she is, or has been, soliciting for immoral purposes;
- (m) is below the age of criminal responsibility and is involved in an offence, other than a minor criminal matter;
- (n) is the child of a parent who has been previously convicted of the offence of defilement or indecent treatment of any of his or her children; or
- (o) is beyond the control of his or her parents or guardian.

(2) A child shall not be considered to come within the scope of paragraph (i) or (j) of subsection (l) if the only reputed prostitute that the child associates with is his or her mother and if it is proved that she exercises proper guardianship and care to protect the child from corrupt influences.

Investigation

77. (1) If the Department has reasonable grounds to suspect child abuse or a need for care and protection, it shall direct a Social Welfare Officer accompanied by the police to enter and search the premises where the child is kept to investigate the case.

(2) If after investigation it is determined that the child has been abused or is in need of immediate care and protection, the Department shall direct a Social Welfare Officer accompanied by the police to remove the child to a place of safety for a period of not more than seven days.

(3) The child shall be brought before a Children's Court by the Social Welfare Officer before the expiry of the seven-day period for an order to be made.

(4) The Children's Court may, until it determines the order, commit the child to a residential care home or to the care of the Department or other suitable person.

Supervision
orders and
care orders

78. On the application of a Social Welfare Officer or an authorised person, a Children's Court may make -

- (a) a supervision or interim supervision order placing a child under the supervision of a Social Welfare Officer or a Probation Officer while leaving the child in the custody of his or her parents, guardian or relative; or
- (b) a care order or interim care order, placing a child in the care of the manager of a residential care home or with an approved foster parent in accordance

with this Act.

- Welfare reports
79. (1) The Children's Court shall require a written welfare report in respect of a child before making a supervision order or a care order.
- (2) The Social Welfare Officer shall prepare a welfare report and comply with the request of a Children's Court whenever required to produce the welfare report.
- (3) The Social Welfare Officer shall make a home visit and interview the parents or guardian of the child concerned before making a welfare report.
- (4) Where the child in respect of whom the welfare report is made is of sufficient age and understanding, the Social Welfare Officer shall interview the child.
- (5) A welfare report shall contain matters relating to the welfare of the child and recommendations as to any action to be taken by the Children's Court.
- (6) The Children's Court shall take the information contained in the welfare report into account in so far as it is relevant to the order being made.

Ground for making a supervision or care order

80. A Children's Court may only make an order under this Part, if it is satisfied that -
- (a) the child concerned is suffering or is likely to suffer significant harm; and
 - (b) that the harm, or probability of harm, is attributable to –
 - (i) the care given to the child, or likely to be given to the child if the order were not made, not being what it would be reasonable to expect a parent to give to a child, or
 - (ii) the child being beyond parental

control.

Application for a supervision order

81. Before making an application for a supervision order, the Social Welfare Officer or an authorised person must be satisfied that -

- (a) the Department has dealt with the matter without success; and
- (b) there is need for continuous supervision enforced by a court order.

Duties of a supervisor while a supervision order is in force

82. The duties of a supervisor while a supervision order is in force are to -

- (a) be friendly to, advise, and assist the supervised child;
- (b) advise the child's parents or guardian;
- (c) make plans for the child's future in consultation with the child and his or her parents or guardian;
- (d) apply to the Court to discharge or vary the order if necessary; and
- (e) take such other reasonable steps as may be necessary to reduce the harm to the child.

Duration of supervision order

83. (1) A supervision order shall be made for a period of not more than one year at a time but may be extended for a further period of not more than six months or such other period as may be prescribed on the application of the Social Welfare Officer.

(2) An extension of a supervision order shall require a written report by the Social Welfare Officer.

(3) A supervision order shall terminate when the child to whom it relates attains eighteen years of age.

Social Welfare Officer to

84. The duty to enforce a supervision order shall

enforce orders be vested in the Social Welfare Officer or such other officer, as the Department considers appropriate.

Requirements as to change of address and visits 85. A supervision order shall require the person with whom the child lives to -

- (a) inform the supervisor of any change of his or her address;
- (b) allow the supervisor to visit the child at his or her home.

Care order 86. (1) A Children's Court may, on the application of a Social Welfare Officer or an authorised person, make a care order or an interim care order placing a child in the care of the manager of a residential care home or with foster parents.

(2) An application for a care order may only be made -

- (a) after all possible alternative methods of assisting the child have been tried without success, and the significant harm from which the child is suffering or is likely to suffer requires his or her removal from where he or she is living; or
- (b) the danger to which the child is exposed is so severe as to require his or her immediate removal from where he or she is living.

Purpose of a care order 87. The object of a care order is to -

- (a) remove a child from a situation where he or she is suffering or likely to suffer significant harm; and
- (b) assist the child and those with whom he or she was living or wishes to live to examine the circumstances that have led to the making of the order and to take steps to resolve or ameliorate the

problem so as to ensure the child's return to the community.

Duration of a care order

88. (1) A care order shall be for a maximum period of three years or until the child reaches the age of eighteen years, whichever is shorter.

(2) A care order shall be reviewed every six months by the Social Welfare Officer and the parents of the child concerned, and the Social Welfare Officer may, thereafter, make recommendations as to steps to be taken, having regard to the outcome of the review.

Duty to enforce a care order

89. The duty to enforce a care order is vested in the Social Welfare Officer or such other person as the Department considers appropriate.

Parental responsibility for a child in a residential care home or foster home

90. (1) The Department and the parents of a child shall have parental responsibility for the child while the child is in a residential care home or with a foster parent.

(2) The child's contact with his or her parents, guardian, relatives and friends while he or she is in the residential care home or with a foster parent shall be encouraged unless it is not in the best interests of the child.

(3) The Department and the parents of a child shall ensure that the child's development while in a residential care home or with a foster parent, particularly his or her health and education, is attended to.

(4) The Department shall -

(a) communicate with the parents or guardian of a child in a residential care home;

(b) inform the parents or guardian of the child's progress; and

(c) arrange, through the Social Welfare Officer, a trial period for the child to be

at home with his or her parents or guardian, as soon as it is appropriate.

(5) The Department, the parents of a child and the manager of the residential care home shall hold review sessions at least once every six months, and may, thereafter, make recommendations as to steps to be taken having regard to the outcome of the review.

Special duties
of the
Social Welfare
Officer in
relation to
care order

91. (1) It is the duty of the Social Welfare Officer or such other authorised person as the Department considers appropriate, before and after the termination of the care order, to work in partnership with the parents, guardians or relatives, to whom the child is expected to return after the termination of the care order.

(2) The duties of the Social Welfare Officer or authorised person under this section include child and family therapy, and through counselling service before, during and after the child's return and gaining the assistance of those in the community who can help in the process of resolving the problems which caused the care order to be made.

(3) In carrying out his or her duties under this section, the Social Welfare Officer or authorised person shall take into account the wishes of the child.

(4) Where a child is placed with a foster parent, it is the responsibility of the Social Welfare Officer or authorised person to -

- (a) communicate with the parents or guardian of the child;
- (b) inform them of the progress of the child;
- and

(c) arrange a trial period for the child to be at home as soon as it is appropriate.

(5) The Social Welfare Officer or authorised person shall visit the child during the trial period at

home and make plans for the future of the child in consultation with the foster parents.

Interim supervision order and interim care order

92. (1) A Children's Court may, on hearing information on oath by a Social Welfare Officer or an authorised person, that a child is suffering or likely to suffer significant harm, make an interim supervision order or an interim care order in respect of the child.

(2) An interim order shall not be made unless a child is suffering or is likely to suffer significant harm as described in section 80.

(3) The maximum period for an interim order is three months but the Court may prescribe a lesser period, which shall not be less than eight weeks.

(4) If the Social Welfare Officer wishes to recommend a full care or supervision order, he or she shall present a report to the Court during the period of the interim order.

Exclusion order

93. (1) A Children's Court may, in addition to, or in proceedings for a supervision order, care order, interim supervision or interim care order, make an exclusion order, prohibiting a named person from having contact with the child, or with the child and persons looking after the child.

(2) A Children's Court shall, before making an exclusion order, be satisfied that it is in the best interest of the child.

(3) The Children's Court may specify the duration of the exclusion order.

Enforcement of exclusion order

94. A person who breaches an exclusion order commits an offence and shall be dealt with in accordance with the provisions of this Act except that the Social Welfare Officer may proceed on behalf of the State against the offender.

Search and production order

95. (1) A Children's Court may, in proceedings for an application for a care order, on hearing information on oath, make a search and

production order authorising the Social Welfare Officer, with a police officer, to enter any premises specified in the order to search for and remove to a place of safety, a child whom the Social Welfare Officer believes or suspects is suffering or is likely to suffer significant harm.

(2) Before searching the specified premises, the Social Welfare Officer holding the order, shall inform the Department.

(3) A child removed on a search and production order shall be produced in the Children's Court within forty-eight hours after his or her removal.

Removal of a child under emergency protection

96. (1) A Social Welfare Officer, any member of the police force or an authorised person who has reasonable grounds for believing that a child is suffering or is likely to suffer significant harm shall immediately notify the Department by any possible means, and thereafter in writing, of the case.

(2) The Department shall, pursuant to a notification under subsection (1), take the child and place him or her under emergency protection in an approved place of safety for a maximum period of forty-eight hours.

(3) The Department may be assisted by a police officer in removing and taking the child to a place of safety.

(4) As soon as possible and in any case within the period of forty-eight hours referred to in subsection (1), the Department shall take the child before a Children's Court and shall make a report, taking into account the wishes of the child.

(5) The Children's Court before which a child is brought may make an emergency protection order in respect of the child and give such directions as it considers appropriate in the circumstances.

(6) Where the Department places a child under emergency protection it may, if it deems it necessary, ensure the provision of medical

attention or treatment, including medical examination of the child.

(7) Whenever a child is placed under emergency protection, his or her parents or the person with whom the child was living shall be informed as soon as practicable and shall be allowed to have contact with the child unless it is not in the best interest of the child to do so.

Offence to remove without authority a child from a place of safety

97. A person who, without reasonable cause, removes a child placed under emergency protection from a place of safety, without the authority of the person in whose custody the child is, commits an offence, and is liable on conviction to a fine of fifty thousand dalasis or imprisonment for a term not exceeding three years or to both the fine and imprisonment.

Persons to apply for discharge or variation of supervision or care order

98. A Children's Court may discharge a supervision or care order in the best interest of the child on the application of -

- (a) the child concerned;
- (b) the parent, guardian or relative of the child;
- (c) a person who has parental responsibility for the child;
- (d) a person with whom the child was living before the order was made; or
- (e) the Social Welfare Officer.

Duty of Department to investigate

99. Where the Department is informed or has reasonable cause to believe that a child is suffering or is likely to suffer significant harm, it shall make enquiries to decide whether to act to safeguard or promote the welfare of the child.

Requirement to disclose information

100. A Children's Court may summon a person to disclose an information concerning a child if it is satisfied that the information is being withheld by the person.

Medical examination of child

101. (1) The Children's Court has power to order that a child be medically examined if there is any reason to believe that the child is in need of the examination, or for some reason requires a report concerning the child's physical or mental condition.

(2) The Children's Court may request in writing a medical officer to conduct the examination.

Contravention of order by a child

102. (1) A child who contravenes an order from the Children's Court and runs away may be apprehended without warrant by the police and returned to the place specified in the care or supervision order.

(2) The Children's Court may make another order where the child has run away in order to place the child elsewhere if the approved fit person is not willing to take the child.

Lack of interest in welfare of child under care order

103. A child under a care order whose parent, guardian or relative does not show an interest in the welfare of the child within a period stipulated by a Children's Court may be placed with a foster parent.

PART VIII – FOSTERING

Definition of foster parent

104. A foster parent is a person who is not the parent of a child but is willing to undertake the care and maintenance of the child.

Person who can foster

105. (1) A person above the age of twenty-one years who is of high moral character and proven integrity may be a foster parent to a child.

(2) A foster parent must be at least fifteen years older than the child to be fostered.

Foster care placement

106. (1) Where –

- (a) a child has been committed to a residential care home under a care order;

- (b) a recommendation has been made by a Social Welfare Officer that a residential care home is the most suitable place for a child; or
- (c) a child has been placed in a residential care home by any person,

a committee comprising a Social Welfare Officer, a person in charge of the residential care home and two other persons from the community, with interest in the welfare of children, selected by the Department may recommend to the Department that the child be placed with a foster parent.

(2) Subject to subsection (1), a person who wishes to foster a child shall apply to a Social Welfare Officer or to the manager of the residential care home who shall forward the application to the Department for consideration.

(3) The Department shall not place a child with a foster parent under this section unless it has applied to the Children's Court for an order, which the Court may make if it is satisfied that it is in the best interest of the child to do so.

(4) A foster parent in whose care a child is placed or committed shall have the same responsibilities in respect of the child's maintenance as the parent of the child while the child remains in his or her care.

(5) A foster parent is liable for contravention of any of the provisions of Parts II and III.

(6) The Department, the parents and the foster parent of a child shall hold review sessions at least once every six months and thereafter may make recommendations as to steps to be taken having regard to the outcome of the review.

Regulations
under this
Part

107. (1) The Secretary of State may by regulations or rules provide for the procedure for the registration of foster parents, making fostering orders and other matters relating to fostering of

children under this Act.

(2) The Chief Justice may make rules to provide for the practice and procedure of the Children's Court in proceedings relating to fostering.

PART IX - ADOPTION

Interpretation 108. In this Part, unless the context otherwise requires –

“inter-country adoption” means the adoption of a Gambian child by a person who is not a citizen of The Gambia and whose ordinary place of residence is outside The Gambia.

Jurisdiction 109. (1) An application for an adoption order shall be made to a Children's Court, which may, subject to the provisions of this Act, grant the application.

(2) A child need not be a citizen of The Gambia to be adopted.

Restrictions and conditions 110. (1) An adoption order may be granted to a sole applicant or jointly to spouses where –

(a) the applicant or at least one of the joint applicants has attained the age of twenty-one years and is at least fifteen years older than the child, and is not more than sixty years old ; and

(b) in the case of an application by one of the spouses, the other has consented to the adoption.

(2) The Court may dispense with the consent required under paragraph (b) of subsection (1), if the spouse whose consent is required cannot be found or is incapable of giving consent, or the spouses are separated and living apart and the separation is likely to be permanent.

(3) An adoption order shall not be made in favour

of a sole male applicant in respect of a female child, or in favour of a sole female applicant in respect of a male child, unless the Court is satisfied that there are special circumstances that justify, as an exceptional measure, the making of an adoption order.

(4) The application shall not be considered unless the applicant has fostered the child for a period of not less than thirty-six months under the supervision of a Social Welfare Officer.

(5) The Social Welfare Officer is required to submit a report to assist the Court in considering the application and the Court may, in addition, require some other person or the local authority to make a report in respect of the adoption application.

(6) Except where the application is by spouses jointly, an adoption order shall not be made authorising more than one person to adopt a child at the same time.

Inter-country
adoption

111. (1) A person who is not a citizen of The Gambia may in exceptional circumstances adopt a Gambian child, if he or she -

- (a) has been ordinarily resident in The Gambia for at least six months; or
- (b) has fostered the child for at least thirty-six months under the supervision of a Social Welfare Officer; and
- (c) does not have a criminal record and produces a police check report;
- (d) has a home study report concerning his or her suitability to adopt a child from his or her country's probation and welfare office or other competent authority;
- (e) satisfies the Court that the child will enjoy safeguards and standards equivalent or more than those existing in The Gambia;

(f) satisfies the Court that his or her country of origin will respect and recognise the adoption order.

(2) For the purposes of an application to which this section applies, the Social Welfare Officer referred to in paragraph (b) of subsection (1) shall be required to submit a report to assist the Court in considering the application, and the Court may, in addition, require some other person or authority to make a report in respect of the application.

(3) The restrictions and conditions in section 110, other than subsections (4) and (5) of that section, apply to an application to which this section relates.

Consent

112. (1) The consent of the parents of the child, if known, is necessary for the adoption order to be made but the consent may be revoked at any time before the pronouncement of the adoption order.

(2) The Court may dispense with the consent if the parents are incapable of giving it.

(3) While an application for an adoption order is pending in the Court, a parent who has given his or her consent to the adoption is not entitled, except with the leave of the Court, to remove the child from the care and custody of the applicant.

(4) The Court may refuse to grant leave to remove the child from the care and custody of the applicant under subsection (3) if it considers it significantly harmful to the welfare of the child.

(5) If in the view of the Court a child is able to understand the adoption proceedings, then his or her views shall be taken into consideration.

(6) If the child is at least fourteen years of age, his or her consent to the adoption must be obtained unless it is impossible for him or her to express his or her wishes.

(7) Where it appears to the Court that any person who is not the parent of the child has any rights or obligations in respect of the child under any order of the Court or agreement or under personal law or otherwise, the Court may require the consent of that person before the adoption order is made.

(8) The Court shall also request a Social Welfare Officer to prepare a report to assist it to determine whether any person who is not a parent of the child has any rights or obligations in respect of the child and whether that person's consent ought to be obtained before the making of the adoption order.

Functions of
Court

113. (1) The Court shall, before making an adoption order, be satisfied that -

- (a) every person whose consent is required and is not dispensed with, has consented and understands the nature and effects of the adoption, namely, that it will permanently deprive that person of parental rights over the adopted child.
- (b) the order if made will be for the welfare of the child, due consideration being given to the wishes of the child having regard to his or her age and understanding;
- (c) the applicant has not received or agreed to receive, and that no person has made or agreed to make to the applicant, any payment or other reward in consideration of the adoption; and
- (d) the applicant or any person on behalf of the applicant has not paid or agreed to pay money or anything in place of money to the parent, guardian or any person in charge of the child in consideration of the adoption of the child.

(2) The Court may, in an adoption order, impose such terms and conditions as it thinks fit in the circumstances.

- Appeals 114. An appeal shall lie against a decision taken under this Part, from -
- (a) the Children’s Court to the High Court
 - (b) the High Court to the Court of Appeal; and
 - (c) the Court of Appeal to the Supreme Court.
- Effect of adoption 115. On an adoption order being made –
- (a) all rights, duties, obligations and liabilities of the parents and guardians in relation to the future custody, maintenance and to consent or give notice of consent to marriage are extinguished; and
 - (b) there shall vest in, and be exercised by, and enforceable against the adopter all such rights, duties, obligations and liabilities in relation to the future custody, maintenance and education of the child as would vest in him or her if the child were the natural child of the adopter.
- Devolution of property 116. (1) Subject to any applicable personal law, where an adopter dies intestate, his or her property shall devolve in all respects as if the adopted child were the natural child of the adopter.
- (2) If it appears to the High Court on a claim made, that the disposition of property devolving on an intestacy has been exercised unfairly against an adopted child, the Court may order such provision as the Court thinks equitable to be made for him or her out of the property devolving on the intestacy in accordance with the law.
- Wills 117. (1) In any testamentary disposition of

property, whether or not in writing, made after the date of an adoption order, any reference, whether expressed or implied, to the child or children of the adopter shall, unless the contrary intention appears, be construed as including a reference to the adopted child.

(2) Where any disposition made by the adopter before the adoption order makes no provision for the adopted child, the adopted child may apply to the Court to vary the disposition, and the Court may make such order as it thinks equitable to be made for him or her.

(3) Subject to the provisions of any applicable personal law, an adopted person shall not be entitled to inherit from or through his or her natural parents if they die intestate.

Adopted
Children
Register

118. (1) The Department shall maintain an Adopted Children Register in which particulars of adoptions under this Act shall be registered.

(2) The Adopted Children Register shall be open to inspection by interested parties but not to the public.

Disclosure of
adoption

119. (1) A child shall, before, or after attaining the age of eighteen years, on his or her request or at the discretion of the adopter, be informed by the adopter of the identity of his or her natural parents unless it is not in the child's best interest to do so.

(2) It is the duty of the adopter or parent to inform the child that he or she is adopted as soon as the child is of an age of understanding.

Effect of
adoption
on fit person
order

120. Where an adoption order is made in respect of a child under a fit person care order of a Children's Court, the fit person care order shall cease to apply.

Offences related
to adoption

121. (1) No person shall give or receive any payment or reward in respect of an adoption except with the approval of the Court.

(2) A person who contravenes the provisions of this section commits an offence and is liable on summary conviction to a fine not exceeding five hundred thousand dalasis or to imprisonment for a term not exceeding three years or to both the fine and imprisonment.

Notice to be given to send child abroad

122. (1) The Department shall be notified by the adopter when the adopted child is being sent out of The Gambia permanently after the adoption order has been made by the Court.

(2) The notice shall be given to the Department thirty days before the departure of the adopter and the adopted child from The Gambia.

(3) A person who contravenes the provisions of this section commits an offence and is liable on summary conviction to a fine not exceeding thirty thousand dalasis or imprisonment for a term not exceeding one year or to both the fine and imprisonment.

Rules as to procedure for adoption

123. (1) The Chief Justice may make rules for the procedure for making application for adoption and for other matters relating to adoption.

(2) The rules shall provide for –

- (a) the proceedings to be held *in camera* except under exceptional circumstances;
- (b) the admission of documentary evidence relating to the consent required for the order;
- (c) requiring a Social Welfare Officer to represent the interest of the child in proceedings relating to an adoption order or an interim order;
- (d) requiring a Social Welfare Officer to prepare a social enquiry report to

assist the Court to determine whether the adoption order is in the best interest of the child or not; and

(e) such other matters as the Chief Justice may determine.

(3) The rules made under this section shall be published in the *Gazette*.

PART X - RESIDENTIAL CARE HOMES

Department to
approve
resi-dential
care

124. A Government or non-governmental home set up for the purposes of caring for children shall first be approved by the Department as fit for a residential care home for children.

homes
Admission of
children to

125. A residential care home shall only receive children in the following ways -

residential
care
home

- (a) in an emergency situation, from a police officer, a Social Welfare Officer or any other authorised person, for a maximum period of forty-eight hours pending production of the child in Court; or
- (b) on an interim care order or a care order.

Purpose of
a residential
care home

126 (1) A residential care home shall provide substitute family care for a child until such time as the parents of the child are able to provide adequate care to meet his or her basic needs, or the child completes three years in the home, or attains the age of eighteen years, whichever is earlier.

(2) It is the responsibility of the staff of the residential care home, the Social Welfare Officer and any other authorised person to assist the child to become reunited with his or her parents or guardian.

(3) After a child has been returned home from a residential care home, the Social Welfare Officer and any other authorised person shall keep in regular contact with the child and his or her family until the completion of the order or its discharge.

(4) Where a child is unable to return to his or her parents or to go to foster parents or has no parent, or a foster parent, he or she shall be encouraged and assisted by the residential care home, the Social Welfare Officer and any other authorised person to become independent and self-reliant.

Parental
responsibility
for children in
residential

127. While a child is in a residential care home on a care order, the Department and parents of the child have parental responsibility for the child.

care homes

Contact with
parents and
relatives

128. (1) The manager of a residential care home, the Social Welfare Officer and any other authorised person shall maintain contact with the parents or relatives of a child in the home and also maintain contact between the child and the parents or relatives of the child.

(2) A named person may be refused contact by an exclusion order made by the Children's Court during proceedings on an application for a care order, or later on the application of the child, the Social Welfare Officer or any other authorised person, to the Court when such contact is not in the best interest of the child.

(3) A person refused contact with the child or the child himself or herself may apply to the Court to have the order varied or discharged.

(4) The Court may, in varying an order under subsection (3), allow the person to have supervised contact with the child.

Removal of
child from
residential care
home

129. A person who removes a child from a residential care home without reasonable cause commits an offence and is liable on conviction to a

fine not exceeding thirty thousand dalasis or imprisonment for a term not exceeding one year or to both the fine and imprisonment.

Recovery order

130. (1) When a Children's Court has been informed on information on oath that a child has been removed unlawfully from a residential care home, it may make a recovery order.

(2) A recovery order may –

- (a) direct a person who is in possession of the child to produce him or her on request to an authorised person;
- (b) require removal of the child by an authorised person;
- (c) require any person who has information leading to the whereabouts of the child to disclose it;
- (d) authorise the search of any premises where the child is believed to be staying or is being held; and
- (e) specify the name of the child in question and the person who has the current main parental responsibility.

Application for a recovery order

131. A person with parental responsibility for the child or the Social Welfare Officer may apply for a recovery order.

Escape from residential care home or foster parent

132. (1) A child who runs away from a residential care home to which he or she been committed by the Court on a care order or from a person in whose care he or she has been placed in emergency situation may, pending investigation -

- (a) be brought back to the residential care home from which or the person from whom he or she ran away; or
- (b) be put in alternative residential care home or place of safety.

(2) A child to which subsection (1) applies shall, as soon as possible, be interviewed by the Social Welfare Officer or an authorised person who shall also interview the manager of the residential care home or the person in whose care the child had been placed.

(3) The child may then be returned to where he or she had been placed or, if that is not in the best interest of the child, he or she may be moved by the Social Welfare Officer under a care order or otherwise returned to the Children's Court for variation or discharge of the order.

Court's power to order parent or guardian to contribute

133. (1) Where the Department has custody of a child who has a parent or guardian, the Children's Court may order the parent or guardian to contribute towards the child's maintenance.

(2) The amount contributed shall be a reasonable percentage of the parent's or guardian's earnings and within the means of the parent or guardian and may be varied by the Children's Court if there is a change in the parent's or guardian's circumstances.

(3) A contribution order made under this section shall remain in force as long as the child is in the residential care home, but a person contributing may, at any time, apply to the Children's Court for the order to be varied or discharged on the ground that his or her circumstances have changed since the order was made.

Rules for residential care homes

134. The Secretary of State may make rules for carrying this Part into effect and, in particular for -

- (a) prescribing requirements as to the accommodation and equipment to be provided in the residential care homes;
- (b) prescribing the medical arrangements to be made for protecting the health of the children in the residential care

homes;

(c) regulating the management and discipline of the residential care homes; and

(d) regular inspection of the residential care home.

PART XI – PARENTAGE

Interpretation of
this Part

135. In this Part -

"scientific samples" means any blood, tissue or any other sample taken for the purpose of conducting scientific tests;

"scientific tests" means any test carried out under this Part, and includes any test made with the object of ascertaining the inheritable characteristics of blood, tissue, or any other sample.

Application for
parentage
of a child

136. (1) The following persons may apply to a Children's Court for an order to confirm the parentage of a child –

(a) the child;

(b) the parent or guardian of a child;

(c) a Social Welfare Officer; or

(d) any other interested person.

(2) The application to a Children's Court may be made -

(a) before the child is born;

(b) before a child is eighteen years of age; or

(c) after the child has attained the age of eighteen years, with special leave of the Children's Court.

Evidence of parentage

137. The following may be considered by a Children's Court as evidence of parentage –

- (a) the name of the parent entered in the register of births;
- (b) performance of customary ceremony by the father of the child;
- (c) refusal by the parent to submit to a scientific test; and
- (d) any other matter that the Children's Court may consider relevant.

Use of scientific test to determine parentage

138. (1) A Children's Court may on its motion or on an application of any party to the proceedings, give a direction for -

- (a) the use of scientific tests, including blood tests and DNA tests, to ascertain whether a party to the proceeding is or is not the father or mother of a child; and
- (b) the taking, within a period to be specified in the direction, of blood or other samples from the child, the mother of the child and any party alleged to be the father or mother of the child or from any two of those persons.

(2) In the application of the provisions of subsection (1), religious precepts shall be taken into consideration.

(3) The Court may at any time revoke or vary a direction previously given by it under subsection (1).

(4) Where an application is made for a direction under this section, the order shall specify who is to carry out the tests.

(5) The person responsible for carrying out blood tests taken for the purpose of giving effect to a

direction under this section shall make, to the Children's Court which gave the direction, a report in which he or she shall state -

- (a) the results of the scientific tests.
- (b) whether the party or person to whom the report relates is or is not indicated by the results as the father or mother of the child whose parentage is to be determined; and
- (c) if the party is so indicated, the value, if any, of the results in determining whether that party or person is actually the father or mother of the child.

(6) The report made under subsection (5) shall be -

- (a) received by a Children's Court as evidence in the proceedings of the matters stated in it;
- (b) in the form prescribed by regulations made under section 144.

(7) Where a report has been made to the Court under subsection (5), a party to the proceedings may, with the leave of a Children's Court, or shall, if the Court so directs, obtain from the person who made the report a written statement explaining or amplifying any statement made in the report, and that statement shall be deemed, for the purposes of this section, to form part of the report made to the Court.

(8) Where a direction is given under this section in any proceeding, a party to the proceedings, shall not, except the Court otherwise directs, be entitled to call as a witness -

- (a) the person responsible for carrying out the tests taken for the purpose of giving effect to the direction, or

- (b) any person by whom any thing necessary for the purpose of enabling those tests to be carried out was done,

unless within fourteen days after receiving a copy of the report he or she serves notice on the other parties to the proceedings or on such of them as the Children's Court may direct, of his or her intention to call that person and where a person is called as a witness the party who called him or her shall be entitled to cross-examine him or her.

(9) Where a direction is given under this section, the party on whose application the direction is given shall pay the cost of taking and testing blood or other samples for the purpose of giving effect to the direction, including any expenses reasonably incurred by any person -

- (a) in taking any step required of him or her for the purpose; and
- (b) in making a report to the Children's Court under this section,

but the amount paid shall be treated as costs incurred by him or her in the proceedings.

Consent
required for
taking scientific
samples

139. (1) Subject to the provisions of subsections (3) and (4), a scientific sample which is required to be taken from any person for the purpose of giving effect to a direction under section 138 shall not be taken from that person except with his or her consent.

(2) The consent of a child who has attained the age of sixteen years to the taking from himself or herself of a scientific sample shall be as effective as it would be if he or she had attained the age of majority.

(3) Where a child has, by virtue of subsection (2), given an effective consent to the taking of a scientific sample, it shall not be necessary to

obtain any consent for it from any other person.

(4) A sample scientific may be taken from a child under the age of sixteen years, not being a person as is referred to in subsection (5), if the person who has the care and control of him or her consents.

(5) A scientific sample may be taken from a person who -

(a) is suffering from mental disorder within the meaning of any relevant law in The Gambia; and

(b) is incapable of understanding the nature and purpose of scientific tests,

if the person who has the care and control of him or her consents and the medical practitioner in whose care he or she has certified that the taking of the blood or other sample from him or her will not be prejudicial to his or her proper care and treatment.

(6) The provisions of this section are without prejudice to the provisions of section 138.

Failure to
comply with
direction for
taking of
scientific
samples

140. (1) Where a Children's Court gives a direction under section 138 and a person fails to take any step required of him or her for the purpose of giving effect to the direction, the Children's Court may draw such inference, if any, from that fact as appear proper in the circumstances.

(2) Where, in any proceeding in which the father or mother of a child fails to be determined by the Children's Court, there is a presumption of law that the child is legitimate, the Children's Court may adjourn the hearing for such period as it thinks fit to enable a party to take the step required to give effect to any direction given by the Court under section 138, if the party who-

(a) is claiming any relief in the proceedings;

and

- (b) for the purpose of obtaining that relief is entitled to rely on the presumption,

failed to take any step required of him or her for the purpose of giving effect to the direction.

(3) If at the end of the period referred to in subsection (2), the person has failed without reasonable cause to take the step required, the Children's Court may, without prejudice to subsection (1), dismiss his or her claim for relief notwithstanding the absence of evidence to rebut the presumption.

(4) Where a person, named in a direction under section 138, fails to consent to the taking of a scientific sample from himself or herself or from any person named in the direction of whom he or she has the care and control, he or she shall be deemed for the purposes of this section to have failed to take a step required of him or her for the purpose of giving effect to the direction.

Penalty for personating another, etc for purpose of providing scientific sample.

141. If, for the purpose of providing a blood or other sample for a test required to give effect to a direction under section 138, a person personates another, or proffers a child knowing that it is not the child named in the direction, he or she commits an offence and is liable on conviction to a fine not exceeding twenty thousand dalasis or imprisonment for a term not exceeding one year or to both the fine and imprisonment.

Effect of declaration of parentage

142. (1) A declaration of parentage by a court shall have the effect of establishing a blood relationship of father and child or of mother and child and, subject to the provisions of any applicable personal law, the child shall be in the same legal position as a child actually born in lawful wedlock towards the father or the mother.

(2) A declaration of parentage shall not, by itself, confer rights of custody of the child upon the declared father or mother.

Appeals

143. A party to proceedings for a declaration of parentage may appeal to High Court against the finding of a Children's Court and the appellate court may confirm or revoke the declaration or make any other lawful order that it thinks fit.

Power of Secretary of State to make regulations under this Part

144. The Secretary of State may make regulations for the purposes of this Part and in particular, the regulations may -

- (a) provide that blood or other samples shall not be taken except by such medical practitioners as may be appointed by the Secretary of State;
- (b) regulate the taking, identification and transporting of the blood or other samples;
- (c) require the production, at the time when a scientific sample is to be taken, of such evidence as to the identity of the person from whom it is to be taken as may be prescribed by the regulations;
- (d) require the person from whom a scientific sample is to be taken, or, in such cases as may be prescribed by the regulations, such other person as may be so prescribed, to state in writing whether he, she or the person from whom the scientific sample is to be taken, as the case may be, has during such period as may be specified in the regulations, suffered from any such illness as may be so specified or received a transfusion of blood;
- (e) provide that scientific tests shall not be carried out except by such persons, and at such places, as may be appointed by the Secretary of State;

- (f) prescribe the blood or other tests to be carried out and the manner in which they are to be carried out;
- (g) regulate the charges that may be made for the taking and testing of scientific samples and for the making of a report to a Court under section 138;
- (h) make provision for securing that, so far as practicable, the samples to be tested for the purpose of giving effect to a direction under section 138 are tested by the same person; and
- (i) prescribe the form of the report to be made to a Children's Court under section 138.

PART XII - POSSESSION AND CUSTODY OF CHILDREN

Acquisition of parental responsibility

145. (1) Where the father and mother of a child were not married to each other at the time of his or her birth -

- (a) the Children's Court may -
 - (i) on the application of the father, order that he shall have parental responsibility for the child; or
 - (ii) on the application of the mother, order that she shall have parental responsibility for the child; or
- (b) the father and mother may by agreement have joint parental responsibility for the child.

(2) No parental responsibility agreement shall have effect for the purpose of this Act, unless it is made in the form and manner prescribed by regulations made by the Chief Justice under this section.

(3) Subject to subsection (4), an order under subsection (1)(a), or a parental responsibility agreement, may only be brought to an end by an order of the Children's Court made on the application -

(a) of any person who has parental responsibility for the child; or

(b) of the child himself or herself, with leave of the Court.

(4) The Children's Court may only grant leave under subsection (3) (b) if it is satisfied that the child has sufficient understanding to make the proposed application.

(5) Where the Children's Court makes a residence order in favour of the father or the mother of a child it shall, if the father or mother would not otherwise have parental responsibility for the child, also make an order under subsection (1) giving him or her that responsibility.

(6) Where the Children's Court makes a residence order in favour of a person who is not the parent or guardian of the child concerned, that person shall have parental responsibility for the child while the residence order remains in force.

(7) Where a person has parental responsibility for a child as a result of subsection (5), he or she shall not have the right to -

(a) consent or refuse to consent, to the making of an application or order or any other order relating to adoption in respect of the child; or

(b) appoint a guardian for the child.

(8) Where subsection (5) requires the Children's Court to make an order under subsection (1) in respect of the father of a child, the Court shall not bring that order to an end at anytime while the

residence order concerned remains in force.

(9) The fact that a person has, or does not have, parental responsibility for a child shall not affect -

- (a) any obligation which he or she may have in relation to the child, such as, a statutory duty to maintain the child; or
- (b) any right which, on the death of the child, he or she or any other person may have in relation to the property of the child.

(10) A person who does not have parental responsibility for a particular child but has care of the child may, subject to the provisions of this Act, do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the welfare of the child.

Order as to
custody and
access

146. (1) The Children's Court may, on application of the father or mother of a child -

- (a) make such order as it may deem fit with respect to the custody of the child and the right of access to the child of either parent, having regard to -
 - (i) the welfare of the child and the conduct of the parents, and
 - (ii) the wishes of the mother and father of the child;
- (b) alter, vary or discharge the order, on the application of -
 - (i) the father or mother of the child, or
 - (ii) the guardian of the child, after the death of the father or mother of the child; and
- (c) in every case, make such order with

respect to costs, as it may think just.

(2) The power of the Children's Court under subsection (1) to make an order as to the custody of a child and the right of access to the child may be exercised, notwithstanding that the mother of the child is at the time not residing with the father of the child.

(3) Where the Children's Court makes an order under subsection (1), giving the custody of the child to the mother, the Children's Court may further order that the father shall pay to the mother, towards the maintenance of the child, such weekly or other periodical sum as the Children's Court may, having regard to the means of the father, think reasonable.

(4) Where the Children's Court makes an order under subsection (1) giving custody of the child to the father, the Children's Court may further order that the mother shall pay to the father, towards the maintenance of the child, such weekly or other periodical sum as the Court may, having regard to the means of the mother, think reasonable.

(5) Subject to this section, no order whether for custody or maintenance shall be enforceable, and no liability shall accrue under the order while the mother of the child resides with the father, and any such order shall cease to have effect if, for a period of three months after it is made, the mother of the child continues to reside with the father.

Court to have regard to conduct of parent

147. Where the parent of a child has -

- (a) abandoned or deserted the child; or
- (b) allowed the child to be brought up by another person at the expense of that other person.

for such a length of time and under such circumstances as to satisfy the Children's Court that the parent was not mindful of his or her parental responsibilities, the Children's Court shall not

make an order for the child to be delivered to the parent, unless the parent satisfies the Court that, having regard to the welfare of the child, the parent is a fit person to have the custody of the child.

Power of Children's Court as to production of child

148. Where the parent of a child applies to the Children's Court for a writ or an order for the production of a child, and the Court is of the opinion that the parent -

- (a) has abandoned or deserted the child; or
- (b) had otherwise so conducted himself or herself that the Court should refuse to enforce his or her right to the custody of the child,

the Court may, in its discretion, decline to issue the writ or make the order.

Power of Court to order repayment of cost of bringing up child

149. If at the time of the application for a writ or an order for the production of a child, the child is being brought up by another person, the Children's Court may, in its discretion, if it orders the child to be given up to the parent, further order that the parent pays to that other person-

- (a) the whole of the costs properly incurred in bringing up the child; or
- (b) such portion of the costs as seems to the Court to be just and reasonable,

having regard to the circumstances of the case.

Power of Court to consult child's wishes

150. Nothing contained in sections 147, 148 and 149 shall interfere with or affect the power of the Children's Court to consult the wishes of the child in considering what order ought to be made under section 149 or diminish the right which any child has to exercise his or her own free choice.

Power of Court as to child's religious education

151. The Children's Court may, on an application by a parent for the production or custody of a child, if it is of the opinion -

- (a) that the parent ought not to have the custody of the child; and
- (b) that the child is being brought up in a different religion other than that in which the parent has brought the child up,

make such order as it may deem fit to ensure that the child is brought up in the religion in which the parent requires the child to be brought up.

Enforcement of order for payment of money by attachment of income

152. Where the Court makes an order for the payment of money in pursuance of this Act, the Court shall, in addition to any other powers for enforcing compliance with the order, have power, in any case where pension or income, which is capable of being attached, is payable to the person against whom the order is made, after giving the person to whom the pension or income is payable an opportunity of being heard, order that such part of the pension or income as the Court may deem fit be attached for the payment of any money under this Act.

Notice of change of address by person ordered to pay money

153. A person who for the time being is under an obligation to make payment in pursuance of an order for the payment of money under this Act shall give notice of any change in his or her address to such person, if any, as may be specified in the order.

Power of Secretary of State to make order

154. (1) The Secretary of State may, by order published in the *Gazette*, prohibit -

- (a) the giving or acquiring of the custody, possession, control or guardianship of a child; or
- (b) the removal of a child from any part of The Gambia.

(2) Where the Secretary of State has made an order under subsection (1), no person shall give or acquire the custody, possession or control of or remove a child from any part of The Gambia specified in the order, except in accordance with

rules made by the Secretary of State.

Prohibition
against
acquiring
custody,
of child for the
purpose of
dealing in him or
her

155. (1) No person shall hire, give or acquire the custody, possession, control or guardianship of a child whether or not for pecuniary or other benefit in circumstances that it may reasonably be inferred that the child has been hired, sold or bartered, or that by reason of the hiring, giving or acquiring, the child may reasonably be inferred to be placed in any danger, whatsoever.

(2) In any prosecution for the contravention of subsection (1), where it is proved that the custody, possession, control or guardianship of a child has been given to or acquired by a person, other than a person who is member of the family of the child, it shall be presumed by the Children's Court that the child has been given or acquired in contravention of the provisions of subsection (1).

(3) It shall be a defence to this section to prove that the child concerned was given or acquired in accordance with customary law, provided that the customary law is not repugnant to natural justice, morality or humanity or inconsistent with any written law.

(4) A person who contravenes the provisions of subsection (1) commits an offence and is liable on conviction to a fine not exceeding twenty thousand dalasis or imprisonment for a term of one year or to both the fine and imprisonment.

Unlawful child
removal

156. (1) No person shall unlawfully remove a child from another person who has the lawful custody of the child.

(2) A person who contravenes the provisions of subsection (1) commits an offence and is liable on conviction to a fine not exceeding twenty thousand dalasis or imprisonment for a term of not exceeding one year or to both the fine and imprisonment.

Variation of
custody

157. Where the Court is satisfied on information from a Social Welfare Officer or other official of

the Department that the parent who has custody of the child is wilfully neglecting or mistreating the child, custody shall be granted to the other parent.

Up bringing of child

158. In separation, divorce and nullity cases, there shall be joint consultation between the parents in bringing up the child where the circumstances permit and wherever possible.

Unfit parents

159. Where a court, during divorce, separation or nullity proceedings, finds that the child is suffering or is likely to suffer significant harm as a result of both parents being unfit to have custody of the child, the court shall place the child in the custody of a fit person, but the parents shall be allowed to have reasonable access to their child unless it is not in the best interests of the child for them to do so.

PART XIII – MAINTENANCE

Duty to maintain a child

160. (1) A parent or any other person who is legally liable to maintain a child or contribute towards the maintenance of the child is under a duty to supply the necessaries for health, life, education and reasonable shelter for the child.

(2) For the purpose of this section, “education” means basic education.

Maintenance during divorce, separation or nullification of marriage

161. (1) In all cases of divorce, separation or nullification of marriage, both parents shall continue to maintain and educate their child.

(2) Where the child is in the custody of one parent, the other parent shall have reasonable access to the child unless the court otherwise decides.

Application for child maintenance order

162. (1) A person who has custody of a child and who is -

- (a) the mother of the child;
- (b) the father of the child;

- (c) the guardian of the child; or
- (d) a person authorised by law,

may apply to the Children's Court for a maintenance order in respect of the child.

(2) The following persons may also apply to Children's Court for a maintenance order –

- (a) a child, by his or her next friend; or
- (b) a Social Welfare Officer.

(3) The application for maintenance may be made against any person who is liable to maintain the child or contribute towards the maintenance of the child.

(4) Application for a maintenance order may be made -

- (a) during a subsisting marriage;
- (b) during proceedings for divorce, separation or nullity of marriage;
- (c) during separation;
- (d) during proceedings for declaration of parentage; or
- (e) after a declaration of parentage has been made.

(5) The application may be made -

- (a) at any time during pregnancy; and
- (b) before the child attains the age of eighteen years.

(6) An application for a maintenance order shall

be made by complaint on oath to a Children's Court having jurisdiction in the place where the applicant resides and the summons shall be served on -

- (a) the father of the child;
- (b) the mother of the child; or
- (c) any other person legally liable to maintain the child.

(7) The Children's Court shall issue a summons to the father or mother of the child to appear before the Court on a day named in the summons.

(8) On the appearance of the person summoned or on proof that the summons was duly served on him or her, seven days or more before the hearing, the Court shall hear the evidence of the applicant and shall also hear any evidence tendered by or on behalf of the father or mother.

(9) After hearing evidence under subsection (8), the court may then, having regard to all the circumstances of the case, proceed to make an order against the father or mother for the payment to the applicant of -

- (a) a monthly sum of money as may be determined by the Court, having regard to the circumstances of the case and to the financial means of the father or mother, for the maintenance of the child;
- (b) the funeral expenses of the child if the child has died before the making of the order; and
- (c) the costs incurred in obtaining the order.

(10) Maintenance includes provision for feeding, clothing, education, medical and the general

welfare of the child.

(11) If the Court thinks fit, it may, in place of a monthly payment, order that a lump sum determined by the Court be paid into Court and that the sum shall be expended on the maintenance of the child.

Consideration
for maintenance orders

163. A Children's Court shall consider the following when making a maintenance order –

- (a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;
- (b) any impairment of the earning capacity of the person with duty to maintain the child;
- (c) the financial responsibility of the person with respect to the maintenance of other children;
- (d) the cost of living in the area where the child is resident;
- (e) the rights of the child under this Act; and
- (f) any other matter which the Children's Court considers relevant.

Request for
social
enquiry
report

164. (1) A Children's Court may direct a Social Welfare Officer to prepare a social enquiry report on the issue of maintenance before it for consideration.

(2) The Children's Court shall, in making any order, consider the social enquiry report prepared by the Social Welfare Officer.

Form of
maintenance
order

165. (1) A Children's Court may award maintenance to the mother of a child whether married to the father or not, where the father has been identified, and the maintenance shall include the following –

- (a) medical expenses for the duration of her pregnancy, delivery or death of the child.;
- (b) a periodic allowance for the maintenance of the mother during her period of pregnancy and for a further period of nine months after the delivery of the child; and
- (c) the payment of a reasonable sum to be determined by the Children's Court for the continued education of the mother if she is a child herself.

(2) A Children's Court may order a periodic payment or lump sum payment for the maintenance of a child and the earning or property of the person liable may be attached.

(3) The attachment order shall be applicable in all cases of failure to pay maintenance.

(4) When considering an application for maintenance, a Children's Court may make a maintenance order, which it considers reasonable for any child in the household.

(5) A Children's Court may make an order for arrears of maintenance against any person liable to pay the maintenance.

Warrant to attach earnings or levy the distress for the recovery of maintenance money

166. If at any time, after the expiration of one month from the making of a maintenance order, information is given to a Children's Court on oath, that any sum to be paid under the order has not been paid, the Children's Court may, by warrant, cause the person against whom the order was made to be brought before the Court, and if he or she neglects or refuses to pay the sum due from him or her under the order, the Court may, by warrant, direct -

- (a) that an attachment of earnings be made; or

- (b) that the sum due, together with any costs incurred, be recovered by distress and sale or redistribution of the property of the father or mother unless he or she gives sufficient security by way of recognisance or otherwise to the satisfaction of the Court for his or her appearance before the Court on a day appointed for the return of the warrant of distress, but not more than seven days from the taking of the security.

Appointment
of custodian

167. (1) Whenever a maintenance order is made against the father or mother of a child, a Children's Court may, at the time of making the order or from time to time thereafter, on being satisfied that the applicant -

- (a) is not a fit and proper person to have custody of the child; or
- (b) is dead, or has become of unsound mind, or is in prison,

appoint a person who is willing to have custody of the child to be the custodian of the child.

(2) The appointment of a custodian may be made on the application of a Social Welfare Officer, the person having custody of the child or the person against whom the maintenance order is made.

(3) The appointment of a custodian may be revoked and another person appointed to have custody of the child.

(4) A custodian shall have power to apply for the recovery of all payments in arrears becoming due under a maintenance order as any other applicant would have been entitled to do.

(5) Where an order of appointment or of

revocation of custodian is made, the Court may also order the child to be delivered to the person appointed to have custody of the child.

(6) If a child in respect of whom a maintenance order subsists is wrongfully removed from the person in whose custody he or she is, the Court may, on the application of the custodian, make an order that the custody of the child be returned to the applicant.

(7) A person who contravenes an order made under subsection (6) commits an offence and is liable on conviction to a fine not exceeding twenty thousand dalasis or imprisonment for a term not exceeding one year or to both the fine and imprisonment.

Misapplying maintenance money

168. A person in whose custody a child is, commits an offence if he or she misapplies any money paid for the maintenance of the child, and is liable on conviction to a fine not exceeding twenty thousand dalasis or imprisonment for a term not exceeding one year, or to both the fine and imprisonment.

Rules in respect of fees and costs

169. (1) The Chief Justice may make rules prescribing the fees and costs payable in any proceedings for application for an order under this Part.

(2) The rules made under subsection (1) shall include provision for the remission of the fees and costs when the person liable to pay them does not have the means to do so.

Persons entitled to maintenance order

170. (1) A person who has custody of a child who is the subject of a maintenance order is entitled to receive and administer the maintenance order of the Children's Court.

(2) If the parent, guardian or whoever has custody of the child ceases to be a fit person, the Children's Court of the area where the child is resident may appoint another person to have custody of the child and administer the main-

tenance order and that person shall act as if originally appointed by the Children's Court.

Duration of order

171. (1) A maintenance order issued by a Children's Court shall expire when the child attains the age of eighteen years or dies before that age.

(2) A maintenance order shall lapse before the child attains the age of eighteen years if before that age the child is gainfully employed.

Continuation of maintenance order in certain cases

172. Notwithstanding section 171, a Children's Court may continue a maintenance order after a child has attained the age of eighteen years if the child is engaged in a course of continuing education or training after that age.

Variation or discharge orders

173. A Children's Court may, if satisfied, vary or discharge a maintenance order on the application of a parent, the person who has the custody of the child or any other person legally liable to maintain the child.

Enforcement of order

174. An action may be brought by any person to enforce a maintenance order thirty days after the order is made or due.

Non-custody parent to have access to child

175. A non-custody parent in respect of whom an application is made to a Children's Court for an order of parentage, custody, access or maintenance under this Act shall have access to the child who is the subject of the order unless the Court otherwise decides.

Duplicity of maintenance applications
Cap. 43

176. The provisions of this Act are subject to the Matrimonial Causes Act and no action may be brought for a maintenance order if an application for maintenance is pending in matrimonial proceedings.

Offences under this Part

177. A person who –

- (a) fails to supply the necessaries of health, life, education and reasonable shelter for a child when legally required to do so contrary to section 160; or
- (b) brings an action for a maintenance under this Part while an application for maintenance is pending in matrimonial proceedings,

commits an offence and is liable on summary conviction to a fine not exceeding twenty thousand dalasis or imprisonment for a term not exceeding one year or to both the fine and imprisonment.

Forms and procedure

178. The forms to be used and the procedure for applications under this Part shall be provided for by regulations made by the Secretary of State.

PART XIV – GUARDIANSHIP

Interpretation of this Part

179. In this Part, unless the context otherwise requires –

“guardian” means a person who is the guardian of a child by virtue of the provisions of this Act or a person lawfully appointed to be guardian of the child by deed or will or by an order of a court of competent jurisdiction or by operation of law.

Effect of guardianship

180. (1) A person appointed as a guardian under this Part shall have parental responsibility for the child.

(2) A person appointed as a guardian *ad litem* under section 187 shall be a guardian only for the purposes of representing the child and his or her interest in certain proceedings, but shall otherwise have no parental responsibility for the child.

Guardianship of child

181. (1) The parents of a child shall have guardianship of the child and, in the event of the death of a parent, the surviving parent shall be the guardian of the child.

(2) Where the parents of a child are not fit to be guardians of the child jointly or severally, the Children's Court shall, on application of a member of the family or an appropriate authority, appoint a person to be a joint guardian with the parent or parents of the child.

(3) A surviving parent who has guardianship of a child may, by deed, appoint a guardian for the child in the event of the death of that parent.

(4) A single parent may, by deed, appoint a person to be the guardian of the child upon the death of that single parent.

(5) Where a guardian is appointed to act jointly with a parent or parents of a child under subsection (2) and the guardian so appointed considers the parents unfit to have the custody of the child, the guardian may apply to the Court, and the Court may make –

- (a) an order that the guardian be the sole guardian of the child; and
- (b) such order regarding the custody and right of access of the parents to the child as the Court may think fit, having regard to the welfare of the child.

(6) The Court may under subsection (2) order that a parent or parents of a child make a payment to a joint guardian towards the maintenance of the child.

Appointment of guardian

182. (1) Where an application for the guardianship of a child is made to the Court by a person, the Court may, by order, appoint that person to be the guardian of the child if –

- (a) the child has no parent with parental responsibility for him or her; or
- (b) a residence order has been made in respect to the child in favour of a parent or guardian who had died while the

order was in force.

(2) The power conferred in subsection (1) may also be exercised in any family proceedings if the Court considers that the order should be made notwithstanding that no application was made for it.

(3) A guardian of a child may, by deed, appoint another person to be the guardian of the child in the event of his death.

(4) An appointment made by a will which is not signed by the testator, shall have effect only if is signed at the direction of the testator.

Requirement of consent

183. The consent of a person appointed as a guardian is necessary for the appointment to have effect.

Revocation of guardianship

184. The appointment of a guardian under sections 182 and 187 may be brought to an end at any time by an order of the Court -

(a) on the application of a natural parent or any person who has parental responsibility for the child;

(b) on the application of the child concerned, with leave of the Court;

(c) in any family proceedings, if the Court considers that it should be brought to an end notwithstanding that no application has been made; or

(d) on the application of an appropriate authority.

Power of guardians over estate of child.

185. A guardian under this Act shall have all such powers over the estate, as the case may be, of a child as a guardian appointed by will or otherwise by virtue of the rules of common law, equity, or applicable personal law.

Disputes between joint

186. Where two or more persons act as joint

guardians

guardians of a child and they are unable to agree on any question affecting the welfare of the child, any of them may apply to the Court for its direction, and the Court may make an order regarding the question in dispute.

Appointment
of guardian *ad
litem*

187. (1) The Court may, for the purpose of a specified proceeding, appoint a guardian *ad litem* for the child concerned to safeguard the interests of the child, unless it is satisfied that it is not necessary to do so.

(2) The guardian *ad litem* shall be –

- (a) appointed in accordance with the rules made by the Chief Justice; and
- (b) under a duty to safeguard the interests of the child in the manner prescribed by those rules.

(3) Where –

- (a) the child concerned is not represented by a legal practitioner; and
- (b) any of the conditions mentioned in subsection (4) is satisfied,

the Court may appoint a legal practitioner to represent him or her.

(4) The conditions under which an appointment may be made under subsection (3) are that –

- (a) no guardian *ad litem* has been appointed for the child;
- (b) the child has sufficient understanding to instruct a legal practitioner and wishes to do so; and
- (c) it appears to the Court that it would be in the best interest of the child for him or her to be represented by a legal practitioner.

(5) A legal practitioner appointed under or by virtue of this section shall represent the child, in accordance with the Rules of Court.

(6) In this section, “specified proceedings” means any proceedings –

- (a) on an application for a care order or supervision order;
- (b) in which the Court has given a direction under section 80 and has made, or is considering whether to make, an interim care order;
- (c) on an application for the discharge of a care order or the variation or discharge of a supervision order;
- (d) in which the Court is considering whether to make a residence order with respect to a child who is the subject of a care order;
- (e) with respect to a contact between a child who is the subject of a care order and any other person;
- (f) under Part XII;
- (g) on an appeal against –
 - (i) the making of, or refusal to make of a care order super-, vision order or any order under section 80;
 - (ii) the making of, or refusal to make a residence order with respect to a child who is the subject to a care order, or
 - (iii) the variation or discharge, or refusal of an application to vary or discharge, an order of a kind

mentioned in sub-paragraph (i) or (ii),

- (iv) the making of or refusal to make an order under Part XII which are specified for the time being, for the purposes of this section, by Rules of Court

(7) Notwithstanding any enactment or rule of law to the contrary, the Court may take account of –

- (a) any statement contained in a report made by a guardian *ad litem* who is appointed under this section for the purpose of the proceedings in question; and

- (b) any evidence given in respect of the matters referred to in the report,

in so far as the statement or evidence is, in the opinion of the Court, relevant to the question which the Court is considering.

Establishment of panels of persons from which guardians *ad litem* may be appointed

188. (1) The Secretary of State may by regulations provide for the establishment of panels of persons from which guardians *ad litem* appointed under this section shall be selected.

(2) The regulations may, in particular, make provisions -

- (a) as to the constitution, administration and procedures of the panels;
- (b) requiring two or more specified Local Governments to make arrangements for the joint management of a panel;
- (c) for the defrayment by the Government of expenses incurred by members of the panels;
- (d) for the payment by the Government of

fees and allowances to members of the panels;

- (e) as to the qualifications for membership of a panel;
- (f) as to the training to be given to members of the panels;
- (g) as to the co-operation required of specified Local Governments in the provision of panels in specified areas; and
- (h) for monitoring the work of guardians *ad litem*.

(3) The Chief Justice may make rules to make provision as to –

- (a) the assistance which a guardian *ad litem* may be required by the Court to give to it;
- (b) the consideration to be given by a guardian *ad litem*, where an order of a specified kind has been made in the proceedings in question, as to whether to apply for the variation or discharge of the order; and
- (c) the participation of guardians *ad litem* in any review, of the kind specified in the Rules, conducted by the Court.

Right of guardian *ad litem* to have access to records

189. (1) Where a person has been appointed as a guardian *ad litem* under this Act, he or she has the right, at all reasonable times, to examine and take a copy of –

- (a) any record held by the Government or the appropriate authority which was compiled in connection with the making, or proposed making, by any person of any application under this Act with respect to the child concerned; and

- (b) any other record held by the Government or the appropriate authority which was compiled in connection with any function which has been referred to the Department, so far as the records relate to that child.

(2) Where a guardian *ad litem* takes a copy of a record which he or she is entitled to examine under this section, that copy or any part of it shall, notwithstanding anything to the contrary in any enactment or rules, be admissible as evidence of any matter referred to in any –

- (a) report which he or she makes to the Court in the proceedings in question; or
- (b) evidence which he or she gives in those proceedings.

Saving of existing orders and jurisdiction of the Court

190. (1) Notwithstanding the provisions of this Act, an order lawfully made by any court relating to the guardianship or custody of a child before the commencement of this Act and which is in force at the time of the commencement of this Act and is not inconsistent with this Act shall continue in force until other provisions are made under or pursuant to this Act.

Cap. 6:01

(2) Nothing in this Act shall restrict or affect the jurisdiction of a court to appoint or remove guardians by virtue of the Courts Act or any other written law, until the Children's Court has been established in the relevant jurisdictions.

PART XV - WARDSHIP

Jurisdiction of Children's Court

191. A Children's Court has jurisdiction in all matters pertaining to making a child a ward of court.

Wardship proceedings

192. (1) Subject to the provisions of this section, no child shall be made a ward of court except by

virtue of an order, to that effect, made by the Children's Court.

(2) Where application is made for an order in respect of a child, the child becomes a ward of court on the making of the order or on the expiration of such period as may be prescribed unless within that period another order is made in accordance with the new application.

(3) The Court may, either on an application in that behalf or without an application, order that a child who is for the time being a ward of court shall cease to be a ward of court.

Maintenance
of ward of
court

193. (1) Subject to the provisions of this section, the Court may make an order –

- (a) requiring either parent of a ward of court to pay to the other parent; or
- (b) requiring either parent or both parents of a ward of court to pay to any other person having the care and control of the ward,

such weekly or other periodical sums towards the maintenance and education of the ward as the Court thinks reasonable, having regard to the means of the person or persons making the payment.

(2) An order under subsection (1) may require such sums as are mentioned in that subsection to continue to be paid in respect of any period but not beyond the date on which the ward of court attains the age of majority, and such order, if made, may provide that any sum which is payable for the benefit of that ward, having regard to the age of the child, be paid directly to the ward.

(3) An order made under subsection (1)(a) shall not take effect, and a liability under an order made under this section shall not accrue, at a time when the parents of the ward of court or former ward of court, as the case may be, are residing together,

and if they so reside for a period of three months after an order has been made, the order shall cease to have effect.

(4) The Court has power, from time to time, by an order under this section, to vary or discharge any previous order made under this section.

Committal of ward to care of appropriate authority, etc.

194. (1) Where it appears to the Court that there are exceptional circumstances making it impracticable or undesirable for a ward of court to be, or to continue to be, under the care of either of his or her parents or any other person, the Court may, if it thinks fit, make an order committing the care of the ward to an appropriate authority.

(2) Where it appears to the Court that there are exceptional circumstances making it desirable that a ward of court, not being a ward who, pursuant to an order made under subsection (1), is in the care of an appropriate authority, should be under the supervision of an independent person, the Court may, with regard to such period as the court thinks fit, order that the ward be under the supervision of a child development officer or other appropriate authority.

(3) The Court has power, from time to time by an order under this section, to vary or discharge any previous order made under this section.

Matrimonial causes

195. A Children's Court hearing a matrimonial case in which a child may be involved may direct that proper proceedings be taken in the Court for making the child a ward of court.

Dismissal of application for wardship

196. Where the Court is of the opinion that an application for wardship is an abuse of the court process, it shall dismiss the application forthwith.

Rules for application for wardship

197. An application for wardship shall be made in compliance with the Rules made by the Chief Justice.

PART XVI – OPERATION AND MANAGEMENT OF CHILD-CARE CENTRES AND PRIVATE

RESIDENTIAL CARE HOMES

Application to
operate a child-
care centre or
private residen-
tial care home

198. (1) No person shall manage or operate a child-care centre or a private residential care home without a permit granted by the Department under this section.

(2) A person who requires a permit under this section shall submit an application to the Department.

(3) The application shall be accompanied by such fee as may be prescribed by regulations made by the Secretary of State.

(4) The Department shall inspect the proposed child-care centre or private residential care home and shall, if it meets the required standard, approve the application and grant a permit on payment of the fee prescribed for the permit.

(5) A child-care centre or private residential care home in operation without a permit granted by the Department shall be closed after the Department has given fourteen days notice to the owner, manager or operator.

Inspection

199. (1) The Department shall inspect the premises, books, accounts and other records of a child-care centre at least once in every six months.

(2) If the inspection reveals that the child-care centre or private residential care home is not being managed efficiently in the best interest of the children, the Department shall suspend the permit and the owner, manager or operator shall be ordered to make good any default within a stipulated time.

(3) If the owner or operator fails to make good the default within the stipulated time, the permit shall be cancelled.

Guidelines

200. The Department shall issue such guidelines

as may be necessary for the operation of child-care centres and private residential care homes.

Policy directives

201. The Secretary of State and the Secretary of State responsible for education may issue such policy directives as may be necessary for the operation of child-care centres.

Existing operators

202. A person who owns, manages or operates a child-care centre or private residential care home before the commencement of this Act who intends to continue to operate the child-care centre or private residential care home shall apply to the Department for a permit within six months of the commencement of this Act.

Offences under this Part

203. A person who -

- (a) manages or operates a child-care centre or private residential care home in contravention of this Part;
- (b) continues to manage or operate a child-care centre or private residential care home in contravention of this Part; or
- (c) obstructs or hinders any person conducting an inspection under this Part,

commits an offence and is liable on conviction to a fine not exceeding fifty thousand dalasis or imprisonment for a term not exceeding two years or to both the fine and imprisonment, and in the case of a continuing offence to a further fine not exceeding one thousand dalasis for each day on which the offence continues.

PART XVII - CHILD JUSTICE ADMINISTRATION

Child to be subjected only to child

justice system and processes

204. A child shall not be subjected to the criminal justice process or to criminal sanctions for adults, but a child alleged to have committed an act which would constitute a criminal offence if he or she were an adult shall be subjected only to the child justice system and processes set out in this

Act.

Protection of
privacy

205. (1) The right of the child to privacy specified in Part II shall be respected at all stages of child justice administration in order to avoid harm being caused to the child by undue publicity or by the process of labelling.

(2) A person shall not publish any information that may lead to the identification of a child offender, except with the permission of the Children's Court or any other court before which the proceedings are being heard.

(3) Records of a child offender shall -

- (a) be kept strictly confidential and closed to third parties.
- (b) be made accessible only to persons directly concerned with the disposition of the case at hand or other duly authorised persons; and
- (c) not be used in adult proceedings in subsequent cases involving the same child offender.

(4) A person who, contrary to subsection (2), publishes -

- (a) the name or address of the child;
- (b) the name or address of any school which the child has been attending; or
- (c) any photograph or other matter likely to lead to the identification of the child;

commits an offence and is liable on conviction to a fine one hundred thousand dalasis or imprisonment for a term not exceeding three years, or to both the fine and imprisonment.

Specialisation
within The
Gambia Police
Force.

206. (1) There is hereby established, in The Gambia Police Force, a Child Welfare Unit which shall consist of police officers who are trained to perform the functions of the Unit.

(2) The functions of the Unit are to-

- (a) prevent and control child offences
- (b) apprehend children accused of committing offences;
- (c) investigate child offences; and
- (d) perform such other duties as may be referred to the Unit under this Act or under regulations made under this Act or by any other enactment.

(3) The officers of the Unit shall be specially trained and instructed regularly for the functions conferred on the Unit under subsection (2).

Disposal of
cases

207. (1) A police prosecutor or any other person dealing with a case involving a child offender shall -

- (a) encourage the disposal of the case, without resorting to formal trial, by using other means of settlement; and
- (b) encourage the parties involved in the case to settle the case, accordingly.

(2) The police, prosecutor or other person referred to in subsection (1) may exercise the discretionary power conferred under that subsection if the offence involved is a misdemeanour and -

- (a) there is need for reconciliation;
- (b) the family, the school or other institution involved has reacted or is likely to react in an appropriate or constructive manner; or

- (c) where, in any other circumstance, the police prosecutor or other person deems it necessary or appropriate in the interest of the child and the parties involved to exercise the discretion.

(3) Police investigation and adjudication before the Court shall be used only as measures of last resort.

Respect of the legal status and rights of the child

208. The legal status and fundamental rights of the child, set out in Part II of this Act and -

- (a) the presumption of innocence;
- (b) the right to be notified of the charges;
- (c) the right to remain silent;
- (d) the right to the presence of a parent or guardian; and
- (e) the right to legal representation,

shall be respected in the administration of the child justice system set out in this Act.

Age of criminal responsibility

209. The minimum age of criminal responsibility is twelve years.

Arrest and charge of a child

210. (1) Where a child has been arrested -

- (a) the police shall, as soon as is practicable, inform the child's parents or guardian, the Department and the Child Welfare Unit of the arrest;
- (b) the Children's Court or police, as the case may be, shall, without delay, consider the issue of release; and
- (c) contacts between the police and the child shall be managed in such way as

to-

- (i) respect the legal status of the child;
- (ii) promote the best interest and well-being of the child, and
- (iii) avoid harm to the child,

having due regard to the situation of the child and the circumstances of the case.

(2) The police shall ensure that the parent or guardian of the child is present at the time of the police interview with the child except where it is not in the best interests of the child.

(3) Where a child's parent or guardian cannot be immediately contacted or cannot be contacted at all, a Social Welfare Officer, a Probation Officer or an authorised person shall be informed as soon as possible after the child's arrest so that he or she can attend the police interview unless it is not in the best interest of the child for him or her to do so.

(4) Where a child is arrested with or without a warrant and cannot be immediately taken before a Children's Court, the police officer to whom the child is brought shall inquire into the case and shall, unless the charge is a serious one, or it is necessary in the child's interest to remove him or her from association with any person, or the officer has reason to believe that the release of the child will defeat the ends of justice, release the child on bond on his or her own recognisance or on a recognisance entered into by his or her parent or other responsible person.

(5) Where release on bond is not granted, a child shall be detained in police custody for a maximum of seventy-two hours or until the child is taken before a Children's Court, whichever is sooner.

(6) No child shall be detained with an adult person.

(7) A female child shall, while in custody, be under the care of a female officer.

(8) In this section -

"harm" includes the use of harsh language, physical violence, exposure to the environment and any consequential physical, psychological or emotional injury or hurt.

Bail

211. (1) Where a child appears before a court charged with an offence, the Magistrate or person presiding over the court shall inquire into the case and unless there is a serious danger to the child, release the child on bail -

- (a) on a court bond on the child's own recognisance; or
- (b) with sureties, preferably the child's parents or guardian who shall be bound on a court bond, not cash.

(2) If bail is not granted, the court shall record the reasons for refusal and inform the applicant of his or her right to apply for bail to the High Court.

Remand

212. (1) Where a child is not released on bail, a court may make an order remanding or committing him or her in custody in a secure home to be named in the order.

(2) Detention pending trial shall -

- (a) be used only as a measure of last resort and for the shortest possible period of time; and
- (b) wherever possible, be replaced by alternative measures, including close supervision, care by and placement with a member of the child's family or

in an educational setting or home approved by a Social Welfare Officer or a Probation Officer.

(3) While in detention, a child shall be given care, protection and all necessary individual assistance, including social, educational, vocational, psychological, medical and physical assistance, that he or she may require having regard to his or her age, sex and personality.

(4) If there is no secure home within a reasonable distance of the court, the court shall make an order as to the detention of the child in a place of safe custody as it deems fit.

(5) For the purposes of this section, a place of safe custody shall be a place which the court considers fit to provide good care for the child and assures that the child shall be brought to Court when required and shall not associate with any adult detainee.

(6) It is the duty of the Government to provide an appropriate place of custody, and before making an order remanding or committing a child in custody, a court shall ascertain that there is a place readily available.

(7) Remand in custody shall not exceed -

(a) six months, in the case of an offence mentioned in section 219 (1); or

(b) three months, in the case of any other offence.

(8) A child shall not be remanded in custody in an adult prison.

(9) A child who escapes from a secure home or other place of safe custody in which he or she is detained may be arrested with or without warrant and returned to that place.

(10) Pending the establishment of secure homes, the Secretary of State may declare any establishment as a secure home.

(11) Whenever possible, the court shall consider alternatives to remand such as close supervision or placement with a fit person determined by the court on the recommendation of a Social Welfare Officer or a Probation Officer.

Criminal jurisdiction of Children's Court

213. A Children's Court shall have jurisdiction to hear and determine all criminal charges against a child except -

- (a) treason; and
- (b) an offence for which a child is jointly charged with an adult.

Right to fair hearing and compliance with due process

214. (1) In the trial of a child under this Act, the observance of his or her rights to fair hearing, and compliance with due process shall be observed.

(2) The procedures established by the child justice system under this Act shall, in relation to the trial of the child offender, as during the initial contact with the child -

- (a) respect the legal status of the child;
- (b) promote the best interest and well-being of the child; and
- (c) avoid harm to the child,

having due regard to the situation of the child and the circumstances of the case.

Guiding principles in adjudication

215. (1) Where a child offender is brought before the Court, the Court shall ensure that -

- (a) the proceeding is conducive to the best interest of the child and is conducted in an atmosphere of understanding which

allows the child to participate and express himself or herself freely;

(b) the reaction taken is always in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and needs of the child and the society;

(c) the personal liberty of the child is restricted only after careful consideration of the case, including the use of alternative methods of dealing with the child, and the restriction is limited to the possible minimum;

(d) the child is not deprived of his or her personal liberty unless he or she -

(i) committed murder or a serious offence involving violence against another person, or

(ii) has persistently committed other serious offences,

and there is no other appropriate response that will protect the public safety; and

(e) the well-being of the child is the guiding factor in the consideration of his or her case.

(2) The Court shall have the power to discontinue any proceeding at any time if circumstances arise which make discontinuation of the proceeding the best way to dispose of the case.

(3) The Court shall handle each case brought before it expeditiously and without unnecessary delay.

Parents or

216. (1) The parents or guardian of a child

guardians to
attend court

offender who is charged before the Court for an act which constitutes a criminal offence, may attend all stages of the proceedings and may be entitled to participate in the proceedings.

(2) The Court may, where necessary, make an order to enforce the attendance of a parent or guardian before it.

(3) Notwithstanding subsection (1), where in the opinion of the Court, it is not in the interest of a child that his or her parent or guardian should attend, the Court shall, by order, exclude the parent or guardian from so attending.

Child justice
procedure in
the Court

217. (1) Where a child is brought before the Court, the Court shall, as soon as possible, explain to the child and his or her parents or guardian in the language the child and his or her parent or guardian understand, the substance of the alleged offence.

(2) Where a child is brought before the Court for an offence, the case shall be finally disposed of in the Court, and it shall not be necessary to ask the parent or guardian of the child whether he or she consents that the child be dealt with in the Court.

(3) If the child does not admit the facts, the Court shall proceed to hear the evidence of the witnesses in support of the facts and at the close of the evidence of each witness, the Court shall ask the child or his or her counsel or if the Court sees fit, the parent or guardian of the child, whether he or she wishes to put any questions to the witness.

(4) If the child, instead of asking questions, wishes to make a statement, he or she shall be allowed to do so and it is the duty of the Court to put to the witnesses such of the questions as appear to be necessary and the Court may put to the child such questions as may be necessary to explain anything in the statement of the child.

(5) If it appears to the Court that a *prima facie* case is made out against the child, the evidence of the witnesses for the defence shall be heard, and the child shall be allowed to give evidence or to make any statement.

(6) If a child admits the offence or the Court is satisfied that it is proved, the Court shall then ask the child if he or she desires to say anything in explanation of reason or reasons for his or her conduct, and, before deciding on how to deal with him or her, the Court -

(a) shall obtain information as to his or her general conduct, home surroundings, school record, including the social inquiry reports referred to in section 222 and medical history, as may enable it deal with the case in the best interest of the child; and

(b) may put to him or her any question arising out of the information;

(7) For the purposes of obtaining any information under subsection (6) or for special medical examination or observation, the Court may, from time to time, release the child on bail or remand him or her to a place of detention.

(8) If the child admits the offence or the Court is satisfied that it is proved, and the Court decides that a remand is necessary for purposes of inquiry or observation, the Court may cause an entry to be made in the Court records that the charge is proved and that the child has been remanded for enquiry or observation.

(9) The Court shall not remand a child under subsection (8) for a period of more than six weeks.

(10) The Court before which a child who has been remanded is brought may, without further proof of the commission of the offence, make any order in respect of the child which could have been made

by the Court which remanded the child.

Restrictions on
punishment

218. (1) A child shall not be -

- (a) ordered to be imprisoned; or
- (b) subjected to the death penalty or have the death penalty recorded against him or her.

(2) A court shall, on sentencing an expectant or a nursing mother, consider the imposition of a non-institutional sentence as an alternative measure to imprisonment.

(3) Where institutional sentence is mandatory or desirable, an expectant or a nursing mother shall be committed to and be held or detained at an appropriate centre or place designated by the Secretary of State for that purpose.

(4) No mother and child shall be held or detained at an appropriate centre in pursuance to subsection (3) for a period longer than the time the child would have attained the age of six years.

(5) Where a mother who has completed her nursing period is further given a sentence of imprisonment, the child shall be treated as a child in need of care and protection and may be committed to the care of the person who will ordinarily have custody, or by a committal order to -

- (a) his or her father; or
- (b) a fit and proper person.

(6) In this section, a "fit and proper person" includes an appropriate authority.

Detention
in the case
of commission
of offences

219. (1) Notwithstanding anything in this Act to the contrary, where a child is found to have committed or attempted to commit murder, treason, robbery or manslaughter, or wounded another person with intent to do grievous harm, the court trying the

case may order the child to be detained for such period as may be specified in the order.

(2) Where an order is made under subsection (1), the child shall, during that period, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and on such conditions as the court may direct and the child whilst so detained shall be deemed to be in legal custody.

Orders of the
Children's Court

220. (1) Where a child charged with an offence is tried by a Children's Court and the Court is satisfied that the child actually committed the offence, the Court shall take into consideration the manner in which, under the provisions of this Act, the case should be dealt with, namely, whether by-

- (a) dismissing the charge;
- (b) discharging the child offender on his or her entering into a recognisance;
- (c) placing the child under care, guidance, or supervision, including -
 - (i) discharging the child offender and placing him or her under the supervision of a supervision officer or Probation Officer,
 - (ii) committing the child offender by means of a corrective order to the care of a guardian and a supervision officer or of a relative or any other fit person, or
 - (iii) sending the child offender by means of a corrective order to a residential care home or an approved institution;
- (d) ordering the child offender to -
 - (i) participate in group counselling and similar activities;

- (ii) pay a fine, damages, compensation or cost,
 - (iii) undertake community service under supervision;
- (e) ordering the parent or guardian of the child offender to -
 - (i) pay a fine, damages, compensation or cost,
 - (ii) give security for his or her good behaviour; or
 - (iii) enter into a recognisance to take proper care of him or her and exercise proper control over him or her;
- (f) committing the child offender to custody in a place of detention provided under this Act;
- (g) making a hospital order or an order prescribing some other form of intermediate treatment; or
- (h) making an order concerning foster care, guardianship, living in communities or other educational settings; or
- (i) dealing with the case in any other manner in which it may be legally dealt with under this Act.

(2) For the purposes of paragraph (f) of subsection (1), detention means placement in a centre designated for that purpose by the Secretary of State in such circumstances and with such conditions as may be recommended to the Court by the Social Welfare Officer or Probation Officer.

(3) Where a child has been remanded in custody

prior to an order of detention being made in respect of him or her, the period spent on remand shall be taken into consideration when making the order.

(4) Detention shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order.

(5) Before making a detention order, the Court shall be satisfied that a suitable place is readily available.

(6) A child shall not be detained in an adult prison.

(7) The order under which a child is committed to a detention centre shall be delivered with the child to the person in charge of the detention centre and shall be sufficient authority for the child's detention in accordance with the terms of the order.

(8) A child in respect of whom a detention order is made shall, while detained under the order and while being conveyed to and from the detention centre, be deemed to be in legal custody.

(9) A Court shall not make an order subjecting a child to corporal punishment.

Power of
Court to
order parent
or guardian
to pay fine

221. (1) Where a child is brought before the Court charged with an offence and the Court decides that the case would be best disposed of by imposition of a fine, damages, compensation or cost, whether with or without any other measure, the Court shall order that the fine, damages, compensation or costs awarded be paid by the parent or guardian of the child instead of the child unless the Court is satisfied that -

(a) the parent or guardian of the child cannot be found; or

(b) the parent or guardian has not contri-

buted to the commission of the offence by neglecting to exercise due care, guidance of and control over the child;

(2) Where a child is brought for an offence, the Court may order his or her parent or guardian to give security for his or her good behaviour.

(3) Where the Court thinks that a charge against the child is proved, the Court may make an order on the parent or guardian under this section for the payment of damages or costs or requiring him or her to give security for good behaviour, without proceeding to find that the child is guilty.

(4) An order under this section may be made by the Court against a parent or guardian who, having been required to attend the court failed to do so, but no order shall be made without the Court giving the parent or guardian an opportunity of being heard.

(5) A sum imposed and ordered to be paid by a parent or guardian under this section, or, any forfeiture of any security under this section, may be recovered from the parent or guardian by distress in like manner as if the order had been made on the conviction of the parent or guardian for the offence with which the child was charged.

Social enquiry
report

222. (1) If the court, after a charge has been admitted or proved, is considering making a detention or probation order, a written social background report shall be prepared by a Social Welfare Officer or a Probation Officer and shall be taken into account by the Court before making the order.

(2) The report shall include, among other things, the social and family background, the circumstances in which the child is living and the conditions under which the offence was committed.

(3) The Court shall ensure that the contents of the report are made known to the child and that a

copy of the report is provided for the child or his or her legal representative.

(4) The Court may in any case request an oral report, in addition to any written report.

National
Rehabilitation
Centre

223. (1) The Secretary of State, in consultation with the Secretary of State responsible for internal affairs, shall establish a National Rehabilitation Centre for Children and such other centres as he or she may deem necessary which shall each be a place for the detention, rehabilitation and re-training of children committed there.

(2) The detention centre shall have a separate wing for female children.

(3) The Secretary of State shall make rules to govern the management of the detention centre.

(4) A person who knowingly assists or induces a child to escape or knowingly harbours or conceals a child who has escaped or, prevents him or her from returning to the detention centre commits an offence and is liable on conviction to a fine of not less than twenty thousand dalasis or imprisonment for a term not exceeding one year or to both the fine and imprisonment.

Committee of
Visitors

224. The Secretary of State shall appoint fit and proper persons known as Committee of Visitors to periodically visit the detained children and inspect the detention centre.

After-care

225. Before a child is released from detention, the Social Welfare Officer or the Probation Officer and the authorities in the detention centre shall discuss the period of after-care with the child

Duration of
cases

226. (1) Every case shall be handled expeditiously and without unnecessary delay.

(2) Where the case of a child appearing before a Children's Court is not completed within twelve

months or such other period as the Court may determine in exceptional case, after the child's plea has been taken, the case may be struck out.

(3) Where a case is heard by a court other than the Children's Court, the maximum period of remand for a child shall be six months, after which the child shall be released on bail.

Remission
of
cases to
Child-
ren's
Court

227. (1) Where it appears to a court, other than a Children's Court, that a person charged before it with an offence is a child, the court shall remit the case to a Children's Court.

(2) Subsection (1) does not apply where a child is charged with treason or the child is jointly charged with an adult.

(3) A court making an order remitting a case to a Children's Court may give directions with respect to the custody or release of the child on bond or bail until he or she can be brought before the Children's Court.

(4) A certificate stating the nature of the offence, the stage at which the case is and that the case has been remitted to the Children's Court shall be forwarded to the Children's Court.

Restriction on
use of certain
words

228. A court shall not use the words "conviction" and "sentence" in reference to a child appearing before it, but shall instead substitute the words "proof of an offence against the child" for "conviction" and "order" for "sentence" respectively.

Children in
Magistrates
Court

229. Subject to sections 227 and 230, a child jointly charged with an adult may be tried in a Magistrate's Court.

Children in the
High Court

230. A child shall be tried in the High Court for an offence with which he or she is jointly charged with an adult and for which only the High Court has jurisdiction.

Remission of
case to Child-

231. (1) Where a child is tried jointly with an adult

ren's Court for appropriate order

in the Magistrates Court or High Court, the child shall be remitted to the Children's Court for an appropriate order to be made if the offence is proved against the child, or if the child admits the charge.

(2) In any proceedings before the Magistrates Court or High Court in which a child is involved, the Magistrates Court or High Court shall have due regard to the child's age and to the provisions of this Act and any other law relating to the procedure of trials involving children.

Appeal

232. An appeal shall lie, in a case involving the trial of a child, from -

- (a) the Children's Court to the High Court
- (b) the High Court to the Court of Appeal; and
- (c) the Court of Appeal to the Supreme Court.

Inquiry as to age of person appearing to the court to be below eighteen years of age

233. (1) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence and it appears to the court that he or she is under eighteen years of age, the court shall make an inquiry as to the age of that person.

(2) In making the inquiry, the court shall take any evidence, including medical evidence which it may require.

Presumption of age by court conclusive evidence of that person's age

234. (1) An order or judgment of the court shall not be invalidated by any subsequent proof that the age of the person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of that person shall be deemed to be his or her true age for the purpose of the proceedings.

(2) A certificate signed by a Government medical or dental practitioner as to the age of a person under eighteen years of age shall be evidence of

that age.

PART XVIII – MISCELLANEOUS

General
penal
provision for
offences under
this Act

235. A person who contravenes any of the provisions of this Act commits an offence and is liable, except otherwise provided in this Act, to a fine not exceeding twenty thousand dalasis or imprisonment for a term not exceeding one year or to both the fine and imprisonment.

Offences by
bodies
corporate

236. Where a body corporate is guilty of an offence under this Act or any regulations made under it, every director, the secretary or any similar officer of the body corporate shall, unless he or she proves that the offence was committed without his or her knowledge or consent, also be liable to be prosecuted, tried, convicted and punished for that offence.

Enforcement
of judgments,
decisions and
orders of the
Children's Court

237. Subject to this Act, any enactment applicable to the enforcement of judgments, decisions and orders of a Magistrates' Court shall, subject to such modifications as may be necessary having regard to the provisions this Act, apply to judgments, decisions and orders of a Children's Court.

Modification
of existing
enactments

238. Any enactment in existence at the commencement of this Act shall have effect with such modifications as may be necessary to give effect to this Act.

Supersession
and
inconsistency

239. (1) Notwithstanding the provisions of sections 238 and 241, the provisions of this Act supersede the provisions of all other laws, other than the Constitution, on any matter pertaining to children for which provision has been made under this Act.

(2) Accordingly, where a provision of this Act is inconsistent with the provision of any other law, the provision of this Act shall prevail, and that other provision shall, to the extent of the inconsistency, be void.

Regulations

240. (1) The Secretary of State may make regu-

lations for giving proper effect and for the better carrying out of the provisions and purposes of this Act, including regulations for the establishment of a probation service.

(2) Subject to the provisions of this Act, the Chief Justice may make rules to provide for the charging of fees for the doing of anything under this Act.

Repeals and amendments Schedule

241. The enactments specified in the First Column of the Schedule to this Act are repealed or amended, as the case may be, in the manner specified in the Second Column of the Schedule.

Transitional provisions regarding children in detention

242. Where immediately before the commencement of this Act there are any children in any institution under an enactment repealed or amended under section 241, the Secretary of State, in consultation with the Secretary of State responsible for internal affairs, shall make such arrangements as may be necessary for the winding up of the institution and otherwise for the welfare of the children, taking into account the provisions of this Act and in particular, taking into account the principle that in all matters concerning the child, the best interest of the child shall be the paramount consideration.

SCHEDULE (section 241)

REPEALS AND AMENDMENTS

FIRST COLUMN

SECOND COLUMN

ENACTMENTS

HOW AFFECTED

1. Adoption Act, 1992
(1992 No. 15)

Whole Act is repealed

2. Children and Young
Persons Act
(Cap. 45)

Whole Act is repealed

3. Maintenance of
Children Act
(Cap. 44:03)

Whole Act is repealed

4. Criminal Code
(Cap. 10)

(a) Section 19 is amended by substituting for the word “fourteen”, the word “eighteen”;

(b) Section 30 is amended -

(i) by deleting subsection (3),

(ii) in subsection (7), by substituting for the word “sixteen”, the word “eighteen”;

(c) Section 125 is amended by substituting for the word “sixteen”, the word “eighteen”;

(d) Section 126(2) is amended by substituting for the word “sixteen” wherever it occurs, the word “eighteen”;

(e) Section 127(1) and (2) is amended by substituting for the word “sixteen” wherever it occurs, the word “eighteen”;

(f) Section 131 is amended by substituting for the words “thirteen” and “sixteen” wherever they occur, the word “eighteen”, respectively;

(g) Section 132 is amended -

(i) by substituting for the words “above the age of thirteen years and under the age of sixteen years”, the words “under the

age of eighteen years”,

(ii) in the proviso, by substituting for the word “sixteen”, the word “eighteen”;

(h) Section 146 is amended by substituting for the word “fourteen” the word “eighteen”;

(i) Section 149 is amended by substituting for the word “sixteen”, the word “eighteen”;

(j) Section 156 is amended by substituting for the word “fourteen” the word “eighteen”;

(k) Section 159 is amended by substituting for the word “fourteen”, the word “eighteen”;

(l) Section 232 is amended by substituting for the words “minor under fourteen years of age if a male, or under sixteen years of age if a female”, the words “person under the age of eighteen years”; and

(m) Section 239 is amended by substituting for the word “fourteen” the word “eighteen”.

Criminal Procedure
Code
(Cap. 12:01)

(a) The Code is amended by substituting for the words “young person” wherever they occur, the word “child”;

(b) Section 2 is amended -

(i) by deleting the definition of “young person”, and

(ii) inserting in the proper

alphabetical sequence, the following new definition-

“child means a person under the age of eighteen years;”.

Matrimonial Causes Act
(Cap. 43)

Section 18 is amended by deleting subsection (3).

Section 31 is deleted

Prisons Act
(Cap. 20:01)

(a) Section 2 is amended by deleting the definition of “juvenile”;

(b) Section 31(1) is amended by deleting the proviso;

(c) Section 36 is amended by deleting paragraphs (b) and (c);

(d) Section 65 is amended by deleting subsection (2); and

(e) Section 70 is deleted.

Prisons Rules
(Cap. 20:01)

3 Rules 48, 49, 50, 51, 52, 53 and 87 are deleted.

The Gambia Armed Forces Act
(Cap. 19)

Section 23 is amended by deleting subsection (3).

4

Wills Act, 1992
(1992 No. 16)

(a) Section 3 is amended by substituting for the full stop at the end of the section, a colon, and inserting thereafter, the following proviso-

“provided that reasonable provision shall be in the will for the education and maintenance of a child of the testator.”; and

(b) Section 4 is deleted.

OBJECTS AND REASONS

The need for the establishment and strengthening of an institutional and legislative framework relating to children has resulted to this Bill, which incorporates all laws relating to children in The Gambia.

The Bill is concise and is divided into XVIII Parts, which deal with matters relating to *inter alia*-

- The Rights of the Child,
- Responsibilities of Parents and the Child,
- Protection of the Rights of the Child,
- The Care and Protection of Children,
- Adoption,
- Maintenance,
- Fostering
- Possession and Custody of Children,
- Residential Care Homes,
- Guardianship,
- The Children's Court and Child Justice Administration
- Operation and management of Child Care Centres and Private Residential Care Homes, to name a few.

This Bill has for the first time sought to give a unified and single definition

to a child, provide for a single reference point for all matters relating to children in The Gambia, as well as establish the Children's Court to hear all those matters relating to children.

**SHIEKH TIJAN HYDARA
ATTORNEY GENERAL AND SECRETARY OF STATE FOR JUSTICE
AND NATIONAL ASSEMBLY MATTERS**

