



Police Training School of The Gambia

Human Rights And The Police

A Training Manual And Teaching Guide



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Human Rights And The Police
Institute for Human Rights and Development in Africa (IHRDA)

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FOREWORD

“The most efficient public security mechanism is the one that enjoys the love, trust, cooperation and respect of the society...and this entails respecting the rights of the people...” – Momodou Sowe, Deputy Inspector-General of Police for The Gambia

The existence of legislative frameworks for the protection of rights, while necessary, cannot have beneficial impact on the lives of individuals without effective and fair implementation of justice in society. The Public Security corps plays a crucial role in these systems. Ironically, public security officers in various countries have often been perceived by society as major agents of human rights violations, thereby generating friction in the relationship between the public security corps and civilians.

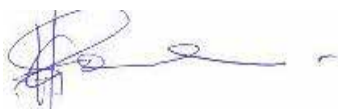
Mindful of the necessity to inculcate a human rights culture in the public security corps, authorities of The Gambia Police Force (GPF) have been keen on collaborating with the Institute for Human Rights and Development in Africa (IHRDA) to build the human rights capacity of GPF Officers. Within the context of this collaboration, IHRDA began in 2015 a human rights education program for Gambia public security officers, with the support of the British Embassy in Banjul. Following the success of the initial phase, which included a series of human rights training sessions for officers in various parts of The Gambia, it was recommended that human rights should be instituted in the curriculum of the Police Training School, to ensure that officers receive specialized training in the application of human rights norms and principles to their mission of public protection and service. This training manual is therefore conceived, in collaboration with management of the Police Training School, to meet the above aspiration, thanks to the support of the Canadian Embassy in Dakar through the Canada Fund for Local Initiatives (CFLI).

The training manual is a comprehensive and user-friendly document that draws from international, regional and Gambian domestic laws and practice relevant to policing and human rights. The manual considers a number of different thematic areas across 12 chapters. The training guidance at the end of the manual aims to provide trainers with practical examples for running training sessions on the content covered in the manual. The exercises given can be used to develop understanding through collaboration and participation of students in the learning experience. This reinforcement of the material helps to cater to a variety of learning styles, and ensures meaningful engagement.

The manual is accompanied by a human rights module which has also been developed as part of this initiative – see Annex 1.

It is therefore our hope that this training manual will serve as a useful tool for better understanding and applying of human rights principles in the everyday duties of public security officers in The Gambia.

IHRDA would like to particularly thank the Canadian Embassy in Dakar for its financial support to this project, and to commend the authorities of the GPF for their commitment towards promoting the human rights culture within their corps.



**Gaye Sowe,
Executive Director,
IHRDA**

Chapter 1 – Understanding Human Rights Concepts

Learning Outcomes:

- Explain the basic characteristics of human rights.
- Describe the different types of rights and the forms of obligations they give rise to.
- Know the different sources from which human rights obligations might come.
- Consider why human rights education is important for law enforcement agencies.

Introduction: Why are law enforcement agencies concerned with human rights?

“The administration of justice, including law enforcement [...] agencies[,] in full conformity with applicable standards contained in international human rights instruments, [is] essential to the full and non-discriminatory realization of human rights and indispensable to the process of democracy and sustainable development.” Vienna Declaration 1993

Law enforcement is vital to well-functioning democracy, and the protection of human rights to all citizens. For example, how can we protect an individual's right to life without effective prosecution of violent crime?

But equally, the administration of justice by public authorities, such as the police, judiciary and prosecutors, must be in line with human rights standards to uphold the protection of these rights to all. Criminals are equally entitled to rights, as human beings, as every other citizen.

What are human rights?

“generally accepted principles of fairness and justice”

Protection of dignity of human beings - Basic standards of treatment which all individuals are entitled to simply because they are human beings. Allow them to live in dignity.

Legally protected - Human rights guarantees take the form of law, which obliges Governments do certain things and prevents them from doing other things, to ensure that every individual is treated in line with the standard of treatment that they are entitled to.

Internationally guaranteed – All States are bound by some human rights guarantees, they are protected and guaranteed at the international level. The international community are responsible for their realisation across the world.

Protect individuals and groups - The standards protect characteristics of the dignity and freedom of

individuals (for example, freedom from torture; right to liberty), and of groups (for example, right to cultural development; right to freely dispose of wealth and natural resources).

Obliges States and State actors – The protection or respect for rights is the responsibility of public officials. A private criminal cannot violate human rights standards. A murder, for example, would only be a human rights issue if the state had not fulfilled their obligation to protect the right to life of the victim.

Why are human rights important?

Human rights are the foundation of freedom, justice and peace. Respect for human rights allows the individual and the community to develop.

Human rights issues affect everyone in their professional and private lives. State employees should be aware of the obligations which they are under, and private individuals should be aware of the rights which public authorities are obliged to respect and protect.

Characteristics of human rights

Human rights are:

- *Inherent* – Every individual is born with human rights. They do not have to be given, bought, earned or inherited. Everyone is entitled to them simply because they are human.
- *Universal* – They apply equally to everyone in the world. All humans regardless of race, sex, religion, ethnicity, national or social origin, is granted the same rights.

“The values of dignity and equality of all members of the human race, like many other basic principles which underlie what we today call human rights, can be found in virtually every culture and civilization, religion and philosophical tradition”
- *Inalienable* – Human rights cannot be taken away by an individual or the State. Even if a national law does not recognise an individual's rights, it can still violate them.

For example: in a country where it is legal for people to be held as slaves, those people still have the human right to be free, even if the government, citizens, and national law do not recognise this right.

- *Indivisible* – Human beings are entitled to all their rights concurrently, to live in dignity. Their entitlement to freedom, security and decent standards of living must be respected simultaneously.

Categories of rights

Civil and political rights

The ‘first generation’ rights, these rights concern classic liberties and freedoms from government interference in speech, thought and choice, as well as participation in political life. For example:

- Right of people to vote freely for their representatives
- Freedom of thought, conscience and religion
- Right to political association, and peaceful assembly
- Right to be presumed innocent until proven guilty

Social and economic rights

The 'second generation' rights, these concern social and economic security of people, and access to basic necessities, such as food, shelter and health care.

These rights often require 'progressive realisation', as they require provision of services or development of infrastructure to reach the standard required by the right. For example, ensuring the right to education requires free access to good schools for all individuals, this can take a long time to develop and is expensive.

For example:

- Right to highest attainable standard of health
- Right to work
- Right to education
- Right to marriage and family

Environmental, cultural and development rights

The 'third generation' rights are a broad, more progressive set of rights. These include group rights, the right to live in a clean environment and protection of that environment from pollution. It also includes rights to cultural, political and economic development of groups.

For example:

- Right to cultural heritage
- Right to self-determination
- Right to disposal of natural resources
- Right to development

Types of obligation

Human rights may create different types of obligations on States. These are generally split into three types:

Obligation to respect – an obligation on States to 'respect' an individual's freedom or liberty to do something, for example, peacefully assemble or associate with a political group. This is a 'negative' duty, meaning that it requires states to refrain from doing things which would infringe the freedom.

Obligation to fulfil – an obligation on States to create a state of affairs in which the right can be enjoyed, for example, setting up schools to realise the right to education. These are more complex obligations to meet, as they require comprehensive implemented policy and development. This is a 'positive' duty, as it requires positive action to fulfil the obligation, not merely omitting to infringe it.

Obligation to protect – an obligation to protect an individual's liberty or situation from infringement by third parties, for example, protecting the right to life of victims from violation by groups in a State's territory. This is also a 'positive' duty, as it requires the State to take reasonable action to protect individuals against non-State actors.

Holding the State liable for the actions of private entities must be limited, and authorities are normally only expected to show 'due diligence' in protecting victims.

i.e. if a private individual murders another individual, the State will not be liable for failing to protect the right to life of the victim if they have exercised 'due diligence'. This is discharged by investigating, prosecuting,

and convicting the perpetrator as appropriate. By failing to do this, the State violates the obligation to protect.

Sources of human rights

Customary international law

Law which is binding on States, and develops through general and consistent practice by States, and is followed because of a sense of legal obligation.

For example:

The law against genocide: States treated it as illegal and so it developed into a legal obligation even before the law was affirmed in 1948.

Treaties

Law which states voluntarily sign up to, binding them and all other signatories under the understanding that they will all enforce it against one another.

Human rights treaties may be international, and therefore open to signature by any State in the world, or regional, and only open to States on a particular continent or region. They may cover all human rights, or only one substantive area (for example, the Convention on the Rights of Persons with Disabilities).

When a treaty is agreed, States can sign it, showing that they intend to be bound by the treaty. It is only once the State government *ratifies* the treaty that it has legally consent to be bound. Once a treaty has been signed and ratified by some number of states, it enters into force. This is when a State who has ratified that treaty is considered *legally bound*.

Once legally bound, States can be liable if they fail to meet their obligations under the treaty. This could mean, for example in a treaty on trade, that another State might sue in the International Court of Justice in event of a violation. Human rights treaties are unique in that they do not create obligations between States, but rather between each State and individuals under their control. In the event of a violation of that treaty, the victim will often be able to bring a complaint before the relevant treaty body. The treaty bodies, created by the States who sign up to a treaty, are responsible for monitoring implementation in each State party of the treaty.

For example:

- International Covenant on Civil and Political Rights – monitored by the UN Human Rights Committee
- UN Convention on the Rights of the Child – monitored by the Committee on the Rights of the Child
- African Charter on Human and Peoples' Rights - monitored by the African Committee on Human and Peoples' Rights

National constitutions

Rights of citizens in a State will often be granted directly by the national constitution of that State. International law is not always directly applicable to violations happening on the ground, and so this is often the legal starting point when a citizen's human rights are violated.

Note however, that human rights are *inalienable*: just because the treatment of an individual does not violate their rights under a constitution, that does not mean that their human rights are not violated, as international human rights law has primacy over standards at national level.

For example:

Chapter IV of the Constitution of The Gambia guarantees fundamental rights and freedoms of the individual.

What constitutes a human rights violation?

As a human rights monitor, you would not be concerned with any injustice against an individual, but only where it constitutes a violation of human rights.

Was the act a breach of national and/or international human rights law?

What is called a human rights violation is always a breach of international human rights law. Just because the act is in compliance with national law does not change that.

States, however, will often incorporate provisions from international human rights law (such as rights granted in treaties) into their national law or constitution. A violation of human rights therefore may also breach national law.

Who is responsible for the act?

International human rights law is concerned with obligations on states. A 'State' is a political entity possessing sovereignty, and therefore not being subject to higher political authority (a country, or nation). Public authorities, or representatives of a State (such as a police officer, or civil servant) are considered to be State actors and therefore the State will be responsible for violations resulting from their acts.

Some acts by non-State actors may fall under human rights law:

- *Armed opposition groups* – are not formally bound by human rights, as non-State groups are not capable of signing up to treaties. However there are exceptions under international humanitarian law that such groups are obliged to respect human rights.
- *Multinational corporations* – also not bound formally by international law as non-State actors. This is a topic of debate however, and the power and wealth of companies have led to calls that they should be accountable for violations of human rights.
- *Common criminals* – may be breaking national law, but will not be considered to violate human rights. Individuals breaching national law should be dealt with by national law enforcement agencies. A failure to properly enforce national laws may, however, be a breach of obligations to protect human rights.

For example: an individual murdering another will not be a breach of the victim's right to life unless the State had not fulfilled their obligation to protect the right to life of the victim.

What type of obligation is the State under?

Depending on whether a human rights obligation is a 'positive' or 'negative' duty, a State may infringe a right by an act or an omission.

For example, arbitrary detention by a State actor is a positive act violating an obligation to respect the individual's right to liberty. Additionally, the State failing to investigate abductions of children by private actors would violate the obligation to protect the victim's right to liberty, so the State may be responsible for their omission.

Who monitors human rights?

The implementation of human rights standards at national level is monitored by groups operating on various levels:

- International and regional human rights mechanisms – set up under treaties to monitor the

implementation of rights under their mandate, for example, the African Commission on Human and Peoples' Rights.

- National human rights institutions – governmental bodies set up to monitor human rights situations in their States, for example, human rights commissions or ombudsman.
- Concerned government agencies and departments - public institutions will monitor the human rights implications of their work, for example, the police or army. Courts and law-making bodies will often consider human rights situations in their work also.
- Human rights and other non-governmental organisations (NGOs) – organisations working in fields relevant to human rights law may monitor and report on relevant human rights situations to their work.
- Other interested bodies – the media, universities, religious organisations, trade unions and professional organisations (such as lawyers or doctors) may have an interest in promoting human rights, and monitoring their implementation in their field.

Human rights and the police

As police are on the front line of the relationship between the State and its citizens, they are closely tied to the defence and realisation of human rights in a State.

Police need to be particularly vigilant for human rights violations which might occur in their work.

For example:

- Torture, inhumane or degrading treatment
- Arbitrary arrest and detention
- Enforced or involuntary disappearance
- Discrimination on the basis of race, gender, social status etc.

Does concern for human rights hinder effective police work?

Some people might ask:

- Is respecting human rights opposed to effective law enforcement?
- Can it sometimes be necessary to 'bend' the law a little to secure conviction?
- Is law enforcement a war against crime, and are human rights therefore mere obstacles thrown in the path of police by lawyers and NGOs?

However, this is not the case. Human rights and police work have the same goal: the safety, security and freedom of all citizens in a State.

Human rights violations can hinder effective police work in many ways:

- They erode public confidence and trust of authorities and police
- They isolate the police from the rest of the community
- They hamper effective prosecutions in court, and can lead to innocent people being punished, or the guilty going free.
- They force police agencies to be reactive rather than preventative in their approach to crime control.

- They exacerbate civil unrest, and can bring government authorities into disrepute.

Can respect for human rights help the police?

“Respect for human rights by law enforcement agencies actually enhances their effectiveness. Where human rights are systematically respected, police officers have developed professionalism in their approaches to solving and preventing crime and maintaining public order. In this sense, respect for human rights by police is, in addition to being a moral, legal and ethical imperative, a practical requirement for law enforcement.”

The UN have found a number of benefits for law enforcement when police respect, uphold and defend human rights:

- Public confidence is built and community cooperation fostered
- Legal prosecutions are more successful in court
- Police are seen as part of the community, performing a valuable social function
- As closer to the community, police are in a better position to prevent and solve crimes
- Justice is administered fairly, and confidence is preserved
- An example is set for others, to respect law in society
- Support is elicited from the media, the international community and higher authorities
- Increase contribution to peaceful resolution of complaints and conflicts

“An effective police service is one that serves as the first line of defence in the protection of human rights. Its members carry out their work in a way that does not rely on fear and raw power, but instead on regard for the law, honour and professionalism.”

Chapter 2 – Human Rights Protection in Gambian Law

Learning Outcomes:

- *Describe the basic landscape of human rights protection in the Constitution of The Gambia.*
- *Identify the relevant chapters of the Constitution, and other Acts where human rights protection is prominent.*
- *Consider how the Women’s Act and the Children’s Act have built on protection offered by the Constitution in the Gambia.*

Introduction

Gambian law enshrines rights for all individuals under its jurisdiction, providing human rights protection enforceable in domestic courts. This makes up the primary source of protection for all individuals against the authorities.

Chapter IV of the Constitution of The Gambia lists the fundamental rights and freedoms of the individual, this forms the protection of mostly civil and political rights in Gambian law. Economic, social and cultural rights are further protected by Chapter XX of the Constitution, which is intended to provide guidance for policy to pursue social and economic goals. This is then built on by specific legislation which reinforces the application of rights to vulnerable groups, for example the Women’s Act and the Children’s Act.

Chapter IV of the Constitution

Protection of civil and political rights in Gambian law is enshrined in Chapter IV of the Constitution of The Gambia, 1997, titled ‘Protection of Fundamental Rights and Freedoms’.

Article 17

(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.

The protection of rights in this section are therefore directly enforceable in Courts if an individual has one of their rights violated. Article 17(1) clearly places obligations to ensure the rights on all branches of the State and where applicable, to private individuals also. Article 17(2) clearly states that the rights and freedoms apply equally to all individuals, reinforcing the universality of these rights.

Articles 18 – 33 list the rights and freedoms to which the chapter refers:

Article 18 – right to life

Article 19 – right to personal liberty

Article 20 – protection from slavery and forced labour

Article 21 – protection from torture and inhuman treatment

Article 22 – protection from deprivation of property

Article 23 – right to privacy

Article 24 – right to fair trial

Article 25 – freedom of speech, conscience, assembly, association and movement

Article 26 – political rights, including right to vote and take public office

Article 27 – right to marry

Article 28 – right of women to equal treatment and opportunity with men

Article 29 – rights of children, including to name, nationality, and freedom from exploitation

Article 30 – right to education

Article 31 – rights of disabled persons, to equal respect and dignity

Article 32 – right to culture, language, tradition and religion

Article 33 – protection from discrimination

These rights are mostly civil and political rights, with the exception of the rights to education and to culture. The collection of rights in Chapter IV are given a high status of protection by Article 17, which makes them enforceable in courts. Any violations of the rights given to individuals in this chapter may therefore be taken as a claim to the courts in The Gambia.

Article 37

(1) If any person alleges that any provisions of section 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.

Provision for this is made in Article 37 of the Constitution, which allows violations of any of the rights and freedoms of that Chapter to be brought before the High Court. They may rule on any case which is raised by the purported victim of a violation (or under Sub-section 2, on the victim's behalf if the victim is detained), or rule on any question regarding these rights which is raised in a lower court.

Chapter XX of the Constitution

Chapter XX, titled 'Directive Principles of State Policy', gives the foundation for public policy to be followed by the State. These take the form of socio-economic goals which are to be pursued, creating obligations of the State to pursue these policies for the enjoyment of all citizens of the Gambia. These therefore, provide some protection of the economic, social and cultural rights of individuals.

Article 211

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 of The Gambia, the Executive, 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.*

Under Article 211, the listed organs are obligated to pursue the aims listed in Chapter XX in as far as they are economically capable. Unlike the rights and freedoms, violations of these obligations cannot be directly enforced in court, but it does provide indirect protection for economic, social and cultural rights of citizens, through the guide to public policy.

The areas outlined for State policy are covered in articles 212 – 219.

Article 212 – national integration, unity, peace and stability

Article 213 – national sovereignty and independence

Article 214 – political objectives (including regular, free and fair elections, decentralised democratic governance, fair representation of women in government, accountability and transparency)

Article 215 – economic objectives (including control of inflation, ample and equal economic opportunity, balanced development, improvement in quality of life, as well as protection of the environment)

Article 216 – social objectives (including equal opportunity for the disabled, the elderly, and children, equal access to clean and safe water, adequate healthcare, shelter, sufficient food, social security, adequate rest, good working conditions)

Article 217 – educational objectives (including free basic education for all citizens, adequate educational opportunity at all levels, skills training, improved literacy rates)

Article 218 – cultural objectives (protection, preservation and fostering of languages and cultural heritage of The Gambia)

Article 219 – foreign relations (including respect for international law, pursuit of the goals of international and regional organisations)

Women's Act and Children's Act

Both the Women's Act and the Children's Act provide additional protection to rights to that offered in the Constitution. Although with respect to both of these groups, the protection in the Constitution should provide protection (through offering these rights to all individuals), these Acts take note of the potential vulnerability of each of these groups and offer modified rights or specific rights to address the challenges faced in protecting the rights of each group.

Women's Act 2010

Section 3

In addition to the rights guaranteed under Chapter IV of the Constitution of the Republic of The Gambia, every woman has the rights and shall enjoy the protections set out in this Act.

Part II of the Act sets out the basic human rights protection of the Act, this is then developed with other Parts which legislate on protection of women against particular issues. Part X of the Act then lists additional rights.

The rights granted in Part II include:

Section 4 – right to dignity, including freedom from torture, degrading treatment and forced labour

Section 5 – right to life, integrity and security of the person

Section 6 – protection from violence

Section 7 – access to justice and equal protection before the law

Section 8 – freedom of expression

Sections 9 & 10 – freedom from and prohibition of discrimination

Section 11 – right to own property

Other Parts in the Act then address thematic issues for women, consisting of multiple rights on discrete points of that issue, and miscellaneous rights under Part X. Some of these parts include:

Part V – prohibition of discrimination against women in employment

- *Right to equal remuneration*
- *Right to maternity leave*
- *Freedom from discrimination in employment*

Part VI - elimination of discrimination in the field of education

- *Right to education and training*
- *Prohibition of expulsion on the ground of pregnancy*
- *Prohibition of withdrawal from school for purposes of marriage*

Part XI – marriage and the family

- *Right to marry*
- *Consent of both parties to marriage*
- *Right to retain maiden name*
- *Right to acquire property*
- *Right to retain nationality*

Part X – additional rights

- *Right to peace*
- *Right to food security*
- *Right to adequate housing*
- *Right to healthy and sustainable environment*
- *Right to positive cultural context*

These rights may be enforced under this Act in The Gambia, and this is provided for by Section 12 of the Act

Section 12

- (1) *The provisions of this Act are enforceable in the same manner as is set out in section 37 of the Constitution of the Republic of The Gambia 1997, or any successive provisions.*

Section 13

The High Court of The Gambia has jurisdiction in respect of any infringement of this Act.

Children's Act 2005

Similarly to the Women's Act, the Children's Act addresses rights particularly for children, a group recognised as requiring modification of rights to address their unique situation.

Part II provides a list of rights of the child, the remaining sections focus on areas of protection for children, providing additional rights where necessary in those systems.

Section 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.

Section 6 – right to survival and development

Section 7 – right to a name

Section 8 – right to acquire a nationality

Section 9 – right to enjoy the best attainable State of physical and mental health

Section 10 – right to privacy

Section 11 – right to parental care, protection and maintenance

Section 12 – right of a child in need of special protection measures

Section 13 – right of the unborn child to protection

Section 14 – contractual rights of a child

Section 15 – right to parental property / inheritance

Section 16 – right to social activities

Section 17 – right to express an opinion and to participate in decisions which affect his or her well-being

Section 18 – right to education

Section 19 – freedom from harmful social and customary practices

Section 20 – right to stay with parents or guardians

Section 21 – right to be maintained

Other rights are protected elsewhere in the Act, where appropriate for the protection with which the Part is dealing, for example:

Section 214 – right to fair hearing

- (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.*

Protection through criminalisation of conduct

Women's Act 2010

Section 74

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 fifty thousand dalasis or imprisonment for a term not exceeding six months or to both the fine and imprisonment.

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.

Both the Women's Act and the Children's Act provide for protection of the rights to each of these groups against private individuals by the creation of penal offences associated with these rights.

These offences provide for the prosecution of private individuals who contravene these rights, which can be used as an alternative to the bringing a claim before the High Court under Article 37 of the Constitution, which may provide a better avenue for violation of rights by authorities.

The creation of these offences are a part of The Gambia fulfilling their obligation to protect the rights of these groups, an obligation which can be found under international law. In order to fully discharge this obligation, 'due diligence' must also be used in the application of these offences for effective protection of the rights found in these Acts.

Chapter 3 – Regional and International Human Rights Obligations of The Gambia

Learning Outcomes:

- *Identify the international treaties to which The Gambia is a party, and describe the types of rights protected by each.*
- *Identify the relevant regional mechanisms for the protection of human rights applicable to The Gambia.*
- *Explain the status of international legal obligations under Gambian law.*

Introduction and terminology

The Gambia, as a State, is bound by international law. As discussed previously, international law may take a number of forms, including treaties and customary law.

Treaties

Many human rights obligations come from treaties. A treaty is an agreement under international law entered into by actors in international law, namely States and international organizations. Treaties are called by several names: treaties, international agreements, protocols, covenants, conventions, exchanges of letters, exchanges of notes, etc.

Treaty terminology:

- They can be general (i.e. International Covenant of Civil and Political Rights, applies equally to everyone) or specific (i.e. Convention on the Rights of the Child, applies only to children).
- Treaties can be multilateral (with many parties, for example, the Convention on the Elimination of Discrimination against Women, which is set up through the auspices of an international organisation with many State parties) or bilateral, between two countries (often these will be trade agreements or agreements over boundaries, rather than human rights treaties).

Upon signing up to a treaty, a State may choose to make a **reservation** or a **declaration**.

- **Reservations** are essentially caveats to a State's acceptance of a treaty. Reservations are a unilateral statement purporting to exclude or to modify the legal obligation and its effects on the reserving State. These must be included at the time of signing or ratification - *a party cannot add a reservation after it has already joined a treaty*.
- **Declarations** are statements made by a State when signing up to a treaty, but these are not intended to affect that State's legal obligations. Instead they are attached to explain or interpret any part of the treaty the state feels are unclear.

States may also make a **derogation** from a treaty. This implies that a member State delays the implementation of an element of a treaty into their legal system over a given timescale, such as five years; or that a member State has opted not to enforce a specific provision in a treaty due to internal circumstances (typically a State of emergency).

As previously stated, consent to be bound by a treaty is normally done by **signature**, **ratification** and **accession**. In some cases the diplomats negotiating a treaty are authorized to bind their states simply by

signing the treaty; in other cases their authority is more limited, and the treaty does not become binding until it is ratified. While some writers argue that treaties generally need ratification others argue that they do not.

- **Signature** of a treaty by a government indicates that it would now be bound by the provisions of the treaty and has become a member state to the treaty.
- **Ratification** is the agreement to be bound by a treaty, given by another authority than the one that concluded the treaty. Normally, this will mean adoption of the treaty by the legislative branch of the state. The ratification of international treaties follows the same rules as the passing of laws in most democracies. While depositing the instrument of ratification, the government indicates that it would now be bound by the provisions of the treaty and has become a member State to the treaty.

The relationship between signature and ratification can be understood only in light of history. In days when slow communications made it difficult for a diplomat to keep in touch with his sovereign, ratification was necessary to prevent diplomats exceeding their instructions. Ratification is now used to give the sovereign time for second thoughts or to give a chance for public opinion to make itself felt.

When a treaty has normally accumulated enough signatures and ratifications by states. It is said to **enter into force**. This is when it starts having effect for the State parties. It becomes binding, and has legal effect.

This legal effect means that the State is now bound by international law according to the provisions of the treaty. The extent to which individuals, companies, or other persons within the State are bound depends on how that States legal system views international law.

- **Dualist** States view domestic law and international law as separate legal systems. As such, any provisions of the treaty must be enacted by the national legislator (such as by an act of parliament) for them to be binding in national courts. This is the case in The Gambia, where, for example, the Women's Act and the Children's Act seek to incorporate international human rights instruments on women and children respectively.
- **Monist** States view domestic law and international law as operating in the same legal system. As such, merely ratifying a treaty is sufficient for its provisions to be used in domestic courts, as it is adopted as part of their law. This is the case in countries such as France or the Netherlands.

Declarations

A declaration (used in a different sense than above) is a non-binding document, which is not enforceable, but stating intent that States respect the contents of the declaration. Examples of these include the Universal Declaration of Human Rights.

Declarations may be called by other names (such as Minimum Requirements, Statements or Restatements of Principles), but they are generally adopted by international political organisations and take the form of principles or norms, but in a way which is not legally binding.

The advantages of creating a declaration is that it does not require the same political will for States as it does not create legal obligations on them. This can serve as a precursor for an agreement. For example, in 1959 the United General Assembly adopted a Declaration on the Rights of the Child. This declaration was not superseded but supplemented by the 1989 Convention on the Rights of the Child. This is an example of how a declaration was used as a springboard for the drafting of a treaty.

International law in The Gambia

For The Gambia to become party to a treaty, different branches of the State must use powers granted to them by the Constitution:

- The President is given the sole power to negotiate and conclude agreements under Section 79(1) (c) of the Constitution.
- Under that same provision, the power to ratify the treaty rests with the National Assembly.
- Both of these branches of the State are required to use these powers to become bound by treaty obligations.

Merely ratifying a treaty is not sufficient for individuals in The Gambia to be able to use the rights granted to them in a domestic court. The Gambia is a *dualist* system for the purposes of international law. This means that international law is not automatically a part of the internal law of the Gambia.

Section 7 of the Constitution of the Republic of the Gambia lists the laws of the Gambia, it does not include international law. Therefore, in order to be applied domestically in the country, provisions of international treaties must be transposed into a law applicable in the Gambia (i.e., an Act of the National Assembly).

What if the laws of the Gambia are inconsistent with human rights?

As international law is not enforceable under Section 7 of the Constitution, national law properly enacted will be enforceable even if inconsistent with human rights. Individuals may not rely on any internationally protected right which has not been transposed into national law.

However, at the international level, a State is bound by the ratification, not by internal procedures such as domestication of the treaty. Article 27 of the Vienna Convention on the Law of Treaties States: “*a State party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*”. Therefore, even if national law does not protect an individual’s human rights, this is still a violation of the state’s international obligations.

Section 219 of the Constitution shows a desire for compliance with international law: “*The state shall endeavour to ensure that in international relations it: [...] (c) fosters respect for international law and treaty obligations*”

International treaty obligations

The Gambia has ratified the following international human rights treaties:

Treaties of general application

International Covenant on Civil and Political Rights

Ratified on 22 March 1979

This treaty, one of the most fundamental in the international human rights system, guarantees protection of civil and political rights and liberties of all individuals in states who have ratified it.

Example provisions:

- Article 6 right to life – States are under an obligation to *protect* persons from arbitrary deprivation of life, such as from extrajudicial killings, executions after unfair trials, death in custody due to inhuman treatment.
- Article 7 freedom from torture, inhuman or degrading treatment – States are under an obligation to *protect* individuals from torture and to *respect* this freedom when individuals are in custody.

- Article 8 prohibition of slavery – States are under an obligation to *respect* the right of individuals not to do forced labour, and *protect* them from becoming enslaved.
- Article 21 freedom of assembly – States are under the obligation to *respect* the right to peacefully assemble, and to refrain from interfering with this right.

International Covenant on Economic, Social and Cultural Rights

Ratified on 29 December 1978

Another important treaty in international human rights, the ICESCR provides protection for socio-economic rights, creating obligations on States parties to work towards high levels of economic security for individuals, through development of infrastructure and services.

Example provisions:

- Article 11 right to adequate standard of living – States are under an obligation to *fulfil* an adequate standard of food, clothing and shelter for individuals, also to *respect* it by not interfering with that standard, and to *protect* this standard from interference by third parties.
- Article 12 right to highest attainable standard of health – States undertake to *protect, respect* and *fulfil* the right of every individual to health, including provision of medical services as well as good conditions of hygiene and disease prevention
- Article 6 right to work and Article 7 right to favourable conditions of work – States undertake to *protect, respect* and *fulfil* the right of every individual to freely chosen work, and good conditions of work and pay.

Treaties of application to certain groups

International Convention on the Elimination of All Forms of Discrimination Against Women

Ratified on 16 April 1993

International Convention on the Elimination of All Forms of Racial Discrimination

Ratified on 22 December 1978

Convention on the Rights of Persons with Disabilities

Ratified on 7 June 2015

These three Conventions focus on the protection of human rights listed elsewhere without discrimination. They reinforce what is stated in other treaties: that human rights are of equal application to all individuals, and that individuals should not have unequal protection on the basis of their sex, race, or disability.

Convention on the Rights of the Child

Ratified on 8 August 1990

This Convention provides for specialised human rights for children under the age of majority (in The Gambia, this is 18). States that have ratified the treaty are under obligations to extend rights to children often in modified forms, and taking account of the unique situation of children.

Example provisions:

- Article 7 right to birth registration and right to a name – States are under obligations to respect, protect and fulfil the right of every child to have their birth and nationality registered.
- Article 12 right to express their views – children are entitled to a fair say with relation to matters affecting them, being given due weight according to the age and maturity of that child.
- Article 28 right to education – States are under obligations to recognise the right to education of every child, this includes an obligation to fulfil compulsory primary education free to all.

Regional treaty obligations

The Gambia has ratified the following African human rights treaties:

African Charter on Human and Peoples' Rights

Ratified on 08 June 1983

This is the chief regional human rights treaty for States in Africa. The treaty incorporates many of the rights discussed in treaties at an international level, but with some modifications. This document was written by African States, and as such there may be a greater ownership over this treaty, as it is written with the African context in mind.

Individual rights under the African Charter (articles 2 – 17):

- Principle of non-discrimination on any grounds
- Equality before the law
- Inherent right to life
- Right to dignity, and freedom from exploitation and degradation including slavery and torture
- Right to liberty and security, prohibits arbitrary detention
- Right to fair trial
- Freedom of conscience and religion
- Right to receive information and freedom of expression
- Freedom of association and peaceful assembly
- Freedom of movement
- Right to health, education and work

The Gambia is by this treaty obligated to ensure these rights for all individuals. This contains a mixture of civil and political liberties, and social and economic rights contained in the two international covenants noted above.

The African Charter is noted for its strong protection of group rights. The following group rights are found in the Charter (articles 19 – 24):

- Protection of the family unit
- Right to existence of peoples, collectively and without domination by one group
- Free disposal of natural resources and self-determination
- Right to national and international peace and security
- Right to economic, social and cultural development

African Charter on the Rights and Welfare of the Child

Ratified on 14 December 2000

This African human rights treaty provides specific rights for children in Africa. It is similar to the UN Convention on the Rights of the Child in many ways but was agreed by African States, giving it a sense of ownership by the States bound. It is therefore better placed to take better account of African cultures and contexts. Of particular interest, this treaty includes duties for children, such as to work for cohesion of the family, respecting parents and elders and to preserve social and national solidarity and independence and integrity of their country.

Example provisions:

- Article 15 child labour – States undertake to *respect* and *protect* children from economic exploitation which might be hazardous or which would interfere with the child's development.
- Article 27 sexual exploitation – States parties are under obligations to protect children from sexual exploitation, such as prostitution or pornography.
- Article 21 protection against harmful social and cultural practices – States are under obligations to take measures to eliminate social and cultural practices which negatively impact the child's physical or social development, dignity or welfare.

Protocol to the African Charter on the Rights of Women in Africa

Ratified on 25 May 2005

This addition to the African Charter reinforces the importance of equal respect for human rights for women in Africa, and reflects the principle of non-discrimination throughout.

Example provisions:

- Article 5 elimination of harmful practices – States are under obligations to prohibit practices which negatively affect the human rights of women.
- Article 6 marriage – States are to ensure that women and men enjoy equal rights in marriage, including freedom to consent, minimum age of 18, and rights relating to names and nationality.

African Union treaties

The Constitutive Act of the African Union

Ratified on 22 February 2001

AU Convention Governing Specific Aspects of Refugee Problems in Africa

Ratified on 12 November 1980

The Gambia, as a member of the African Union, is party to the Constitutive Act and other AU Conventions which may have human rights implications. Although the African Charter and its related documents constitute the main African human rights mechanisms, these documents may incur obligations on States with a human rights implication.

Types of obligations

Substantive obligations

As discussed primarily above, ratifying a human rights treaty incurs a number of obligations on States related to the granting of substantive rights to individuals.

Substantive rights are the identifiable rights, i.e. the right to life, freedom from torture, right to fair trial.

The obligation to ensure these substantive rights is expressly stated in most treaties:

- ICCPR Article 2: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant"
- African Charter on Human and Peoples' Rights Article 1: "parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them"

Each of the substantive rights, as previously discussed, may consist of obligations to *protect*, *respect* or *fulfil* the right. Most rights will create obligations in each of these three categories for states, but some rights may not have unique obligations under each category, i.e. if States *respect* and *protect* the right to freedom of assembly, then *fulfilling* the right will not be necessary.

Reporting obligations

By ratifying human rights treaties, States are agreeing to ensure the contained rights to all individuals under their jurisdiction. As previously mentioned, these treaties often establish bodies who are responsible for monitoring the implementation of these rights in States parties to their respective treaty.

These bodies may have powers under their treaties to receive and examine complaints, or communications from individuals alleging violations, or may be able to assign experts to investigate human rights issues. To assist them in their monitoring of the human rights situations in the States which they monitor, a treaty may impose obligations on its States parties to produce routine reports on the situation of human rights in that State.

These reports may include legal frameworks used in the pursuit of particular rights, details of various cases on the protection of that right in the court, or information or other developments in procedure or policy. They are often prepared by a national human rights institution or government body, in collaboration with human rights defenders and civil society working in the State.

Chapter 4 – Powers of the Gambian Police Force

Learning Outcomes:

- Identify the different powers granted by law to the Gambian Police Force
- Describe the purpose for which those powers are to be used
- Identify the legal basis for those powers
- Consider the legal limitations of those powers

Introduction

The Gambian Police Force is created and mandated under Section 178 of the Constitution of the Gambia 1997, which reads:

- (1) *There shall be a Police Force of The Gambia of which the Inspector General of Police shall be the head.*
- (2) *The Police Force shall be equipped and maintained to perform its traditional role of maintaining law and order, and such other functions as may be prescribed by an Act of the National Assembly.*

For the purposes of ‘maintaining law and order’, the Police are granted powers under Gambian law. The sources of these powers include:

- The Constitution of the Gambia, 1997
- The Criminal Procedure Code (CAP 11:01, Laws of The Gambia Revised Edition 2009)
- The Police Act (CAP 18:01)
- The Trafficking in Persons Act (CAP 13:04)
- The Drug Control Act (CAP 13:05)

Section 4 of the Police Act elaborated on the general duty of the Police:

“The Police shall be employed in The Gambia for the preservation of law and order, the protection of property, the prevention and detection of crime, the apprehension of offenders and the due enforcement of all laws and regulations with which they are charged.”

Arrest

An arrest by the Police may be carried out with or without a warrant.

With a warrant – an ‘arrest warrant’ will be issued to the Police by a Magistrate or Judge upon receiving a complaint that a person has committed an offence.

A warrant of arrest is usually issued in one of the following circumstances:

- The statute which creates the offence or any other law provides that the offender can only be arrested with a warrant.
- When a serious offence is alleged to have been committed by an offender
- When a summons issued by a Magistrate has been disobeyed

Under Section 29 of the Police Act, a lawfully issued warrant may be executed by a police officer at any time, including if they are not currently in possession of the warrant. In this case the warrant shall be shown and read to the person after their arrest.

Without a warrant – under Section 15 of the Criminal Procedure Code, the Gambian Police are empowered to make arrests without a warrant or other order in the following circumstances:

- whom he or she suspects on reasonable grounds of having committed a cognizable offence, an offence under any of the provisions of Chapter XVII of the Criminal Code or any offence for which under any law provision is made for arrest without warrant;*
- who commits a breach of the peace in his or her presence;*
- who obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;*
- in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with respect to such thing;*
- whom he suspects upon reasonable grounds of being a deserter from the Armed Forces;*
- whom he finds in a highway, yard or other place during the night and whom he suspects upon reasonable grounds of having committed or being about to commit a felony;*
- whom he suspects upon reasonable grounds of having being concerned in any act committed in any place out of The Gambia, which, if committed in The Gambia would have been punishable as an offence, and for which he is, under the Extradition Act or otherwise liable to be apprehended and detained in The Gambia;*
- having in his possession without lawful excuse, the burden of proving which excuse shall be on such person, any implement of house breaking;*
- for whom he has reasonable cause to believe a warrant of arrest has been issued by a court of competent jurisdiction in The Gambia;*
- whom he believes to be bound by any recognisance to appear before any court or any police officer and whom he believes to be about to leave or is making preparations to leave The Gambia.*

The general principle for arrests is that the police may make arrests with a warrant, or without a warrant if they satisfy one of the listed circumstances. This test is applied in a specialised way for certain offences, for example, in Section 43 of the Trafficking in Persons Act:

- A police officer may arrest a person for trafficking with a warrant issued in pursuance of this Act or without a warrant.*
- A police officer may arrest a person for trafficking without a warrant where-*
 - An act of trafficking is committed in the presence of the officer;*
 - The police officer is obstructed by the person in the execution of police duties; or*
 - The person has escaped or attempts to escape from lawful custody.*
- A police officer may arrest a person without warrant on reasonable grounds of suspicion where the person-*
 - Has committed an offence of trafficking; or*

- b. *Is about to commit an offence of trafficking and there is no other way to prevent the commission of the offence; or*
- c. *Is wilfully obstructing the police officer in the execution of police duties.*

The Drug Control Act also make provision for arrests without warrants under Section 73(1) + (2):

- (1) *A Narcotics Control Officer, a police officer, customs officer or any other person acting in exercise of his or her own powers may arrest without a warrant a person who has committed, or who the police officer, with reasonable cause, suspects to have committed an offence under the Act.*
- (2) *Where a controlled drug is found on-*
 - a. *any premises or in any place searched;*
 - b. *or in any ship, vessel, boat, aircraft, or other means of conveyance stopped of any description under this Act;*

the Narcotics Control Officer, the police officer, customs officer or any officer who effected the search or stopped the ship, vessel, boat, aircraft, vehicle or other means of conveyance as the case may be, may arrest without warrant any person in the premises, place or ship, vessel, boat aircraft, vehicle or other means of conveyance whom he or she has reason to believe has committed an offence under this Act”.

If the police officer has not witnessed a crime but makes an arrest, they will be allowed to do so if they have ‘reasonable grounds for suspicion’. This must be shown on the facts.

“In the exercise of his powers under s. 15 of the CPC or section 73 of the Drug Control Act, a police officer or Narcotics Control Officer, as the case may be, must show that there were facts from which it could be reasonably inferred that the suspect committed an offence.

In the absence of such facts, the police officer or Narcotics Control Officer cannot defend his action by relying on the statutory provision”

Other reasons for arrest

- *in proximity to a police station*

Section 16 of the Criminal Procedure Code reads:

“An officer in charge of a police station may in like manner arrest or cause to be arrested any person –

- (a) *found taking precautions to conceal his or her presence within the limits of the station under circumstances which afford reason to believe that he or she is taking such precautions with a view to committing a cognizable offence;*
- (b) *within the limits of the station who has no ostensible means of subsistence or who cannot give a satisfactory account of himself or herself.*

Under Section 17 of the Code, this power is also allocable to subordinate officers not “in charge of a police station” if the officer in charge has an order given to them in writing, specifying the person to be arrested and the cause.

- *refusal to give name and residence*

Section 18 of the Criminal Procedure Code provides:

- (1) *When a person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses on the demand of the officer to give his or her name and residence, or gives a name or residence which the officer has reason to believe to be false, he*

or she may be arrested by the officer in order that his or her name or residence may be ascertained.

Searches and Seizures

Search of persons or vehicles

- stop and search

Section 36 of the Police Act provides:

“A police officer may stop, search or detain any vessel, boat, aircraft or vehicle in or on which there is reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having in his or her possession or conveying in any manner anything stolen or unlawfully obtained, and may seize the thing.”

This power is broadened with respect to vessels in the waters of The Gambia in Section 33 of the Police Act, under this section police officers are empowered to:

“[...] take all necessary measures for the effectual prevention or detection of any such felony and take into custody all persons suspected of being concerned therein, and also take charge of all property suspected to have been stolen, smuggled or in any way liable to forfeiture or arrest under the Customs Act or other law, Act or regulation for the time being in force within The Gambia.”

- on arrest

Section 13 of the Criminal Procedure Code gives the Police the power to make searches of persons arrested where it is appropriate for the offence which they are suspected of. This search must be for the purpose of gathering evidence for the trial of the offender.

“[The] person shall not be searched unless there are reasonable grounds for believing that he or she has about his or her person, any-

- (a) Stolen articles;*
- (b) Instruments of violence;*
- (c) Tools connected with the kind of offence which he or she is alleged to have committed; or*
- (d) Other articles which may furnish evidence against him or her in regard to the offence which he or she is alleged to have committed.”*

Search of premises

Police officers have the power to execute search warrants issued by Magistrates or Judges, for the purpose of searching a premises in accordance with the warrant. Section 95 of the Criminal Procedure Code states:

“A search warrant may be issued and executed on any day, including a Sunday, and shall be executed between the hours of sunrise and sunset, but the Magistrate or Justice of the Peace may, by the warrant, in his or her discretion, authorise the police officer [...] to execute it at any hour”

Under Section 93 of the Criminal Procedure Code, police officers also have the power to search premises without a search warrant:

- (1) When a police officer has reason to believe that material evidence can be obtained in connection with an offence for which an arrest has been made or authorised, a police officer may search the dwelling or place of business of the person so arrested or of the person for whom the warrant of arrest has been issued and may take possession of anything which might reasonably be used as evidence in a criminal proceedings.*

Seizure and detention of articles

A Magistrate will issue a search warrant for the purpose of finding and seizing a thing under Section 94(1) of the Criminal Procedure Act:

- (a) *On or in respect of which an offence has been or is suspected to have been committed;*
- (b) *Which there is reasonable ground for believing will afford evidence as to the commission of an offence; or*
- (c) *Which there is reasonable ground for believing is intended to be used for the purpose of committing an offence.*

The police officer will therefore under the warrant have the power to seize that thing, and to bring it before the Magistrate issuing the warrant.

As previously noted, a police officer entering a premises without a search warrant will under Section 93 have the power to seize anything which may be evidence of the crime for which the person has been arrested. Under Sub-section (3) this shall also be detained and brought before the magistrate.

Investigation of certain specific crimes

Relating to the investigation of the specific offences under the respective acts, the following acts have specific procedures for searching individuals, premises, and the seizure of evidence:

- The Anti-terrorism Act – Section 56
- The Hoarding Act – Section 7
- The Drug Control Act – Section 72
- The Money Laundering Act – Section 13

Instituting criminal proceedings and prosecution

Police officers are able to institute criminal proceedings in two ways under Section 69(1) of the Criminal Procedure Code:

- (1) *Criminal proceedings may be instituted in one of the following ways-*
- (2)
 - a. *By a police officer bringing a person arrested with or without a warrant before a Magistrate upon a charge;*
 - b. *By a public prosecutor or a police officer laying a charge against a person before a Magistrate and requesting the issue of a warrant or a summons[...]*

Police officers are the main prosecutors in the Magistrates' Courts. Section 28 of the Police Act reads:

“Any police officer may conduct in person any prosecution before any court of summary jurisdiction whether the information or complaint is laid in his name or not”

Chapter 5 – Arrest Procedures and the Right to Personal Liberty

Learning Outcomes:

- Recall the procedures for conducting a legal arrest
- Consider the potential human rights implications of this power
- Describe the protection of the right to liberty in the Constitution, and in regional and international instruments
- Identify how individual provisions and safeguards aid the protection of the human right in The Gambia

Introduction

A key human right with which police powers may come into conflict with is the right to personal liberty. The right generally means that people should be free from arrest and detention, however, this is permitted where it is provided for by law. It is necessary to place limits on this freedom for the purpose of crime control.

The procedural rules regarding arrest powers of the Police Force must be considered in light of the right to personal liberty. Although arrest may be conducted in line with the law protecting liberty, there are specific rights and guarantees which must be protected in line with its execution, protected internationally but also in the Gambian Constitution.

The right to personal liberty in Gambian law

The right to personal liberty is provided for in Chapter IV on fundamental rights and freedoms of the Constitution of The Gambia 1997, at Section 19:

- (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 ground 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.*

The protection of this right to personal liberty in the Constitution weaves a number of smaller individual rights and guarantees into the law for persons who are deprived of their liberty, these must be implemented into arrest and detention procedure.

For example:

- Persons must not be arrested without legal basis and procedure.
- Persons arrested must be informed of reason for detention (within 3 hours)

The various guarantees and rights which are contained in this provision are implemented through the development of procedural rules which run through the domestic law relating to police detention of liberty.

With respect to the above two examples:

- Warrants for arrest may be issued (Section 81 of the Criminal Procedure Code) before arrest. If an arrest is made without a warrant then it must have been made for one of a list of verifiable circumstances (Section 16 of the Criminal Procedure Code), if this cannot be proven then the arrest is illegal.
- “A person who is arrested, whether with or without a warrant, shall be taken with all reasonable dispatch to a police station, or other place of reception of arrested persons, and shall without delay be informed of the charge against him or her”

The Children's Act

The right to personal liberty is also protected specifically for children, by the provision of specific rules in the Children's Act for the detention of children.

Section 210 on the arrest and charge of a child provides:

- (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*

[...]

- (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.

The Act provides a stricter maximum length of custody at 72 hours for a child, and makes the failure to release a child after that time a criminal offence under Section 235 of that Act.

The right to personal liberty in human rights law

The following treaties are binding on The Gambia, and contain protection of the right to liberty:

African Charter on Human and Peoples' Rights

Article 6: Every individual shall have the right to liberty and to the security of his person. No one shall be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

International Covenant on Civil and Political Rights

Article 9:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

These two treaties place obligations at both the international and regional levels on The Gambia to ensure the right to liberty. These obligations are with respect to all persons, however, the rights are repeated again in treaties specifically aimed at the rights of children:

Convention on the Rights of the Child

Article 37:

[...]

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of

the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

African Charter on the Rights and Welfare of the Child

Article 4:

1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

Article 17:

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

2. [...] (b) Ensure that children are separated from adults in their place of detention or imprisonment.

These treaties emphasise the importance of a child's *best interests*. By treating detention or imprisonment of a child as a measure of last resort, there is a key difference here with the treatment of adults. The detention of an adult may be for the purpose of punishment of a crime, but for a child it should be for their safety or rehabilitation.

Limitations on the right to personal liberty

As noted above, the right to liberty must necessarily be limited to pursue aims such as crime control. These are provided for in the text of the right.

For example:

ICCPR Article 9(1): “[...] No one shall be deprived of his liberty **except on such grounds and in accordance with such procedure as are established by law.**”

So the State party may legitimately deprive the liberty of individuals, if the grounds for doing so are written into law, and the procedure followed is legal.

Derogating from the right to personal liberty

ICCPR Article 4:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation [...]

States may in that time, fail to ensure the right to personal liberty but only to the extent strictly required. Article 4 also notes that this derogation may not involve taking measures which are inconsistent with other obligations under international law or which involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Guidance for protecting the right to liberty

In addition to legal obligations which are binding on The Gambia, there are soft law documents aimed at providing guidelines for ensuring the full enjoyment of the right.

Of particular interest are “The Guidelines on the Conditions of Arrest, Pre-Trial Custody and Pre-Trial Detention in Africa”, adopted by the African Commission on Human and Peoples’ Rights. These provide

elaboration on the right to personal liberty, but their recommendations are not binding on States.

For example:

Grounds for arrest

- Persons shall only be deprived of their liberty on grounds and procedures established by law. Such laws and their implementation must be clear, accessible and precise, consistent with international standards and respect the rights of the individual.
- Arrests must not be carried out on the basis of discrimination of any kind such as on the basis of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, disability or any other status.

Procedural guarantees for arrest

- Arrest shall only be carried out by police or other officials authorized by the State for this purpose, and shall be carried out pursuant to a warrant or on reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence.
- Police officers or other officials conducting an arrest must clearly identify themselves and the unit to which they belong by showing an official identity card which visibly displays their name, rank and identity number. Any vehicles used shall have clearly visible number plates and any other required or legally prescribed identity markers or numbers.
- The lawful use of force and firearms shall be a measure of last resort and limited to circumstances in which it is strictly necessary in order to carry out an arrest.

Rights of an arrested person

- The right to be informed of the reasons for their arrest and any charges against them.
- The right to silence and freedom from self-incrimination.
- The right of access, without delay, to a lawyer of his or her choice, or if the person cannot afford a lawyer, to a lawyer or other legal service provider, provided by State or non-State institutions.
- The right to contact and access a family member or another person of their choice, and if relevant consular authorities or embassy.
- The right to information in accessible formats, and the right to an interpreter.
- The right to apply for release on bail pending investigation or questioning by an investigating authority and/or appearance in court.
- The right to challenge promptly the lawfulness of their arrest before a competent judicial authority.

Notification of rights

- At the time of their arrest, all persons shall be informed of their rights, orally and in writing, and in a language and format that is accessible and is understood by the arrested person.

Police custody

- All persons detained in police custody shall have a presumptive right to police bail. They should have access to a judicial authority to review, renew and appeal decisions to deny police bail.
- Access to a lawyer or legal services.
- Access to an interpreter during questioning.

Chapter 6 – Search Procedures and the Right to Privacy

Learning Outcomes:

- Outline the potential human rights violations associated with police power to search
- Consider the limitations on the right to privacy.
- Identify the legal bases for interference with privacy for the purpose of entering a premises to search.

Introduction

The Police are granted powers to search persons and premises for the purpose of gathering evidence as discussed previously. This requires an interference with the private property, and the private affairs of the person who is suspected of having committed a crime. Although this intrusion is necessary to allow the Police to effectively investigate crime, this should be balanced against the right of the claimant to privacy.

The right to privacy in Gambian law

The right to privacy is provided for in Chapter IV on fundamental rights and freedoms of the Constitution of The Gambia 1997, at Section 23:

- (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.*

The Children's Act

The right to privacy is also protected specifically for children, Section 10 of the Children's Act provides:

- (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 protection of the law against an interference or attack under subsection (1).*

The right to privacy in human rights law

The following treaties are binding on The Gambia, and contain protection of the right to privacy:

International Covenant on Civil and Political Rights

Article 17:

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- 2. Everyone has the right to protection of the law against such interference or attacks.*

In addition, two treaties provide protection of the right with respect to children:

Convention on the Rights of the Child

Article 16:

- 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*
- 2. The child has the right to the protection of the law against such interference or attacks.*

African Charter on the Rights and Welfare of the Child

Article 10:

No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to protection of the law against such interference and attacks.

Limitations on the right to privacy

The right to privacy is not protected absolutely in international law, and the protection offered in the ICCPR only extends to protection against 'arbitrary or unlawful interference'. The State party may therefore legitimately encroach on the privacy of individuals providing that it is a lawful interference and is not arbitrary.

ICCPR Article 4 applies also to this right, providing derogation from the right to privacy:

- 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation [...]*

States may in that time, fail to ensure the right to privacy but only to the extent strictly required. Article 4 also notes that this derogation may not involve taking measures which are inconsistent with other obligations under international law or which involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Search procedure under Gambian Law

Searches may be executed under a warrant issued by a Magistrate or Justice of the Peace, if they are satisfied there are reasonable grounds to believe that the thing to be searched is being used for the commission of an offence (Section 94 of the Criminal Procedure Code)

After the search, the police officer may then take possession of anything which might be reasonably needed as evidence in any criminal proceedings. See s. 93 (1) of the CPC.

The right to privacy allows for interference '*in accordance with law*'. The issuance of a warrant by a judge

will therefore operate as a legal limit on privacy to enter a property, or to view correspondence.

Additionally, without a warrant, the Police may also stop, search and detain any vessel, boat or aircraft (Section 36 of the Police Act). Despite the increased interference with privacy, this is permitted under law, and is not considered arbitrary because the officer must be under 'reasonable suspicion'.

Chapter 7 – Dealing with Non-Nationals in Conflict with the Law

Learning Outcomes:

- Understand the concept of nationality and how it may be determined if someone is a national of a State.
- Identify the level of human rights obligations owed towards non-nationals in a State's jurisdiction.
- Explain the problems often faced by non-nationals in a State, and which of these the Police may encounter.

Introduction

The application of human rights obligations to a country's own citizens within their territory is not always achieved by States, and things can become even more complicated when dealing with non-nationals within a State's territory. This may manifest in terms of problems with the provision of social security or support, or in terms of processing criminal justice. The extent of obligations owed to non-nationals has been a matter of political discussion for some time, however, international human rights law is very clear that a State owes obligations to everyone within its territory.

The concept of nationality

Nationality is a political notion reflecting a person's belonging to a nation. Someone's nationality will often imply that they have citizenship to a nation. In international law, nationality and citizenship are words used interchangeably to describe the legal relationship between an individual and a State.

A person will be considered a citizen of a State if they have an effective link with it, this may be found by a number of different means:

- Being born in a country (known as *jus soli* or the law of the place)
- Being born to a parent who is a citizen of the country (known as *jus sanguinis* or the law of blood)
- Naturalization, or the acquisition of citizenship by an extended period of residence.
- Entering a marriage with a citizen of a State.
- A combination of these approaches.

The rules for having or acquiring citizenship in a State are decided by that State, and varies across the world. International law does not stipulate any rules on this, and generally leaves the authority for deciding these rules with each State.

Chapter III of the Constitution of The Gambia 1997 provides the rules for acquiring or losing citizenship of The Gambia:

Article 9 - Every person born in The Gambia after the coming into force of this Constitution shall be presumed to be a citizen of The Gambia by birth if at the time of his or her birth, one of his or her parents is a citizen of The Gambia.

Article 10 - A person born outside The Gambia after the coming into force of this Constitution shall be a citizen of The Gambia by descent if at the time of his or her birth either of his or her parents is a citizen of The Gambia otherwise than by virtue of this section or any comparable provision of any earlier Constitution.

Article 11 - (1) Any person who-

(a) is married to a citizen of The Gambia and, since the marriage, has been ordinarily resident in The Gambia for a period of not less than seven years; or

(b) has been married to another person who was, during the subsistence of the marriage a citizen of The Gambia and, since the end of the marriage (whether by annulment, divorce or death), has been ordinarily resident in The Gambia for a period of not less than seven years, shall be entitled, upon making application in such manner as may be prescribed by or under an Act or the National Assembly, to be registered as a citizen of The Gambia.

(2) The annulment of a marriage of a person who has been registered as a citizen of The Gambia under this section, or under the provisions of any earlier law for the registration as a citizen of The Gambia of a person on account of marriage, shall not affect that person's status as a citizen of The Gambia.

Article 12 - (1) Any person who has been ordinarily resident in The Gambia for a continuous period of not less than fifteen years and who satisfies the conditions set out in subsection (2) may apply, in such a manner as may be prescribed by or under an Act of the National Assembly, to be naturalised as a citizen of The Gambia.

(2) The conditions referred to in subsection (1) are that the applicant-

(a) is of full age and capacity;

(b) is of good character;

(c) has clearly shown that, if naturalised, he or she intends to continue permanently to reside in The Gambia;

(d) is capable of supporting himself or herself and his or her dependents;

(3) The Secretary of State shall give reasons for any refusal of an application made under this section.

(4) No person shall be naturalized until he or she has renounced any other citizenship he or she may have, and taken an oath of allegiance to The Gambia.

A non-citizen/non-national of a State is a person who has not been legally recognised as having one of these effective links to the country where he or she is located.

Non-nationals may fall within one or more of a number of different categories:

- Permanent residents
- Migrants
- Refugees
- Asylum-seekers
- Victims of trafficking
- Foreign students
- Temporary visitors
- Tourists
- Undocumented workers
- Stateless persons

Issues may arise with non-nationals in a legal setting when they come into contact with the justice system

as a result of being suspected or accused of committing an offence. Another situation in which they may have legal issues is where a non-national is facing the denial of rights he/she is entitled to under the law, or if the law unfairly discriminates on the basis of nationality.

Problems facing non-nationals

Even if equality is provided for in law, non-nationals often face difficult realities when living in a State in which they are not citizens.

For example:

- Xenophobia, racism and discrimination
- Differences in language and culture
- Access to education and healthcare
- Lack of political representation
- Difficulty in obtaining identity documents, access to work
- Lack of means to challenge or remedy violations of their rights.

Selected non-citizen groups face the worst problems:

- Stateless persons – these persons are not provided with the consular protection offered by a nationality, and may face additional problems with obtaining identity documents or applying for citizenship or residents permits.
- Refugees and asylum-seekers – often having fled a disaster or political turmoil, refugees are particularly vulnerable and may often resort to petty crime for economic reasons. Refugee shelters and conditions of detention should meet international standards. If found in an illegal situation (such as being in a country without valid visas), they should not be treated as criminals. Where they are detained, it should not be indefinitely, and careful attention should be paid to the accommodation and facilities offered to families of asylum-seekers held in detention. Asylum-seekers will often lack identity papers and are uncertain about travel routes. Wherever possible, they should be allowed freedom of movement and not detained.
- Migrant workers and their families
Specific international law for migrant workers aims to protect them from exploitation or bad working conditions, the freedom to return to their country of origin, and protection of their travel and identity documents. Where necessary they should be allowed consular or diplomatic assistance and emergency medical care.
- Domestic workers
The Committee on Elimination of Racial Discrimination has specifically expressed concern that non-citizens working as domestic workers face illegal employment practices, passport deprivation, illegal confinement, rape and physical assault.

Protection of non-nationals in Gambian law

The Constitution of The Gambia 1997, Section 17 provides that:

*“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.**”*

The implication of this guarantee in the Constitution is that rights and freedoms of non-nationals should be equal to those of Gambian citizens. Rights such as the right to personal liberty, privacy, fair trial, freedom from slavery, right to life, and freedom from torture apply equally to non-citizens under Gambian law.

This means that police are legally bound to apply the law on the same footing to non-nationals when investigating an offence, making an arrest, controlling road traffic, controlling borders, in custody and detention.

Access to consular assistance

The Consular Conventions Act (CAP 24:02) does not provide explicitly for a right of arrested non-nationals in The Gambia to have access to consular assistance. However, Section 14(2) of the Criminal Procedure Code is relevant here:

Section 14

(2) The person while in custody shall be given reasonable facilities for obtaining legal advice, taking steps to furnish bail, and otherwise making arrangements for his or her defence or release.

Although not mentioned explicitly, in the event of a non-Gambian being arrested, this could mean access to the local consular post of their country of origin. Failure to do so could lead to a international diplomatic incident between The Gambia and that country.

International law and the protection of non-nationals

International human rights law obliges States to respect and to ensure all rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This includes persons in their territory who are not nationals of that State.

This is in accordance with the *universality* of human rights, a characteristic previously discussed which means they apply equally to every individual.

Discrimination according to nationality

African Charter on Human and Peoples' Rights

*Article 2: Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter **without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.***

The emphasis on rights being applied to 'every individual' is repeated throughout the African Charter, including in the right to life, dignity, liberty, fair trial, freedom of association and assembly, freedom of movement.

International Covenant on Civil and Political Rights

*Article 2: Each State Party to the present Covenant undertakes to respect and **to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.***

The ICCPR expressly states that all individuals within the States jurisdiction and territory are afforded rights, meaning that they cannot be granted only to nationals.

This is emphasised throughout the Covenant, and it is emphasised that laws must apply equally to all persons without discrimination:

*Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and **guarantee to all persons equal and effective protection against discrimination** on any ground such as race, colour, sex, language, religion, political or other opinion, **national or social origin**, property, birth or other status.*

The Human Rights Committee (the monitoring body for the ICCPR) have reiterated the importance of ensuring rights for non-nationals in their 'General Comment No. 15 – The position of aliens under the Covenant':

"the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."

"Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens."

However, it is noted that not all rights can be applied equally to aliens and citizens; some may only be applicable to citizens where it is appropriate.

For example:

Article 25 ICCPR: Every citizen shall have the right and the opportunity [...] to take part in the conduct of public affairs [and] to vote and to be elected at genuine periodic elections[.]

International Convention on the Elimination of All Forms of Racial Discrimination

In General Recommendation XXX, the Committee on the Elimination of Racial Discrimination has stated that:

"States are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of their civil, political, economic, social and cultural rights to the extent recognized under international law and enunciated especially in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights"

Vienna Convention on Consular Relations 1963

The Gambia is also a party to the Convention on Consular Relations, having ratified that Convention on 28 March 2013.

Article 36 of the Convention provides for communication and contact between a national of a State with consular relations and the consular post of their nation of origin. Subsection (1)(b) particularly covers contact on arrest:

Article 36

(1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

[...]

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

Chapter 8 – Prohibition of Torture under Gambia Law and International Law

Learning Outcomes:

- Define what torture means under international law, and what type of acts may constitute torture.
- Describe the circumstances in which torture can be legal.
- Consider the negative consequences of torture.
- Discuss the legal status of torture in the Gambia.

Introduction

Torture and inhuman or degrading treatment are given a high status in international law, considered one of the gravest offences which can be committed by a public authority. Preventing its occurrence through a State is difficult however, and ensuring that places of detention and police procedure does not involve any tactics which fall within its broad definition can be challenging. However, the benefits of preventing torture can be huge, building trust in public authorities and better places of detention, and fairer trials.

Torture in Gambian law

Freedom from torture is provided for in Chapter IV on fundamental rights and freedoms of the Constitution of The Gambia 1997, at Section 21:

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

Despite this Constitutional protection, there is no offence called torture under the Gambian Criminal Code. This creates problems with impunity, as law enforcement personnel cannot be punished for acts that may be considered torture under international law.

The Women’s Act

With respect to women, the Act contains a prohibition on torture, which is a penal offence under Section 74 of that Act.

Women’s Act

Section 4

Every woman is entitled to respect for the dignity of her person, and accordingly, no woman shall be-
(a) subjected to torture or to inhuman or degrading treatment or punishment

Officers who subject a woman to torture may therefore be prosecuted on the basis of the Women’s Act, but general protection may not be found in Gambian law. General criminal offences may still apply, and

the serious nature of torture as *jus cogens* may mean that prosecution could be achieved without direct protection.

The prohibition of torture in international law

Universal Declaration of Human Rights 1948

Article 5:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The prohibition of torture is absolute. It can be subject to no derogation or limitation, even in times of war, emergency or terrorist threats. In international law, it has taken on a high status as one of the most fundamental principles of customary law. It is considered *jus cogens*: a norm which is binding absolutely on all States regardless of whether they have agreed to it or not.

The Gambia has not yet ratified the UN Convention Against Torture 1984, which sets out in detail the prohibition. However, the prohibition still applies to The Gambia as customary law and *jus cogens*, and through the provisions of other treaties to which The Gambia is a party.

Definition of torture

The UNCAT defines torture as:

Article 1:

- (1) *An act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person*
- (2) *For such purposes as:*
 - a. *Obtaining from that person or a third person information or a confession;*
 - b. *Punishing that person for an act he/she or a third person has committed or is suspected of having committed;*
 - c. *Intimidating or coercing that person or a third person;*
 - d. *For any reason based on discrimination of any kind.*
- (3) *Inflicted by or at the instigation of or with the consent of or acquiescence of the authorities.*

There are three main elements to this definition:

- **Torture constitutes acute suffering** – this is the subjective experience of the individual, and so may vary depending on the situation and the individual. An interrogation method may cause discomfort to a young, healthy male, but cause suffering to an older, ill person. Whether the act is torture would depend on how it is received.
- **Torture is inflicted for a purpose** – the purpose is not limited to those listed in the Article, it could be for the purpose of humiliation, degradation, or some other.
- **Torture is inflicted by a public official, or with their instigation, consent, or acquiescence.**

The Human Rights Committee, in their interpretation of the ICCPR, have offered a definition which varies slightly.

- **Treatment which constitutes torture:** “depends on all 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” (Communication No. 265/1987)
- **Torture can be inflicted by persons acting in official capacity, or in a private capacity** “It is the duty of the State Party to afford everyone protection through legislative and other

measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”
(General Comment No. 20, 1992)

The ICCPR definition also continues express recognition of medical or scientific experimentation, this is a response to a specific form of torture widely used in the Second World War.

What acts may qualify as torture?

- Beatings
- Electric shocks
- Hanging by arms or legs
- Rape, sexual assault, or the threat thereof
- Mock executions
- Corporal punishment – as punishment for crime or in education (Human Rights Committee, *Osborne v Jamaica*)
- Prolonged solitary confinement (Human Rights Committee, *Polay-Campos v Peru*)
- Cruel misinformation regarding disappearance or execution of family members (HRC, *Schedko v Belarus*)

Treaties prohibiting torture to which The Gambia is a party

The Gambia is party to the following international and regional treaties which prohibit torture:

International Covenant on Civil and Political Rights

Article 7:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 4 of the ICCPR, which provides for derogation from ensuring certain human rights in times of public emergency, states:

(2) No derogation from article [...] 7 [...] may be made under this provision.

This point was emphasised in the Human Rights Committee’s General Comment on Article 7, which stated that:

“no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or any public authority”

African Charter on Human and Peoples’ Rights

Article 5:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

The African Commission on Human and Peoples’ Rights have also emphasised the absolute nature of the prohibition of torture:

“Torture is considered as one of the most egregious and morally reprehensible human rights abuses and its prohibition is one of the most fundamental values of democratic societies. The prohibition is absolute

and non-derogable and applies even in the most difficult of circumstances including public emergencies.”
(Communication *Abdel Hadi, Ali Radi & Others v Sudan*)

Definition

The African Commission have drawn inspiration from the UNCAT definition, as set out in Communication *Sudan Human Rights Organisation and Center for Housing Rights and Evictions v Sudan*.

Three elements:

- Severe pain or suffering has been inflicted;
- For a specific purpose;
- By, or at the instigation of, or the consent of, or acquiescence of, State authorities.

With reference to the first element, the African Commission have adopted a broad view of the act which constitutes torture, and considers it to be a particularly serious form of ill-treatment.

“Article 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience.” (Communication *International Pen and Others (on behalf of Ken Saro-Wiwa Jr) v Nigeria*)

Link between prohibition of torture and other rights

The prohibition of torture is frequently linked to the right to respect for dignity, the right not to be subjected to torture is considered to be a part of this dignity.

i.e. *African Charter on Human and Peoples’ Rights* Article 5 above.

i.e. *ICCPR* Article 10(1): *“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”*

This right in the *ICCPR* emphasises also the relationship between freedom from torture and deprivation of liberty. Those who are detained in custody are commonly at risk of ill-treatment and torture. Article 10(1) emphasises the importance of dignified and respectful treatment even when deprived of liberty.

Detainees may not be *“subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons”* – Human Rights Committee General Comment No 21

The following treaties also emphasise the freedom from torture, inhuman or degrading treatment with respect to children:

Convention on the Rights of the Child

Article 37(a):

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

African Charter on the Rights and Welfare of the Child

Article 16:

1. State Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.

These provisions emphasise the situation of children, and adapts what constitutes an act of torture to include forms of punishment which may be acceptable for adults (i.e. life imprisonment). The African Charter in particular also highlights child abuse as potential form of torture.

Meeting State obligations

The prevention of torture requires multifaceted criminalisation and other measures to be properly implemented. The Human Rights Committee consider that all necessary steps should be taken and consider this to be a priority for all States.

Negative consequences of torture

Aside from the fundamental element of harm done to an individual, torture has a number of potential problems associated with it:

- *Increased chance of false confessions or miscarriages of justice – information given under duress is less reliable than that given freely.*
- *Erodes public confidence in authorities.*
- *Destroys any attempts at administering justice – failing to follow the law in its administration decreases legitimacy.*
- *Represents the ultimate abuse of State power or authority.*

Torture is considered one of the worst human rights violations to commit, and the international community are unanimous in their condemnation of it.

Realising the prevention of torture

Amnesty International have come up with a 12-step plan towards preventing torture to be followed in States.

1. **Condemn torture.**
The highest authorities should demonstrate total opposition to torture, making it clear to all members of the police and military that it will not be tolerated.
2. **Ensure access to prisoners**
The practice of incommunicado detention should be ended. Prisoners should have access to relatives, lawyers, doctors and judicial authority without delay.
3. **No secret detention**
All prisoners should be held in officially recognised places of detention, and information about their arrest and whereabouts should be available.
4. **Provides safeguards during detention and interrogation**
All prisoners should be informed of their rights, which should include to lodge a complaint. Inspections should be regular, unannounced and unrestricted.
5. **Prohibit torture in law**
Governments should adopt law to integrate treaties on torture, and any permitted forms of torture should be illegal. No derogation should be permitted.
6. **Investigate**
All complaints and reports of torture should be promptly investigated by an independent body. Officials suspected should be suspended and those at risk protected from reprisals.
7. **Prosecute**
All those responsible should be brought to justice, in all circumstances. There should be no justification, and prosecution should always happen.

8. **No use of statements extracted under torture**
Governments should ensure that statements obtained through torture may not be invoked in any proceedings.
9. **Provide effective training**
All officials involved in custody, interrogation or medical care should clearly understand that torture is a criminal act. Officials should be instructed they have the right to refuse to obey any order to torture.
10. **Provide reparation**
Victims of torture should be entitled to reparation in the form of compensation, appropriate medical care and rehabilitation.
11. **Ratify international treaties**
Governments should ratify treaties without reservations, and comply with recommendations from independent bodies and experts.
12. **Exercise international responsibility**
Governments should hold other governments to account when engaging in torture. They should also intercede by transfer of training and equipment in a way that does not facilitate torture.

Chapter 9 – Police

Learning Outcomes:

- Know the UN guidelines on when law enforcement officers should use force.
- Understand the principle of proportionality and understand how it should be applied to the use of force.
- Consider the occasions on which firearms should be used by police officers
- Describe the use of proportionality under Gambian law.

Introduction

It may sometimes be necessary for the police to use force in arresting or controlling perpetrators of crime in the fulfilment of their duties. However, this is viewed as an extreme measure and carries with it a high degree of responsibility and duty of care towards the public.

Use of excessive force by a police officer can constitute a violation of a number of human rights, including the right to integrity of the person, freedom from torture, inhuman or degrading treatment, or in some cases even the right to life.

Law of The Gambia on Police Use of Force

On arrest

Part III of the Criminal Procedure Code provides for rules surrounding the arrest of those suspected of committing crimes. The following provisions in that part stipulate the extent of reasonable use of force:

Section 8

(1) In making an arrest the police officer or other person making the arrest shall actually touch or confine the body of the person to be arrested, unless there is a submission to the custody by word or action.

(2) If the person forcibly resists the endeavour to arrest him or her, or attempts to evade the arrest, the police officer or other person may use all means necessary to effect the arrest.

(3) Nothing contained in this provision shall be deemed to justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the person.

Section 11

The person arrested shall not be subjected to more restraint than is necessary to prevent his or her escape.

These provisions incorporate the principle of proportionality, only authorising force during an arrest where it is necessary and only a proportionate amount of force to be used.

Firearms and the Police

It should be considered that the use of firearms by Police, Section 28 of the Firearms and Ammunition Act (CAP 21:01, Laws of The Gambia Revised Edition 2009) provides that any member of the Gambian Police Force will not be liable for a fine if carrying or discharging a loaded firearm while on duty.

International law and police use of force

International law acknowledges that the police may sometimes need to use force, however, in order for this to be respectful of human rights it must be carried out in compliance with law and with restraint.

UN General Assembly: Code of Conduct for Law Enforcement Officials

Article 3

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

This article concerns the use of force by law enforcement officials. While this provision implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances, this should be only as is necessary for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders.

National law should ordinarily restrict the use of force by law enforcement officials in accordance with a principle of proportionality. The UN insists that this provision should be interpreted in line with those principles of proportionality, and does not authorize the use of force which is disproportionate to the legitimate objective to be achieved.

The use of firearms is considered an extreme measure by the UN. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.

Article 8

Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them.

Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

This article emphasises the need for internal discipline of law enforcement agencies. The protection of human rights by the agency require that officers are vigilant as to the behaviour of their colleagues, and complying with good practice deserves respect and the full support and cooperation of the community and the agency with which they serve.

UN Congress on the Prevention of Crime and Treatment of Offenders: Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

This document is soft law, specifying the principles under which force and firearms should be used. It builds on the basic principle outlined in Article 3 of the above Code of Conduct.

Principle No 4.

*Law enforcement officials, in carrying out their duty, shall, as far as possible, **apply non-violent means before resorting to the use of force and firearms**. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.*

Principle No 5.

Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

- (a) **Exercise restraint** in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;*
- (b) **Minimize damage and injury**, and respect and preserve human life;*
- (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;*
- (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.*

Principle No 6.

Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.

Principle No 7.

Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

Principle No 8.

Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

Principle No 9.

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

Principle No 10.

In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

Principle No 11.

Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:

- (a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;*
- (b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;*
- (c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;*
- (d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;*
- (e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;*
- (f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.*

Principle No 22.

Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11 (f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.

Chapter 10 – The Rights of Detainees and Prisoners

Learning Outcomes:

- Understand the underlying principle for the good treatment of persons deprived of liberty.
- Describe the rights which may be at issue with persons deprived of liberty.
- Outline the minimum standards for detention of the UN
- Identify groups who are particularly vulnerable, and note groups who should not be detained together.

Introduction

Persons in places of detention are deprived of their personal liberty if they are suspected of an offence but not yet convicted, or who have been convicted of an offence. As persons in State custody, they are vulnerable and reliant on the authorities for all aspects related to their conditions of living. As such, the protection of their rights will not only involve prevention of torture, but may also include social and economic aspects such as their right to food, rest and medical care.

The protection of these rights is often hindered by budgetary constraints, and prisons and places of detention often struggle with other issues such as over-crowding. Despite this, the protection of dignity of persons deprived of liberty is essential to protect their value as human beings, and for effective criminal justice in a State.

Persons deprived of liberty may include:

- Persons in pre-trial detention – detained persons.
- Persons convicted of an offence – prisoners.

The key principle of dignity is important in considering the rights of persons deprived of liberty. Despite their detention, they are still human beings, and therefore have inherent dignity. The deprivation of their right to liberty does not mean they should not be able to enjoy other human rights.

The rights of detainees in Gambian law

The following acts contain provisions relevant to persons deprived of their liberty:

Prisons Act 1953 (CAP 20:01)

This Act contains provisions relevant to the setup and running of prisons, and contains some rights of those detained in those prisons:

Section 36 – Separation of prisoners

(1) Male and female prisoners shall be confined in separate parts of the prison in such manner as to prevent their seeing or conversing or holding any intercourse with each other.

(2) The following classes of prisoners of each sex shall, as far as prison accommodation renders it practicable, be separated from one another, namely-

(a) prisoners awaiting trial from convicted criminal prisoners;

(d) civil prisoners from criminal prisoners;

(e) first offenders from offenders with one or more previous convictions;

(f) such classes of prisoners as the Commissioner may specify from any other classes specified by him or her.

Section 39 – Supply of food, etc., to civil or unconvicted criminal prisoners

If a civil or unconvicted criminal prisoner does not provide himself or herself with food, clothing and bedding he or she shall receive the regular prison food, clothing and bedding.

Section 46 – Removal of sick prisoners to hospital

(1) In case of serious illness of a prisoner confined in a prison in which there is no suitable accommodation for him or her, the medical officer shall make an order for his or her removal to a hospital.

Part VII – Labour of prisoners and communication with prisoners

Section 50 – Female prisoners are not to be employed outside the prison

Section 51 – Unconvicted prisoners are not to be required to do labour

Section 53

Subject to the other provisions of this Act, a convicted criminal prisoners shall be allowed one visit from friends after he or she has completed three months of his or her sentence, and thereafter according to progressive stages or as a reward for good conduct in accordance with rules made under this Act.

Section 56

(1) Subject to such conditions as may be prescribed, every prisoner other than a convicted criminal prisoner shall be given all reasonable opportunities of communication with his or her friend or legal adviser and may write and receive letter.

Section 57

(1) Ministers of religion, or other accredited representatives of any recognised religious body who are approved by the Commissioner, may be admitted at proper and reasonable times to the prison to visit prisoners who may be desirous of their services.

Children's Act 2005

Section 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.

Section 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-

(f) committing the child offender to custody in a place of detention provided 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 Minister in such circumstances and with such conditions as may be recommended to the Court by the Social Welfare Officer or Probation Officer.

(4) Detention shall be a matter of last resort and shall only be made after careful consideration and after all 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.

Section 223

(1) The Minister, in consultation with the Minister 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 retraining of children committed there.

(2) The detention centre shall have a separate wing for female children.

(3) The Minister shall make rules to govern the management of the detention centre.

The Children's Act provides that children convicted with offences may be detained (but not imprisoned in an adult institution). An example given in the Act of one of these places of detention is a National Rehabilitation Centre. Although the Act confers such rights as not to be kept with adult prisoners, and that female children should be separated, ensuring other rights needs to be accomplished through the running of the prison, which is left to relevant public officials.

The rights of detainees in international law

International Covenant on Civil and Political Rights

Article 10:

(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

(3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation[...]

The humane treatment of prisoners required under the ICCPR is rooted in their dignity and to facilitate their re-entry to society.

Other relevant rights include the freedom from torture, inhuman and degrading treatment or punishment (Article 7). Places of detention are often isolated and carry with them the risk of cruel or unusual punishment by authorities carried out with impunity.

African Charter on Human and Peoples' Rights

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

All of the rights contained in these human rights treaties should apply equally to persons deprived of their liberty in respect of their dignity.

Soft law documents

International human rights bodies have also adopted non-binding documents containing rules or principles for the treatment of persons deprived of liberty.

- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)
- UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) (2015)

Soft law documents have also been produced within the African regional system

- *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines) (2002)*
- *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (2014)*

General Rights/Principles applicable for persons deprived of liberty

The soft law documents mentioned above, in particular the Mandela Rules, outline the principles which must be applied in protecting the human rights of persons deprived of their liberty.

Minimum Rules for the Treatment of Prisoners

Basic Principles

- Right to life
- Freedom from torture, cruel, inhuman or degrading treatment or punishment
- No discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status.
- Deprivation of liberty already being afflictive, prisons should not aggravate the suffering.
- The purpose of imprisonment should be to protect society against crime, but aim to reintegrate persons after the period so they can continue to lead a law-abiding and self-supporting life.
- By seeking to minimize differences between prison life and the outside world, respect the dignity of prisoners and maintain social responsibility.

Accommodation

- Different categories of prisoners should be separated (male/female, adult/child, detained/convicted).
- Avoid overcrowding, no more than 2 prisoners in a room unless a dormitory.
- Adequate ventilation and climate.
- Appropriate access to hygiene, and good provision of clothing and bedding.

Food and drink

- Adequate food of appropriate nutritional value for health.
- Water should be made available whenever needed, especially for drinking.

Medical care

- Access to medical facilities free of charge.
- The right to be transferred to specialised medical centres if needed.
- Every detention place should have the service of at least one qualified medical officer with a knowledge of psychiatry.

Socio-cultural rights

- Respect for religion and culture of prisoners.
- Right to satisfy the needs of the prisoner's religious life.
- Right to possess books related to the prisoner's religion.

Access to the outside world

- Persons deprived of liberty shall be allowed to communicate with family and receive visits.
- Right to access information, such as by newspaper.
- Right to meet with legal counsel.

The Minimum Rules provide for an extensive catalogue of rights for prisoners, and they should have access to complaint mechanisms and compensation/reparation in the end of violations of rights.

Rights applicable to specific categories of persons deprived of liberty

Prisoners

Persons deprived for a sentence after conviction should have the opportunity to become more responsible and willing to respect the law after released. Important provision to facilitate this includes:

- Education activities
- Recreational activities
- Appropriate treatment according to classifications of prisoner
- Encouragement of good conduct
- Opportunity to work, strengthening capacity to earn after release
 - Work should not be constant, and should include rest days
 - Work should not consume time for activities for education and rehabilitation of prisoners

Pre-trial detainees

Persons awaiting trial should be allowed rights reflecting of their innocence until conviction. Many of their specific rights revolve around their trial.

- Presumption of innocence
- Should be kept separate from convicted prisoners
- Right to a fair trial within reasonable time
- Regular review of pre-trial detention orders provided for by law
- Right to challenge the lawfulness of detention

Detainees in police custody

- Presumption of innocence
- Maximum duration of police custody before charged to be 48 hours
- Information on the right to presence of legal assistance
- Effective presence of legal assistance during questioning
- Presence of an interpreter when necessary
- Right to remain silent

- Questioning to be recorded, of not too long duration, to have reasonable intervals between sessions, and detainee statement to be confirmed by the detainee.

Vulnerable groups of persons deprived of liberty

Women

- Women should be detained in separate venues from men.
- Searches must be conducted by female law enforcement officials in a manner that respects the woman's dignity.
- Women should not be subject to closed confinement or disciplinary segregation if pregnant, breast-feeding or accompanied by infants.
-

Women with caretaking responsibilities for children should have decisions made on the basis of the child's best interests.

African Charter on the Rights and Welfare of the Child

Article 30

State Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;*
- (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;*
- (c) establish special alternative institutions for holding such mothers;*
- (d) ensure that a mother shall not be imprisoned with her child;*
- (e) ensure that a death sentence shall not be imposed on such mothers;*
- (f) the essential aim of the penitentiary system will be the reformation, integration of the mother to the family and social rehabilitation.*

Children

ICCPR Article 10

- 2. (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.*
- 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*

Juveniles are persons under the age of 18. In cases of doubt and where there is reason to believe that a person is below 18, that person should be treated as a child. Human rights law is clear that children must be detained separately from adults in specialised institutions.

Principles of children's rights such as "best interests" of the child should guide any decision and action with respect to child suspects and detainees.

Persons with disabilities

- Person with disabilities should be treated humanely.
- Reasonable accommodation and adjustments should be done to ensure that persons with disabilities deprived of their liberty have full access to prison life on an equitable basis.
- Disciplinary action shall take account of a person's disability.
- Arrangements should be made to transfer persons with mental disabilities to mental health facilities.

Non-nationals

All non-nationals should be given the right to seek consular assistance, and should be provided with the means of doing so. These may be refugees or stateless persons, in which case they should also be given access to legal assistance, or put in contact with a relevant international organisation.

Issues with the realisation of these rights

It is very difficult to monitor the conditions of detention in many places, as they are often isolated and there is little communication. Access by NGOs and international organisations is essential for transparency and to build awareness for persons deprived of their liberty and officials.

The UN Minimum Rules State:

“In view of the great variety of legal, social, economic and geographical conditions in the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.”

The provision of detention centres which are capable of providing all of these rights is not possible economically all the time. The categories of detainees and the separation they need mean that a number of institutions must be available in any one place, and these all require the provision of adequate food, hygiene and medical care.

However, through the use of alternative sentences, training and sensitization of law enforcement agents on human rights issues, and the development of codes of conduct and rules, systems of detention are well able to improve, for the protection of the dignity of those inside.

Chapter 11 – Police and Gender-Based Violence Cases

Learning Outcomes:

- Describe what comprises gender-based violence.
- Explain some of the issues surrounding the policing of gender-based violence.
- Outline how the incorporation of the Maputo Protocol and CEDAW has strengthened protection for women in the Gambia.
- Consider the international reaction to gender-based violence.

Introduction

‘Sexual and Gender-based violence’ is a term used to describe violence which is inflicted on the basis of gender, this may be physical, mental, emotional, psychological, sexual verbal or emotional maltreatments or assault. It can be inflicted by men and women, and by both men and women. It will often be inflicted as part of a pre-existing relationship, such as within a marriage or family.

Often, women will be the victims of gender-based violence, and it is often inflicted by men. The reason for this misbalance reflects the power inequalities between women and men in society and in the family. As such, gender-based violence is considered especially harmful to the rights of women and girls. It is estimated that one in three women across the world will experience physical or sexual abuse in her lifetime, making gender-based violence one of the most prevalent human rights violations in the world.

Gender-based violence can have serious consequences on health and development in society, particularly but also on the broader families and communities. As well as physical trauma causing injury or death, mental or emotional trauma which is often linked to sexual violence can lead to mental health problems or even suicide. Additionally, gender-based violence costs money in responding to the situation, with medical and police responses. This has impact on development through direct cost, and loss of productivity and earnings of those who suffer the violence.

Challenges in policing gender-based violence

Gender-based violence is often inflicted within the home or family. Legal systems and cultural norms respect the right to privacy and the sanctity of family life, as such, violence occurring behind closed doors (such as within the family) has historically not been treated as a crime, but as a private family matter. While the law no longer reflects this, and violence within the home is treated with the necessary severity, there are still problems with the enforcement of the law.

Reporting of cases is very low. With domestic violence, victims are often afraid to report violence they experience from spouses or partners due to fear of repercussions, or for the safety of other family members. Victims, either male or female, may also be ashamed of the violence that they are suffering within the home, and so even if suffering injuries and receiving medical care, they may not report the injuries as a result of violence. Reporting of cases may mean the break-up of the family, so the victim often feels ‘tied-in’ to the violence, leaving them to suffer as the violence may even worsen. Other family members may

intervene to prevent the reporting of the violence, for fear of breaking up the family.

Gender-based violence can also sometimes take on a mental or emotional abuse, which can worsen the above problems for victims.

Often there is inadequate training for law enforcement officers and facilities for handling the victims of gender-based violence. Officers should be aware of their powers under the law, and be educated as to the challenges with gender-based violence, particularly with its reporting and risks for victims.

Laws in the Gambia relating to gender-based violence

The Constitution of the Gambia 1997

Section 28:

- (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*

Women's Act 2010

In 2010, the Women's Act was adopted in The Gambia to implement the CEDAW and the Maputo Protocol into domestic law. Additionally to general offences in the Criminal Code, this Act creates a number of rights to protection from violence and maltreatment, specifically against women:

Section 4 - Right to dignity

Every woman is entitled to respect for the dignity of her person, and accordingly, no woman shall be

- (a) subjected to torture or inhuman or degrading treatment or punishment*
- (b) held in slavery or servitude and*
- (c) required to perform forced or compulsory labour*

Section 5 – Right to life

- (1) Every woman is entitled to respect for her life and the integrity and security of her person.*

Section 6 - Protection from violence

- (1) Every woman shall be protected against any form of physical, sexual, psychological or economic harm, suffering, or violence whether occurring in public or private life.***
- (2) Any form of violence against women is hereby prohibited.***
- (3) All Government Departments, agencies, organs, public or private institutions shall take appropriate measures to promote and protect women's right and their legal status from any form of abuse or violence by any person, enterprise, organization or institution.*

Under Section 12 of the Act, these rights may be enforceable if violated in the High Court. However, under Section 74 the Act also makes it a criminal offence to violate any of the provisions of the Act. This provides extra protection for women by allowing law enforcement to get involved over any potential infringement of life, integrity, or any form of violence or suffering.

The Women's Act is also important for the provision of maternity leave and other protection for women in maternity:

Section

- (1) Every woman is entitled to a period of 6 months maternity leave with pay or with comparable social benefit without loss of employment, seniority or similar benefits.*
- (2) In order to reinforce the common responsibility of men and women in the upbringing and development of their children, every father is entitled to a reasonable period of time not exceeding ten working days as paternity leave with pay, for every child delivered for him.*

Section 22

(1) Every form of discrimination against women on the grounds of maternity is hereby prohibited.

Domestic Violence Act 2013

This Act focuses on acts in the context of a previous or existing domestic relationship. Section 15 gives a broad range of acts which can constitute domestic violence, including any sort of physical, sexual, emotional, verbal or psychological abuse.

The domestic relationship could be between a spouse or partner, or between a parent and child. Section 16 gives a large number of possible domestic relationships. The Act importantly does not distinguish between men and women as the perpetrators or victims of domestic violence, meaning that the provisions could apply to any form of violence in domestic setting.

The Act is also versatile and innovative in the range of ways in which individuals may report a complaint.

Section 20

(1) A victim of domestic violence or any other person with information about domestic violence may file a complaint with the Police about the domestic violence.

(6) A complaint of domestic violence may be filed with the Police at the place where the –

(a) offender resides;

(b) victim resides;

(c) domestic violence occurred or is occurring; or

(d) victim is residing temporarily where the victim has left her or his usual place of abode.

Creating more options for making a complaint is essential to increase the reporting of gender-based violence, by allowing others to file the complaint this may avert some of the issues associated with women reporting their domestic violence.

The role and powers of the police in dealing with domestic violence are also laid out. These duties are very important for the effective enforcement of protection from gender-based violence particularly in domestic settings.

Section 21

A Police Officer shall respond promptly to a request for assistance from domestic violence and shall offer protection as the circumstance of the case or the person require.

Section 22

(1) When receiving a complaint, a Police Officer shall-

(a) interview the parties and witnesses;

(b) record the complaint in detail;

(c) assist the victim to obtain medical treatment if necessary;

(d) assist the victim to a place of safety [...]

(3) Family mediation or intervention shall not be a bar to the investigation or prosecution of a complaint of domestic violence.

These provide an elaboration on the general duties of police to investigate and enforce laws outlined in the Police Act (Section 4). The Domestic Violence Act is very specific about the procedure to be followed on a complaint of domestic violence. If implemented properly, these rules may help the reporting of violence against women to increase.

Sexual Offences Act 2013

Section 2

Interpretation of terms:

“Sexual Act” means-

- (a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person,*
- (b) the insertion of any other part of the body of an animal or any object into the vagina or anus of another person, except where such insertion is consistent with sound medical practices, carried out for proper medical purposes, or*
- (c) cunnilingus or any form of genital stimulation.*

Section 3

Rape:

(1) A person who intentionally, under coercive circumstances-

- (a) engages in a sexual act with another person; or*
- (b) causes another person to engage in a sexual act with the perpetrator or with a third person, commits the offences of rape*

(2) for the purposes of sub-section (1) “coercive circumstances” includes-

- (a) the application of physical force to the complainant or to a person other than the complainant;*
 - (b) threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant;*
 - (c) threats (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant or to a person other than the complainant, under circumstances where it is not reasonable for the complainant to disregard the threats,*
 - (d) circumstances where the complainant is under the age of sixteen years.*
 - (e) circumstances where the complainant is unlawfully detained;*
 - (f) circumstances where the complainant is affected by – Physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary)*
 - (g) circumstances where the complainant submits to or commits the sexual act by reason of having been induced (whether verbally or through conduct) by the perpetrator, or by some other person to the knowledge of the perpetrator, to believe that the perpetrator or the person with whom the sexual act is being committed, is some other person;*
 - (h) circumstances where as a result of the fraudulent misrepresentation of some fact by, or any fraudulent conduct on the part of, the perpetrator, or by or on the part of some other person to the knowledge of the perpetrator, the complainant is unaware that a sexual act is being committed with him or her; circumstances where the presence of more than one person is used to intimidate the complainant.*
- (3) For the purposes of this section, rape shall not apply to married couples.*

The following provision relates to the procedure of the prosecutor in sexual offences:

Section 11. Special duties of prosecutor

In criminal proceedings at which an accused is charged with an offence of a sexual nature, the prosecutor shall consult with the complainant in such proceedings in order –

- (a) to ensure that all information relevant to the trial has been obtained from the complainant, including information relevant to the question whether the accused maybe released on bail and the imposition of any conditions of bail; and*
- (b) to provide all such information to the complainant as will be necessary to lessen the impact of the trial on the complainant.*

This provision enforces the focus which must be made on the well-being and informing of the complainant in sexual offences cases. This, if implemented, goes some way to reorienting the procedure to focus on the victim.

Section 8. Evidence of previous consistent statements

- (1) Evidence relating to all previous consistent statements by a complainant shall be admissible in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature.
- (2) An inference shall not be drawn only from the fact that no such previous statements have been made.

As previously stated a large issue with the problem in gender-based violence is the reporting. This section provides that if a complainant does come forward, it will not work against them that they may not have reported the cases previously.

The implementation of the Maputo Protocol and CEDAW in these three acts go some way to addressing the issues of gender-based violence. It is still essential that this is implemented properly by Police officers and that law enforcement agencies have awareness of the issues surrounding gender-based violence, particularly against women.

International law relating to gender-based violence

International law generally focuses on women as victims of gender-based violence, and documents focusing on women's rights contain a number of provisions relevant to gender-based violence.

Convention on the Elimination of All Forms of Discrimination Against Women

The work of the UN related to this Convention, and the Committee on the Elimination of Discrimination Against Women have highlighted gender-based violence as a huge problem around the world.

This has led to the adoption of the UN Declaration of the Elimination of Violence against Women (1993). Article 3 of that Declaration highlights the human rights which are violated by a system tolerant of violence against women:

- (a) The right to life;
- (b) The right to equality;
- (c) The right to liberty and security of person;
- (d) The right to equal protection under the law;
- (e) The right to be free from all forms of discrimination;
- (f) The right to the highest standard attainable of physical and mental health;
- (g) The right to just and favourable conditions of work;
- (h) The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)

The Maputo Protocol was an addition to the African Charter focuses on the rights of women in Africa.

Article 4

1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.
2. States Parties shall take appropriate and effective measures to:
 - a) enact and enforce laws **to prohibit all forms of violence against women** including unwanted or forced sex whether the violence takes place in private or public;
 - b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the **prevention, punishment and eradication of all forms of violence against women**;
 - c) identify the causes and consequences of violence against women and **take appropriate measures to prevent and eliminate such violence**;
 - d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;
 - e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of

women victims;

f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;

This article demonstrates a high level of focus on the issue of violence against women in African human rights. This provision is amongst those which the Women's Act and Domestic Violence Act have focused on transposing into Gambian law.

Chapter 12 – Policing Cases Involving Children

Learning Outcomes:

- Consider the vulnerabilities of children which require protection by the police.
- Explain the principle which underpins interactions with children.
- Describe the procedure in the Gambia for police interaction, and justice administration of children.
- Outline the international and regional law and guidance relating to the protection of children.

Introduction

Children may come into contact with the Police and the law for a number of reasons:

- Children at risk/in need of care and protection
- Children as victims of crime
- Children as witnesses of crime
- Children as suspected offenders. Children in conflict with the law.

At each stage, the unique situation of children requires a modified approach to the normal procedure be taken for the protection of their rights. Children's rights has emerged since the adoption of the UN Convention on the Rights of the Child as a separate branch of international law, which is lead by principles such as the 'best interests' of the child, and the 'right to be heard'.

Children are more vulnerable than adults as they are often unable to support themselves within society. They inherently have less understanding of processes such as criminal justice and law enforcement, and of their place in society. To take account of these vulnerabilities these specialised principles and rules are developed for their protection. Police officers should be aware when in contact with children of the issues surrounding their protection with the criminal justice system.

Cases involving children in The Gambia

The Children's Act provides a comprehensive framework of legislation for child protection in The Gambia, the fundamental principles of this protection is outlined in Section 3:

Section 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.*

As shown in subsection (2), the 'best interest' of the child can be a broad consideration of a number of different factors which could have impact on any aspect of that child.

A child may be vulnerable in respect of any of the factors listed above, and any decisions made related to that child should bear this vulnerability in mind.

Section 4 of the Act provides for protection and care to be given to a child where necessary:

Section 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.*

Children may particularly come into need for protection and care when they are in contact with the system of law enforcement, such as in the event of the arrest of a parent, or if they are the victim of, witness to, or commissioner of, an offence.

Children as the commissioners of offences

Section 208

The legal status and fundamental rights of the child, set out in Part II of this Act [see Chapter 2 of this Manual] 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.*

This Section outlines the fundamental rights of children in conflict with the law, reflecting those considered imperative to adults. Other provisions dealing with child justice in the Act provide for more specialised procedures, and guarantees for protection.

Establishment of the Police Child Welfare Unit

The Act also creates a Police Child Welfare Unit. This Unit is a specialised arm of the Police who are mandated to use their specialised training to work on cases involving children in conflict with the law.

Section 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.*

Principles such as the child's 'best interests' and their dignity should be taken into account at all stages of the process. Provision is given for these in portions of that act dealing with arrest and charge of a child:

Section 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 as 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.***

As noted, the Act makes persistent deference to the judgment of those involved in determining the best interests of the child, which can be made with reference to the factors from Section 3. This highlights the need to deal with the situation of children in this situation on a case-by-case basis.

Children's Court

The Childrens Act provides for a specialised criminal justice procedure for juveniles, establishing a Children's Court in Part VI of that Act.

Section

68

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

Section 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 the child justice system and processes set out in this Act

The rules and procedure in place for the Children's Court allow for protection of the unique vulnerabilities of child defendants, and as such they should not be tried in the adult criminal justice system where they will be without these.

Section 72

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

(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 [...]

The Children's Court does retain the protection offered by the right to fair trial, and rules of due process, under Section 214.

International treaties relating to the child

UN Convention of the Rights of the Child

Adopted in 1989, the CRC outlines the key principles of children's rights:

Right to life, survival and development

Article 6

1. *States Parties recognize that every child has the inherent right to life.*
2. *States Parties shall ensure to the maximum extent possible the survival and development of the child.*

Best interests of the child

Article 3

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Non-discrimination

Article 2

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

Respect for the views of the child

Article 12

1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

These principles largely permeate through the provisions of the CRC, and in children's rights law more broadly. In particular, the best interests principle will always be tantamount when dealing with children in contact with the police, whether as defendants, witnesses or victims.

African Charter on the Rights and Welfare of the Child

An innovative document, representing the only regional instrument offering specialised protection to children, the African Charter on the Rights and Welfare of the Child implements many of the principles of the CRC, with some modifications made in the African context.

Soft law documents

Numerous soft law documents have been adopted internationally focusing on the rights of children:

- *UN Guidelines on the Prevention of Juvenile Delinquency (the Riyadh Guidelines) (1990)*
- *UN Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1985)*
- *UN Rules for the Protection of Juveniles Deprived of their Liberty (1990)*
- *UN Minimum Rules for Non-Custodial Measures (the Tokyo Rules) (1990)*

Children's Rights in Juvenile Justice Administration

The CRC provides for the administration of juvenile justice in Article 40:

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the **promotion of the child's sense of dignity and worth**, which reinforces the child's respect for the human rights and fundamental freedoms of others and **which takes into account the child's age** and the desirability of **promoting the child's reintegration** and the child's assuming a constructive role in society.
2. Due process rights:
 - Presumption of innocence
 - Inform promptly and directly of charge
 - Presence of parent or guardian
 - Access to legal assistance
 - Confidentiality and privacy of trial
 - No delay in trial
 - Presence of interpreter
3. (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

This article provides that juvenile justice should reflect generally the child's dignity and worth, and enforces the aim of reintegration of the child into society, and of avoiding criminal justice proceedings where possible.

The Convention also protects the right of the child to freedom from torture, right to liberty and for the rehabilitation and social reintegration of children:

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and **shall be used only as a measure of last resort** and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 39

States Parties shall take all appropriate measures **to promote physical and psychological recovery and social reintegration of a child victim** of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Training Guidance

Pedagogical devices:

Ice-breakers

i.e. Chapter 1 – ‘Who can name a human right?’ ‘Can you think of any examples of a human rights violation?’

Test the knowledge of the class before they start a chapter. Human rights issues permeate the news and many students may have ideas about the course content already. Getting the students to consider what they already know will allow them to apply the knowledge they gain in a lesson to their existing knowledge more easily.

Brainstorming

i.e. Chapter 12 – ‘What might be running through the mind of a child when they are arrested?’ ‘What might your priorities be on arresting a child to ensure their ‘best interests’?’

Get students to apply their knowledge from their experience or to empathise, and apply that knowledge to a question. Ask a question which as many people as possible can contribute something to, even if it's only small.

Small discussion groups

i.e. Chapter 8 – give a case to small groups with 4-5 participants in each, get them to focus on the treatment of the claimant in each case and prepare an answer on why it is torture.

Giving students a task, preferably on a handout, with a question which can be split down into parts between a group will encourage group discussion, but will allow them to report back with everyone having the chance to contribute. Set a clear time limit.

Recall

i.e. Chapter 3 – ‘Look at these examples of human rights – what are the different categories of human rights we learned last week?’ ‘What types of obligations could arise under this right?’

Test the ability of students to recall the material learned in a previous class by applying it to the current learning material. If they struggle to recall the information, then reiterate it simply. After repeating over weeks the students will begin to recall the information better.

Scenarios

i.e. Chapter 12 – “Let’s imagine you are an officer and encounter a 16-year old girl you suspect of committing a robbery. She has a 10-month old baby with her. She insists that the baby must stay with her. What will constitute the child’s ‘best interests’ here? Which child’s ‘best interests’ should you protect?”

Encourage students to debate a scenario that is contentious. This will encourage them to see how the principles apply in practice, and show the uncertainty with how the real world can actually be.

Role-play

i.e. Chapter 6 – Imagine a case where a search was conducted. Assign the roles of prosecutor/defence/detained person/police officer. Get the students to debate the various angles according to how their side would argue the case.

Role-plays can be used to get students thinking about how a procedure would occur in real-life, or to debate issues from a perspective they might not otherwise have chosen.

Test learning objectives

i.e. Chapter 11 – write down the learning objectives at the beginning of the class, at the end of the class spend five minutes discussing each one

Using the learning objectives to help students consolidate their thinking is a good method for ensuring retention. Objectives help to structure the class and discussion at the end can be a good sign of engagement with the material.

References And Further Reading

Human Rights Standards and Practice for the Police: Expanded Pocket Book on Human Rights for the Police, OHCHR

U.N. Professional Training Series No. 5/Add.3

<http://www.ohchr.org/Documents/Publications/training5Add3en.pdf>

Code of Conduct for Law Enforcement Officials

U.N. GA Res 34/169

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

U.N. GA Res 45/166

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

U.N. GA Res 43/173

<http://www.un.org/documents/ga/res/43/a43r173.htm>

Guidelines on the Role of Prosecutors

U.N. Congress on the Prevention of Crime and the Treatment of Offenders

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>

Declaration on the Elimination of Violence against Women

U.N. GA Res 48/104

<http://www.un.org/documents/ga/res/48/a48r104.htm>

UN Standard Minimum Rules for the Administration of Juvenile Justice

U.N. GA Res 40/33

<http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>

UN Rules for the Protection of Juveniles Deprived of their Liberty

U.N. GA Res 45/113

<http://www.un.org/documents/ga/res/45/a45r113.htm>

Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Criminal Prevention and Criminal Justice

U.N. GA Res 65/228

https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model_Strategies_and_Practical_Measures_on_the_Elimination_of_Violence_against_Women_in_the_Field_of_Crime_Prevention_and_Criminal_Justice.pdf

Module In Human Rights Law & Practice For The Gambia's Police Training School

1. Understanding Human Rights Concepts

Learning Outcomes:

- Explain the basic characteristics of human rights.
 - Describe the different types of rights and the forms of obligations they give rise to.
 - Know the different sources from which human rights obligations might come.
 - Consider why human rights education is important for law enforcement agencies.
- a. **Introduction: Why are law enforcement agencies concerned with human rights?**
 - b. **What are human rights?**
 - c. **Why are human rights important?**
 - d. **Characteristics of human rights**
 - e. **Categories of rights**
 - *Civil and political rights*
 - *Social and economic rights*
 - *Environmental, cultural and development rights*
 - f. **Types of obligation**
 - *Obligation to respect*
 - *Obligation to fulfil*
 - *Obligation to protect*
 - g. **Sources of human rights**
 - *Customary international law*
 - *Treaties*
 - *National constitutions*
 - h. **What constitutes a human rights violation?**
 - *Was the act a breach of national and/or international human rights law?*
 - *Who is responsible for the act?*

-State Actors

Some acts by non-state actors may fall under human rights law:

- *Armed opposition groups*
- *Multinational corporations*
- *Common criminals*

- i. **What type of obligation is the state under?**
- j. **Who monitors human rights?**
- k. **Human rights and the police**
 - *Does concern for human rights hinder effective police work?*

2. Human Rights Protection in Gambian Law

Learning Outcomes:

- Describe the basic landscape of human rights protection in the Constitution of The Gambia.
- Identify the relevant chapters of the Constitution, and other Acts where human rights protection is prominent.
- Consider how the Women's Act and the Children's Act have built on protection offered by the Constitution in the Gambia.

- a. **Introduction**
- b. **Chapter IV of the Constitution**
- c. **Chapter XX of the Constitution**
- d. **Women's Act and the Children's Act**
 - *Women's Act*
 - *Children's Act*
 - *Protection through criminalisation of conduct*

3. Regional and International Human Rights Obligations of The Gambia

Learning Outcomes:

- Identify the international treaties to which The Gambia is a party, and describe the types of rights protected by each.
- Identify the relevant regional mechanisms for the protection of human rights applicable to The Gambia.
- Explain the status of international legal obligations under Gambian law.

- a. **Introduction and terminology**

Treaties

- *General / Specific*
- *Multilateral / Bilateral*
- *Reservation / Declaration*
- *Derogation*
- *Signature / Ratification / Accession*
- *Entry into force*
- *Monist / Dualist*

Declarations

b. **Place of international law in The Gambia**

- *What if the laws of the Gambia are inconsistent with human rights?*

c. **International treaty obligations**

Treaties of general application

- *International Covenant on Civil and Political Rights*
- *International Covenant on Economic, Social and Cultural Rights*

Treaties of application to certain groups

- *International Convention on the Elimination of All Forms of Discrimination Against Women*
- *International Convention on the Elimination of All Forms of Racial Discrimination*
- *Convention on the Rights of Persons with Disabilities*
- *Convention on the Rights of the Child*

d. **Regional treaty obligations**

- *African Charter on Human and Peoples' Rights*
- *African Charter on the Rights and Welfare of the Child*
- *Protocol to the African Charter on the Rights of Women in Africa*

African Union treaties

- *The Constitutive Act of the African Union*
- *AU Convention Governing Specific Aspects of Refugee Problems in Africa*

e. **Types of obligations**

- *Substantive obligations*
- *Reporting obligations*

4. **Powers of the Gambian Police Force**

Learning Outcomes:

- Identify the different powers granted by law to the Gambian Police Force
- Describe the purpose for which those powers are to be used
- Identify the legal basis for those powers
- Consider the legal limitations of those powers

a. **Introduction**

b. **Arrest**

- *With a warrant*
- *Without a warrant*

Other reasons for arrest

- *In proximity to a police station*
- *Refusal to give name and residence*

c. **Searches and Seizures**

- *Search of persons or vehicles*
 - *stop and search*
 - *Search of premises*
- *Seizure and detention of articles*
- *Investigation of certain specific crimes*

d. **Instituting criminal proceedings and prosecution**

5. **Arrest Procedures and the Right to Personal Liberty**

Learning Outcomes:

- Recall the procedures for conducting a legal arrest.
- Consider the potential human rights implications of this power.
- Identify how individual provisions and safeguards aid the protection of the human right in The Gambia.

a. **Introduction**

b. **The right to personal liberty in Gambian law**

- *The Children's Act*

c. **The right to personal liberty in human rights law**

- *African Charter on Human and Peoples' Rights*
- *International Covenant on Civil and Political Rights*
- *Convention on the Rights of the Child*
- *African Charter on the Rights and Welfare of the Child*

Limitations on the right to personal liberty

Derogating from the right to personal liberty

d. **Guidance for protecting the right to liberty**

- *Grounds for arrest*
- *Procedural guarantees for arrest*
- *Rights of an arrested person*
- *Notification of rights*
- *Police custody*

6. Search Procedures and the Right to Privacy

Learning Outcomes:

- Outline the potential human rights violations associated with police power to search
- Consider the limitations on the right to privacy.
- Identify the legal bases for interference with privacy for the purpose of entering a premises to search.

a. **Introduction**

b. **The right to privacy in Gambian law**

- *Children's Act*

c. **The right to privacy in human rights law**

- *International Covenant on Civil and Political Rights*
- *Convention on the Rights of the Child*
- *African Charter on the Rights and Welfare of the Child*

Limitations on the right to privacy

d. **Search procedure under Gambian Law**

7. Dealing with Non-nationals in Conflict with the Law

Learning Outcomes:

- Understand the concept of nationality and how it may be determined if someone is a national of a state.
- Identify the level of human rights obligations owed towards non-nationals in a state's jurisdiction.
- Explain the problems often faced by non-nationals in a state, and which of these the Police may encounter.

a. **Introduction**

The concept of nationality

- *Means of effective link*
- *Chapter III of the Constitution of The Gambia*
- *Categories of non-nationals*

b. **Problems facing non-nationals**

Selected non-citizen groups facing the worst problems

- *Stateless persons*
- *Refugees and asylum-seekers*
- *Migrant workers and their families*

- *Domestic workers*
- c. **Protection of non-nationals in Gambian law**
- *Access to consular assistance*
- d. **International law and the protection of non-nationals**

Discrimination according to nationality

- *African Charter on Human and Peoples' Rights*
- *International Covenant on Civil and Political Rights*
- *International Convention on the Elimination of All Forms of Racial Discrimination*
- *Vienna Convention on Consular Relations*

8. **The Prohibition of Torture under International Law and Gambian Law**

Learning Outcomes:

- Define what torture means under international law, and what type of acts may constitute torture.
- Describe the circumstances in which torture can be legal.
- Consider the negative consequences of torture.
- Discuss the legal status of torture in the Gambia.

a. **Introduction**

b. **Torture in Gambian law**

- *Women's Act*

c. **The prohibition of torture in international law**

- *Universal Declaration of Human Rights*

Definition of torture

- *United Nations Convention Against Torture*

Three main elements of that definition:

- **Torture constitutes acute suffering**
- **Torture is inflicted for a purpose**
 - **Torture is inflicted by a public official, or with their instigation, consent, or acquiescence.**

Human Rights Committee

- **Treatment which constitutes torture**
- **Torture can be inflicted by persons acting in official capacity, or in a private capacity**

What acts may qualify as torture?

Treaties prohibiting torture to which The Gambia is a party

- International Covenant on Civil and Political Rights
- African Charter on Human and Peoples' Rights

Link between prohibition of torture and other rights

- *Convention on the Rights of the Child*
- *African Charter on the Rights and Welfare of the Child*

d. Meeting state obligations

- Negative consequences of torture
- Realising the prevention of torture

9. The Use of Force and Firearms by the Police

Learning Outcomes:

- Know the UN guidelines on when law enforcement officers should use force.
- Understand the principle of proportionality and understand how it should be applied to the use of force.
- Consider the occasions on which firearms should be used by police officers
- Describe the use of proportionality under Gambian law.

a. Introduction

b. Law of The Gambia on Police Use of Force

- *On arrest*
- *Firearms and the Police*

c. International law and police use of force

- UN General Assembly: Code of Conduct for Law Enforcement Officials
- UN Congress on the Prevention of Crime and Treatment of Offenders: Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

10. The Rights of Detainees and Prisoners

Learning Outcomes:

- Understand the underlying principle for the good treatment of persons deprived of liberty.
- Describe the rights which may be at issue with persons deprived of liberty.
- Outline the minimum standards for detention of the UN
- Identify groups who are particularly vulnerable, and note groups who should not be detained together.

- a. **Introduction**
- b. **The rights of detainees under Gambian law**
 - *Prisons Act*
 - *Children's Act*
- c. **The rights of detainees in international law**
 - *International Covenant on Civil and Political Rights*
 - *African Charter on Human and Peoples' Rights*
 - *Soft law documents*
 - *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)*
 - *UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) (2015)*
 - *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines) (2002)*
 - *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (2014)*
- d. **General Rights/Principles applicable for persons deprived of liberty**
 - *Basic Principles*
 - *Accommodation*
 - *Food and drink*
 - *Medical care*
 - *Socio-cultural rights*
 - *Access to the outside world*
- e. **Rights applicable to specific categories of persons deprived of liberty**
 - *Prisoners*
 - *Pre-trial detainees*
 - *Detainees in police custody*
- f. **Vulnerable groups of persons deprived of liberty**
 - *Women*
 - *Children*
 - *Persons with disabilities*
 - *Non-nationals*
- g. **Issues with the realisation of these rights**

11. Police and Gender-Based Violence Cases

Learning Outcomes:

- Describe what comprises gender-based violence.
- Explain some of the issues surrounding the policing of gender-based violence.
- Outline how the incorporation of the Maputo Protocol and CEDAW has strengthened protection for women in the Gambia.
- Consider the international reaction to gender-based violence.

a. **Introduction**

b. **Challenges in policing gender-based violence**

c. **Laws in the Gambia relating to gender-based violence**

- *The Constitution of the Gambia 1997*
- *Women's Act 2010*
- *Domestic Violence Act 2013*
- *Sexual Offences Act 2013*

d. **International law relating to violence against women**

- Convention on the Elimination of All Forms of Discrimination Against Women
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)

12. Policing Cases Involving Children

Learning Outcomes:

- *Consider the vulnerabilities of children which require protection by the police.*
- *Explain the principles which underpin interactions with children.*
- *Describe the procedure in the Gambia for police interaction with children.*
- *Outline the international and regional law relating to the protection of children*

a. **Introduction**

Children coming into contact with the police:

- *Children at risk/in need of care and protection*
- *Children as victims of crime*
- *Children as witnesses of crime*
- *Children as suspected offenders. Children in conflict with the law.*

b. **Cases involving children in The Gambia**

c. **Children as the commissioners of offences**

- *Establishment of the Police Child Welfare Unit*
- *Principle of 'best interests'*
- *Children's Court*

d. **International treaties relating to the child**

- *UN Convention of the Rights of the Child*
- *African Charter on the Rights and Welfare of the Child*
- *Soft law documents*
- *UN Guidelines on the Prevention of Juvenile Delinquency (the Riyadh Guidelines) (1990)*
- *UN Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1985)*
- *UN Rules for the Protection of Juveniles Deprived of their Liberty (1990)*
- *UN Minimum Rules for Non-Custodial Measures (the Tokyo Rules) (1990)*

e. **Children's Rights in Juvenile Justice Administration**

