

**TOWARDS A CHILD RIGHTS APPROACH; A COMPARATIVE ANALYSIS OF THE
JUVENILE JUSTICE REFORM PROCESS IN KENYA AND SOUTH AFRICA**

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LIST OF ABBREVIATIONS

ACRWC- African Charter on People and Human Rights

CJA- Child Justice Act

MACR- Minimum Age of Criminal Responsibility

NGO- Non Governmental Organisations

UNCRC- United Nations on the Rights and Welfare of the Child

UNICEF- United Nations Children Fund

EXECUTIVE SUMMARY

This thesis compares the laws and practice of child justice in Kenya and South Africa. Both in recognizing the vulnerability and impressionability of children have established separate systems for children in conflict with the law. However the practice on the ground fails to match up to the existing policies and also misses the mark set by international standards. South Africa does appear to offer more extensive protection to the child offender than Kenya. The two countries however set best practices in areas where they can both learn from each other. This study shall explore this.

The thesis is divided into five chapters. Chapter one defines juvenile justice and explores the international and regional instruments on juvenile justice bringing out the recurrent themes present in the instruments. These form the principles against which the child justice systems in Kenya and South Africa shall be measured.

Chapter two discusses the development of child justice from the 17th century to present day exploring the process first in western countries and the influence of western practices on the African continent with colonization and how this changed traditional dispute resolution mechanisms from rehabilitative to more retributive. It shows the development of the system from a welfare model to the justice model to the current systems where many countries have elements of both approaches.

The third chapter explores the laws of child justice in both countries in an attempt to lay the stage for an evaluation of the same against the practice on the ground and the international standards set out in Chapter 1. It discusses the various protections offered children in the laws of the two countries. With the new laws enacted in Kenya and South Africa that affect the child justice field, it's clear that the standards of protection have risen in both countries. However there are still some provisions that do not adequately meet these standards for example South African law that allows children to be held in prisons even at the pre-trial stage. Both laws also do not set the minimum age of criminal responsibility is not set according to international standards.

Chapter four assesses the difference between the law and practice in both jurisdiction and measures both against internationally accepted practice. It brings out the fact that there are huge gaps between what the law says in both countries and what is actually implemented on the ground. There are also instances where the law does not meet the standards set by internationally accepted principles on child justice. An example is the law as relates to detention as a measure of last resort, for the shortest period of time and not in the company of adults.

Lastly in chapter five the study shall conclude with a brief summary, some concluding observations as well as recommendations for both countries on what might work to remedy the weaknesses in both systems.

INTRODUCTION

Children make up more than half of the population of most countries¹. With the economic downturn leading to increased unemployment and with political upheavals mainly involving youth under 18 years of age the rate of offenses committed by children have greatly increased². This thesis delves into the juvenile justice systems of both Kenya and South Africa. The two countries have been lauded as being one of the top 10 countries in Africa with the best juvenile justice systems in the world. But is this true? The facts on the ground tell a different story. It may be that the laws of the two countries are ‘more honored in disobedience than obedience’³.

The thesis shall involve a comparative analysis of the juvenile justice systems in the two countries. This is in itself not an easy task. As Thomas Hammarberg, the Council of Europe Commissioner for Human Rights noted, ‘Comparative study of juvenile justice is a difficult exercise, complicated by the use of different definitions, the lack of data and differences in the way in which data are collected’⁴.

The child offender in both countries has a lot going against him. Most child offenders have social-economic factors working against them and contact with the criminal justice system leads to an entanglement with the law that continues for some of these children right to their adulthood. So what would stop this trend? What is the child focused approach that would respect the rights of the child caught in this system while at the same time rehabilitating them and

¹ <http://www.overpopulation.org/children.html>

² See <http://www.cjcp.org.za/crimestats/violentcrimesdetailed.htm>

³ See Muli wa Kyendo “Over 300 children held in Kenyan Prisons” available at <http://www.digitaljournal.com/article/264039>

⁴ Commissioner for Human Rights (2009) *Children and Juvenile Justice: Proposals for Improvements*, Strasbourg: Council of Europe, p.3

ensuring their reintegration into society? Which juvenile justice system would deal with the core issues that cause commission of the offence?

Over time research has shown that neither the justice nor the welfare approach applied independently is the answer to these questions. Both countries in this study contain elements of both. This thesis argues that the UNCRC and other legal instruments provide a new rights-based approach of dealing with child offenders that is disengaged from the whole debate between justice and welfare model. The child rights approach has been defined as an approach that seeks to ensure that a system 'is one that is consistent with international principles such as those contained in the UNCRC'⁵. The approach works to promote and protect the rights of the child offender within the criminal justice system while ensuring their rehabilitation and eventual reintegration. A child rights approach has also been propagated by the Committee on the Right of the Child⁶.

This thesis examines two countries in Africa; Kenya and South Africa. One of the reasons given for the enactment of the African Charter for the Rights and Welfare of the Child was that the UNCRC did not appreciate the socio- cultural and economic realities in Africa⁷. There are elements unique to Africa that may be addressed by a solution that is sensitive to this fact. There are traditional African dispute resolution mechanisms that work towards rehabilitation and reintegration as opposed to retribution. This thesis shall explore this aspect with South Africa

⁵ Community Law Center Child Justice in Africa; A Guide to Good Practise p67 available at www.communitylawcentre.org/za ; also See General Comment 10 Committee of the Rights of the Child (CRC/C/GC/10)

⁶ UNCRC Committee General Comment No.10: Children's Rights in Juvenile Justice 2007

⁷ Frans Viljoen, "State reporting under the African Charter on Human and People's Rights", Journal of African Law 2000 110-118

having already made significant steps in its laws to integrate such solutions in its laws. African traditional justice systems have a positive aspect to contribute to modern juvenile justice systems and what is actually known as restorative justice the new buzz word in the criminal justice sphere is deeply embedded in African customary law.

Both countries have suffered spates of violence that have increased youth crime. To counter this both have enacted laws that greatly influence the juvenile justice system. These laws; the Child Justice Act in South Africa and the new Constitution in Kenya came into force at the time of this study and only time will tell the practical effects these laws shall have in the child justice fields in the respective countries.

This work is divided into five parts. The first shall discuss the international and regional instruments on child justice laying a standard against which the two jurisdictions shall be measured. Chapter two shall discuss the development of juvenile justice from when separate infrastructure was established to deal with the child offender to present. The third chapter shall evaluate the child justice laws of Kenya and South Africa pointing out what protection they offer the child offender. The fourth chapter shall compare the laws discussed in chapter three with the practice on the ground as well as with the internationally recognized standards on child justice bringing out the gaps that exists. Lastly the study shall conclude with a summary and some recommendations on what could be done in each jurisdiction to fill these gaps.

CHAPTER ONE OVERVIEW OF JUVENILE JUSTICE

There are many diverse and conflicting theories concerning the treatment of offenders including child offenders. These include rehabilitation versus just deserts, protection of the community versus individualized treatment, welfare versus the justice approach⁸. This thesis shall not ascribe to any of these theories but shall instead seek to espouse internationally accepted principles that set a standard for the protection of the rights of the child offender.

Taking a child rights approach this chapter shall seek to bring out those principles which are recognized as best practice in the juvenile justice field. These must of necessity be practices that find expression in the international frameworks of child justice. They are also practices that can be replicated in other jurisdictions. This chapter shall seek to determine what juvenile justice entails as provided for in the various international legal frameworks on the issue. This study shall form the basis for evaluations in later chapters of juvenile justice systems in Kenya and South Africa to determine the extent to which they meet these international standards and what can be done to bridge the gap between ideals and the reality on the ground.

This analysis shall comprise an attempt to define juvenile justice, a brief look at each legal framework that touches directly on child justice and the Chapter shall end with a look at the recurrent themes that arise from the legal frameworks.

1.1 Juvenile Justice Defined

Juvenile justice has variously been defined as encompassing all aspects of the complex system of dealing with children and young people who commit offences⁹. In this sense the juvenile justice

⁸ See Commentary to Rule 17 of the Beijing Rules

⁹ Caroline Ball, et al., Young Offenders: Law, Policy and Practise 2nd Edition (London, Sweet & Maxwell,2001) 3.

process involves the whole process of the handling of the child offender from the time of arrest to the rehabilitation process and increasingly encompasses the period after rehabilitation¹⁰. This is the definition that shall apply for purposes of this paper.

In a criminology sense juvenile justice has been defined as “justice to the delinquent or near delinquent child in various stages of the formal process such as arrest and apprehension, adjudication, sentencing, custodial care, detention and after care”¹¹. In order to encompass those offenses that are not handled within the criminal justice system juvenile justice has also been defined to include all offences that are committed by children¹² “whether discovered or not, reported or not to the police or any other law enforcement agency, brought before a judicial, administrative or other body; sentenced or not”.¹³

A child offender is therefore “a child alleged as, accused of or recognized as having infringed the penal law¹⁴.” However as UNICEF accurately points out, juvenile justice affects not only children who commit crime but also “child victims of poverty, abuse and exploitation”.¹⁵

The issue of whether juvenile justice encompasses the period before the commission of a crime has been debated. Seeking to clarify this issue the Second UN Congress¹⁶ on Crime Prevention

¹⁰ The Department of Probation and After Care services in Kenya was formed under Cap 64 of the Laws of Kenya, Probation of Offenders Act with the provision of after care services as one of its central aims. See also the Governance Justice Law & Order Sector (GJLOS) Reform Programme website at <http://www.gjlos.go.ke/gjinner.asp?pcat2=agencies&pcat=vphomeaffairs&cat=probation>

¹¹ Ved Kumari, The Juvenile Justice System in India, from Welfare to Rights (Oxford University Press, 2004) 4

¹² The United Nations Convention on the Rights of the Child (UNCRC) in Article 1 defines a child as every human being below the age of eighteen years.

¹³ UNICEF (2004), Justice for Children: Detention as a last resort. Innovative Initiatives in the East Asia and Pacific Region (New York: UNICEF) 7

¹⁴ Article 40 of the UNCRC

¹⁵ UNICEF (2004), Justice for Children: Detention as a last resort. Innovative Initiatives in the East Asia and Pacific Region (New York: UNICEF) 6

and Treatment of Offenders stated that justice before the onset of delinquency referred to social justice which is relevant to the development of children. Justice after delinquency referred to treatment of accused or adjudicated young offenders. The two could not be separated for purposes of discussion on juvenile justice especially as far as prevention was concerned¹⁷.

The other difficulty in measuring what constitutes juvenile delinquency is the whole discussion surrounding status offences. Status offences as relates to juvenile justice are offences which if committed by an adult would not constitute a crime¹⁸. They include such acts as sexual activity, running away and consuming alcohol. The Second UN Congress on Crime Prevention and Treatment of Offenders recommended limiting the scope of juvenile delinquency to violations of criminal law and leaving out vaguely anti social behavior and acts of rebellion that are common to the growing up process¹⁹.

Further Article 56 of the Riyadh guidelines²⁰ prevents the criminalization of status offenses. Still some jurisdictions especially in the United States recognize status offenses as criminal. Other jurisdictions have headed the guidelines and recognize as offences only those acts that if committed by an adult would be considered a crime²¹. This disparity has created confusion as to the expanse of juvenile justice.

¹⁶ London 1960

¹⁷ Wolf Middendorff, New Forms of Juvenile Delinquency: their origin, prevention and treatment report presented during Second UN Congress on Crime Prevention and Treatment of Offenders (London 1960)

¹⁸ Tiffany Rose, Juvenile Justice and the Status Offense: a Justification for the current system (unpublished paper)

¹⁹ See Geert Cappelaere Introduction to United Nations Guidelines for the Prevention of Juvenile Justice Defence for Children International 1995

²⁰ United Nations Guidelines for the Prevention of Juvenile Delinquency

²¹ Wolf Middendorff, New Forms of Juvenile Delinquency: their origin, prevention and treatment report presented during Second UN Congress on Crime Prevention and Treatment of Offenders (London 1960) 1

1.2 Juvenile Justice in the International context

The development of human rights in general was enhanced by their recognition in the international sphere as universal. However Child rights were not given requisite attention until the drafting of the UNCRC in 1989, 41 years after the drafting of the Universal Declaration of Human Rights.

The first international instrument to recognize the rights of the child was the Geneva Declaration of the Rights of the Child adopted by the League of Nations in 1924²² but its implementation failed with the dissolving of the League. Regardless the Geneva Declaration was a testament to the fact that children occupy a special place in society that necessitates recognition of separate provisions for the rights of the child in the international realm. The UNCRC which was adopted in 1989 and came into force in September 1990 is based on this declaration.

1.2.1 The United Nations Convention on the Rights of the Child (UNCRC)

The Convention deals with a wide range of child rights including civil and political, social, cultural and economic rights. It also provides a framework within which juvenile justice is to be understood. The issue of child justice is provided for in Articles 37 and 40 of the Convention.

Article 40 (1) provides that a child alleged to have or who has committed an offence shall 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

²² This document was drafted and approved by Save the Children International Union (SCIU). SCIU played a pivotal role in propagating child rights after World War 1. See Lara Bolzman, “The Advent of Child Rights on the International Scene and the Role of the Save the Children International Union 1920- 45”, *Refugee Survey Quarterly* (2008) 26-36. See also Save the Children Website at http://www.savethechildren.net/alliance/about_us/history.html

which take into account the child's age and the desirability of promoting the child's reintegration and the child assuming a constructive role in society.”

The UNCRC proposes a child centered approach setting a very high standard to be achieved by state parties²³. Article 37 provides for due process rights of the accused child and prohibits the imposition of capital punishment and life imprisonment without parole on a child offender. The UNCRC also emphasizes the need for diversion²⁴ and alternative sentences²⁵.

Impact

For Kenya and South Africa the ratification of the UNCRC and later the African Charter for the Rights and Welfare of the Child (ACRWC) created climate for re evaluation of their own national laws on the child²⁶. Soon after the ratification of the UNCRC by Kenya in July 1990 the Child law reform process started which resulted in the Children Act of 2001. In South Africa the juvenile justice law reform process started with the formation of the South African Law Reform Commission's (SALRC) Project Committee on Juvenile Justice which culminated in the Child Justice Bill 49 of 2002²⁷.

The UNCRC is a treaty and is thus binding on the parties to it²⁸. It is however not self executing and requires legislative provisions to bring it into effect in the national realm. Both Kenya and

²³ See Anne Skelton and Tshehla B, Child Justice in South Africa Institute for Security Studies Monograph 150 September 2008 17

²⁴ Article 40 (3) (b)

²⁵ Article 40 (4)

²⁶ Godfrey Odongo “The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context” in Julia Sloth-Nielsen (ed) Children's Rights in Africa (Cornwall, MPG Books Ltd, 1998) 148

²⁷ Ibid 149

²⁸ Vienna Convention on the Law of Treaties Article 26

South Africa have ratified the Convention²⁹. In Kenya the UNCRC is domesticated through the Children Act³⁰ which in its preamble states that it aims to give effect to the provisions of the Convention. In South Africa though no such statute exists, international law is recognized by the courts³¹. Article 39 (1) of the South African Constitution provides that a Court must consider international law and may consider foreign law in interpreting the bill of rights which covers the rights of a child offender. Further Article 233 of the Constitution provides that in interpreting legislation, the Court should favor reasonable interpretation that is consistent with international law³².

1.2.2 The United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)

These guidelines commonly referred to as the Riyadh Guidelines were adopted in 1990 one year after the UNCRC came into force. They make provision on measures necessary to prevent children from committing crimes. The guidelines have been criticized for their verbosity ‘with many complex ideas being linked together in intricate statements’³³. It is however understandable that there is no easy answer as to the question of how to prevent crime let alone

²⁹ It was ratified by Kenya on 30 Jul 1990 and South Africa on 16 Jun 1995

³⁰ Act 8 of 2001

³¹ In its first case the South African Constitutional Court in S v Makwanyane 1995 (3) SA 391 (cc) (S. Afr) relied on the ICCPR and other international legal instruments to find the death penalty unconstitutional

³² See also Andrews, Penelope Incorporating International Human Rights Law in National Constitutions: The South African Experience (July 12, 2008) Progress in International Law, Russell Miller & Rebecca Bratspies eds 2008. Available at SSRN: <http://ssrn.com/abstract=1159119>

³³ See Anne Skelton and Tshehla B, Child Justice in South Africa Institute for Security Studies Monograph 150 September 2008 18

prevent children from offending. Any answer must of necessity be interlinked with social philosophy that it inevitably cannot be short and succinct³⁴.

The guidelines take a pro active approach to prevention, are very comprehensive and view the child as a fully fledged member of society emphasizing their participation on the prevention process³⁵. This is indicative of the changing attitude of society as to the role of the community in the prevention of juvenile delinquency and the place of the child as a rights bearer.

Impact

The guidelines are soft law and thus not binding for international and national legislative institutions. Geert Cappelaere however argues that although not directly binding, these guidelines are indirectly binding³⁶. Article 7 of the guidelines provides for the interpretation and implementation of the guidelines within the broad framework of other human rights instruments like the UDHR³⁷, ICCPR³⁸ and the ICESCR³⁹. These three instruments are binding treaties. This link can therefore be helpful in enforcing the guidelines⁴⁰. The guidelines have however received very little recognition in South Africa⁴¹ or in Kenya⁴².

³⁴ See Anne Skelton, Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice, Acta Juridica 184. Skelton states that because prevention is intricately connected with issues of social philosophy it perhaps needs more words than usual to formulate provisions on such matters.

³⁵ Geert Cappelaere Introduction to United Nations Guidelines for the Prevention of Juvenile Delinquency Defence for Children International 1995

³⁶ Ibid

³⁷ Universal Declaration of Human Rights

³⁸ International Covenant on Civil and Political Rights

³⁹ International Covenant on Economic, Social and Cultural Rights

⁴⁰ Ibid

⁴¹ See Anne Skelton and Tshehla B, Child Justice in South Africa Institute for Security Studies Monograph 150 September 2008 20

⁴² The latest government initiative to counter the problem of youth crime in Kenya has come in the form of *Kazi kwa Vijana* (Swahili for Employment for the Youth) Programme. The programme like many crime prevention initiatives before it was based on political motives and no reliance was placed on these guidelines to provide direction. <http://www.communication.go.ke/media.asp?id=829>

1.2.3 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)

These rules pre date the UNCRC as they were adopted by the United Nations in 1985. They are expressly mentioned in the preamble of the UNCRC and some of the fundamental provisions of the rules are incorporated into the Convention⁴³. The rules provide guidelines for States in protecting child rights and providing for the child's needs in the creation of separate and specialized infrastructure for juvenile justice⁴⁴. They were the first international legal instrument to comprehensively deal with the issue of the administration of juvenile justice stressing a child rights approach⁴⁵.

Impact

These rules are non-binding per se. However as previously stated when read with related instruments they may be viewed as having a stronger legal force⁴⁶.

1.2.4 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDL Rules)

These rules deal with the category of child offenders deprived of their liberty. These include those held in custody at the pre-trial and trial stage as well as those committed to rehabilitation institutions⁴⁷. The principle message of the JDLs is that deprivation of liberty ought to be a measure of last resort and even then it should be for “the minimum necessary period” and

⁴³ For example issues of non-discrimination and detention as a measure of last resort and for the shortest period possible

⁴⁴ Geert Cappelaere Introduction to United Nations Standard Minimum Rules for the Administration of Juvenile Justice Defence for Children International 1995

⁴⁵ Ibid

⁴⁶ See also Anne Skelton and Tshehla B, Child Justice in South Africa Institute for Security Studies Monograph 150 September 2008 16

⁴⁷ Ibid 24

“limited to exceptional cases”⁴⁸. The importance of this provision can be gleaned from the fact that it is repeated in more or less the similar terms by the other instruments⁴⁹. Article 1 emphasizes a child rights approach providing that ‘the juvenile justice system should uphold the rights and safety and promote the physical and mental well being of juveniles.’ The purpose of the JDL Rules is “to counteract the detrimental effects of deprivation of liberty by ensuring respect for the human rights of juveniles”⁵⁰.

These rules provide for a monitoring and evaluation mechanism through regular and unannounced inspections⁵¹ and an independent complaints procedure⁵². They also have comprehensive provisions for the management of juvenile facilities including the physical environment and accommodation⁵³, education⁵⁴, medical care⁵⁵ and disciplinary measures⁵⁶.

Impact

Kenya has only partly implemented these rules and a lot remains to be done⁵⁷. In South Africa there remain a significant number of children held in detention⁵⁸ and the impact of the JDL Rules has not been recorded. Data collected as at February 2006 for secure facilities and March 2006

⁴⁸ Article 2 United Nations rules for the Protection of Juveniles Deprived of their Liberty

⁴⁹ Rule 17 Beijing Rules, 46 Riyadh Guidelines, Article 37 UNCRC

⁵⁰ Defence for Children International (2003) *Kids behind Bars: A Study on Children in conflict with the law: towards investing in prevention, stopping incarceration and meeting international standards*, Amsterdam: Defence for Children International, p. 12 (available at www.kidsbehindbars.org accessed 6th February 2010)

⁵¹ Article 72

⁵² Article 78

⁵³ Rule 31- 37

⁵⁴ Rule 38-46

⁵⁵ Rule 49-55

⁵⁶ Rule 66- 71

⁵⁷ ⁵⁷ Defence for Children International (2003) *Kids behind Bars: A Study on Children in conflict with the law: towards investing in prevention, stopping incarceration and meeting international standards*, Amsterdam: Defence for Children International, p. 67 (available at www.kidsbehindbars.org accessed 6th February 2010)

⁵⁸ See also Anne Skelton and Tshehla B, Child Justice in South Africa Institute for Security Studies Monograph 150 September 2008 25

for prisons shows that there were a total of 2729 unsentenced children in custody⁵⁹. 57% of these were held in secure facilities and 43% were in prisons⁶⁰.

1.2.5 African Charter on the Rights and Welfare of the Child

This Charter was adopted in 1990 by the then Organization of African Union but only came into force in 1999. Kenya ratified it on 25 July 2000 while South Africa ratified it on 7 January 2000⁶¹. It derived from the sentiment that the UNCRC failed to consider the socio- cultural and economic realities in Africa⁶². The Charter makes extensive provisions for the protection of the rights of the child⁶³ but does not adequately provide for the rights of the child offender. It for example does not state the recurrent theme in all legislation on child justice, that detention shall be the last resort and that no child shall be deprived of their liberty in an arbitrary or unlawfully manner. There has been concern that these were left out deliberately⁶⁴. Fortunately for South Africa and Kenya, these important provisions are included in the Constitution⁶⁵.

1.2.6 Overall message of the Instruments (Recurrent themes)

There are certain principles or themes that are enunciated in the legal frameworks that form the basis of a model juvenile justice system in any country. This section shall expound on what this principles are in an attempt to form a standard against which to compare the juvenile justice systems in both Kenya and South Africa.

⁵⁹ Muntingh Lukas Child Justice Alliance: A Quantitative Overview of Children in the Criminal Justice System Child Justice Alliance University of western Cape 2007 9

⁶⁰ Ibid

⁶¹ <http://www.africa-union.org/child/home.htm>

⁶² Frans Viljoen, "State reporting under the African Charter on Human and People's Rights", Journal of African Law 2000 110-118

⁶³ It makes provisions for handicapped children (Article 13), children in armed conflict (Article 22) against child labor (Article 15) amongst others

⁶⁴ Gose The African Charter and the Rights and Welfare of the Child Community Law Center 2002 67- 75

⁶⁵ Section 28 (1) (g) and section 53 respectively

Rule 5 of the Beijing Rules lays down the aims of juvenile justice to be two fold; promoting the well being of the juvenile and ensuring that any reaction to the child offenders shall “always be in proportion to the circumstances of both the offenders and the offence”. The principles discussed in this chapter are based on these two core principles.

1.2.6.1 Child Participation

The legal instruments discussed previously hold as a core principle the right of the child to have a say in matters affecting them. The UNCRC in Article 12 (1) states that, “ 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 the maturity of the child”. The article proceeds to emphasize the need of the child to be heard in judicial or administrative proceedings being held against him whether directly or through a representative. This may necessitate the provision of legal aid to the child to ensure that the child is actually heard.

The right to be heard is a core part of a fair trial and must be respected at every stage of the criminal justice process⁶⁶. For this right to be effective the Committee on the Rights of the Child has stressed the need for the child to be informed not only about the charges but about the whole criminal justice process that is facing him and the measures that may be imposed⁶⁷. Similarly Rule 14.2 of the Beijing Rules states that the judicial proceedings “shall be conducted in an

⁶⁶ Committee on the Rights of the Child General Comment No.10: Children’s Rights in Juvenile Justice 2007 CRC/C/GC/10, Paragraph 43-45

⁶⁷ Ibid Paragraph 44

atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely”.

The recognition of the child’s right to be heard and to participate in proceedings against him is a shift from the paternalistic attitude where the child was viewed as an object rather than a subject of the juvenile justice system⁶⁸. This is most clearly stated in Article 3 of the Riyadh Guidelines which states, “Young persons should have an active role and partnership within the society and should not be considered as mere objects of socialization or control”.

In the development of preventative policies that ensure the successful integration and socialization of children the guidelines emphasize the need to accept the children as ‘full and equal partners in socialization and integration processes’⁶⁹. And in order for schools to play a role in the prevention of delinquency process the Riyadh guidelines provide that ‘students should be represented in bodies formulating school policy, including policy and decision making’⁷⁰. The need for child participation in ensuring the success of delinquency prevention measures is also seen in the Social Policy chapter of the Riyadh Guidelines Article 50 of which provides that ‘participation in plans and programmes should be voluntary. Young persons themselves should be involved in their formulation, development and implementation’.

Child participation is therefore a central theme of the international legal framework on juvenile justice.

⁶⁸ See Sloth- Nielsen, Julia Child Justice in Africa: A guide to Good Practice Community Law Center 18

⁶⁹ Article 10 Riyadh Guidelines

⁷⁰ Article 31 U.N Guidelines for the Prevention of Juvenile Delinquency

1.2.6.2 Best interest of the child

The second principle of juvenile justice is the best interest of the child principle. Every provision of the UNCRC is premised on this principle. Article 3 of the Convention provides that, ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration’.

As such this principle guides all provisions of the UNCRC including those that make provision for the treatment of child offenders⁷¹. The broadly stated Article indicates that the best interest principle is not confined to the decisions of courts of law alone but also includes administrative decisions and policy formulations that affect the child⁷². The best interest principle therefore means that repression/ retribution must give way to rehabilitation and restorative objectives of the criminal justice system where children are concerned⁷³.

The best interest principle can also be read into the Beijing Rules’ provision that juvenile justice shall ‘emphasize the well being of the juvenile⁷⁴’. There can be no doubt that the juvenile justice system is meant to help and not hurt the child offender. In this regard the general guarantees of the UNCRC also apply to the child offender including prohibition of child labor, protection from sexual exploitation, education and leisure⁷⁵.

⁷¹ Sloth- Nielsen, Julia Child Justice in Africa A guide to Good Practice Community Law Center 18

⁷² Ibid

⁷³ UNCRC Committee General Comment No.10: Children’s Rights in Juvenile Justice 2007 comment 4b

⁷⁴ Rule 5 Beijing Rules

⁷⁵ Defence for Children International (2003) *Kids behind Bars: A Study on Children in conflict with the law: towards investing in prevention, stopping incarceration and meeting international standards*, Amsterdam: Defence for Children International, p. 12 (available at www.kidsbehindbars.org accessed 6th February 2010)

1.2.6.3 Non- discrimination

Non-discrimination is a central principle of juvenile justice⁷⁶. Article 2 of the UNCRC calls for State parties to respect the rights of the child ‘without discrimination of any kind’. The Convention takes a proactive approach urging States to ‘take all appropriate measures’ to ensure that the child is protected from all forms of discrimination. This principle underpins all treatment of the child and thus encompasses child justice.

The CRC Committee calls for equal treatment of all child offenders within the juvenile justice system⁷⁷. The categories of children vulnerable to discrimination include street children, racial and religious minorities, girls, children with disabilities and those who have repeatedly been offenders⁷⁸. Consequently the CRC Committee calls for the adequate training of staff as well as the setting down of laws and regulations that enhance equal treatment⁷⁹.

Similarly as much as a child should not be discriminated against while within the criminal justice system they should not be discriminated when they get out of it. Labeling and profiling are one of the major hurdles that a child offender faces in the rehabilitation process even after completion of the ‘treatment order’. Consequently appropriate support should be given to the child to ease the reintegration process⁸⁰.

⁷⁶ Article 2 UNCRC; Rule 4 JDL Rules; Rule 2.1 Beijing Rules

⁷⁷ UNCRC Committee General Comment No.10: Children’s Rights in Juvenile Justice 2007 comment 4a

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Ireland: Detention of Children in Ireland International Standards and Best Practise (Jan. 28, 2010). Available at http://www.crin.org/docs/IPRT_Detention_of_Children_in_Ireland.pdf

1.2.6.4 Principle of proportionality

A model juvenile justice system recognizes the age of the offender appearing before it. Rule 5 of the Beijing Rules states this principle to be one the aims of juvenile justice stating that this system ‘shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence’.

The proportionality principle is used to curb mainly the use of punitive sanctions⁸¹. It calls for the personal circumstances of the offender to be taken into account in any action concerning the offender. The social status, family situation and willingness of the offender to reform should all be considered⁸².

At the same time the Rules recognize the danger of such measures going beyond what is necessary and in this way infringing on the rights of the child offender. In this regard the commentary states that Rule 5 ‘calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime’.

1.2.6.5 Detention as a last resort

The legal frameworks provide for the restriction of institutionalization in quantity (by requiring it to be a measure of last resort) and in time (that it should be for the minimum necessary period)⁸³.

These two standards introduced by the Beijing Rules, were an improvement to the common rule

⁸¹ Commentary Rule 5 UN Standard Minimum Rules for the Administration of Juvenile Justice

⁸² Ibid

⁸³ Rule 13.1 and 19 of Beijing Rules; Article 37 (b) of the UNCRC; Rule 2 of the JDL Rules

preventing arbitrary and unlawful detention provided for in numerous international legal instruments⁸⁴.

Pre- trial detention

Detention pending trial shall be as a last resort and for the minimum time possible⁸⁵ and as much as possible pre-trial detention should be replaced with alternative measures such as close supervision and placements with family or education institutions⁸⁶. The CRC Committee recommends that the ‘duration of pre-trial detention should be limited by law and be subject to regular review’⁸⁷. Upon apprehension of the child the judge or other competent official should consider release at the earliest opportunity possible⁸⁸ and where pre- trial detention is unavoidable then measures should be taken to prevent ‘criminal contamination’⁸⁹ by separating the children from the adults⁹⁰ and by any other effective measures⁹¹.

Despite the fact that detention pending trial should be the exception rather than the rule⁹² in many States it has instead been used as standard practice. In South Africa statistics collected as on 28 February 2007 show that there are more unsentenced children in prison (56%) than sentenced (44%)⁹³. In Kenya as of 5 June 2009 43.3 % of the total prison population consisted of

⁸⁴ UNCRC Committee General Comment No.10: Children’s Rights in Juvenile Justice 2007 comment 28

⁸⁵ Rule 13.1 Beijing Rules

⁸⁶ Rule 13.2 Beijing Rules

⁸⁷ UNCRC Committee General Comment No.10: Children’s Rights in Juvenile Justice 2007 comment 28

⁸⁸ Rule 10.2 Beijing Rules

⁸⁹ See commentary to Rule 13 Beijing Rules

⁹⁰ Rule 13.4 Beijing Rules

⁹¹ See commentary to Rule 13 Beijing Rules

⁹² Article 9 (3) ICCPR

⁹³ Muntingh Lukas Child Justice Alliance: A Quantitative Overview of Children in the Criminal Justice System Child Justice Alliance University of western Cape 2007 11

pre-trial detainees⁹⁴. The impact of this on the rights of the child shall be discussed in greater details in later chapters. Suffice it to say that a lot still needs to be done to limit the use of pre-trial detention in both countries.

Institutionalization as a rehabilitation measure

The legal instruments call for alternatives to institutionalization as a rehabilitation technique such as probation, compensation, community service orders and supervision orders⁹⁵. The commentary to Rule 18 of the Beijing Rules emphasizes the place of the community in any rehabilitation technique applied to the child. The family's role should also not be undermined. Separation of the child from his family should be a measure of last resort⁹⁶.

A model juvenile justice system in institutionalizing a child aims, “to provide care, protection, education and vocational skills, with a view to assist them to assume socially constructive and productive roles in society”⁹⁷. Even with recourse to institutionalization there are modifications advocated to minimize its effects. The child can be released on conditions before the end of term (conditional release)⁹⁸ as well as recourse to ‘semi- institutionalization arrangements’⁹⁹. Rule 23.2 of the Beijing Rules also gives leeway to modify treatment orders allowing for a competent authority to modify institutionalization orders where he deems it necessary.

⁹⁴ International Center for Prison Studies Prison Brief for Kenya available at

http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wp_country.php?country=25

⁹⁵ See Rule 18.1 Beijing Rules.

⁹⁶ Rule 18.2 Beijing Rules. The ICESCR in Article 10 paragraph 1 refers to the family as the ‘the natural and fundamental group unit of society’. The family therefore plays a crucial role in ensuring the success of the rehabilitation of the child offender

⁹⁷ Rule 26 Beijing Rules

⁹⁸ Rule 28 Beijing Rules

⁹⁹ Rule 29 Beijing Rules

1.2.6.6 Diversion

In an effort to prevent the negative effects of criminal justice process the international legal frameworks on child justice emphasize the need where appropriate to divert the case from the trial process to other formal or informal alternatives provided human rights and legal safeguards are upheld¹⁰⁰. Rule 11(1) Beijing rules envisages involvement of the community in the diversion process with the caveat that any diversion involving community service shall only be done with the consent of the juvenile or his parents¹⁰¹.

The Beijing Rules encourage diversion where the offence is not serious and where ‘the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner’¹⁰². This ambiguity plus the discretionary nature¹⁰³ of diversion has unfortunately resulted in it not being considered the priority measure when dealing with juvenile offenders. Article 40 of the UNCRC has been interpreted as requiring States at the very least to develop legislation, guidelines and directives to ensure recourse to diversion¹⁰⁴.

However respect for human rights and legal safeguards override the need for diversion. Consequently, where a child insists on their innocence, they have a right to have their innocence established by court¹⁰⁵.

¹⁰⁰ Article 40 (3) (b) UNCRC, Rule 11 (1) Beijing Rules

¹⁰¹ Rule 11 (3) Beijing Rules

¹⁰² Commentary Rule 11 Beijing Rules

¹⁰³ Rule 11.2 Beijing Rules

¹⁰⁴ Sloth Nielsen Julia

¹⁰⁵ Sloth- Nielsen, Julia Child Justice in Africa A guide to Good Practice Community Law Center 24

1.2.6.7 Specialized legislation and procedures

Article 40(3) of the UNCRC makes a crucial provision calling for States to ‘promote the establishment of laws, procedures, authorities and institutions’ that are specific to child offenders. This provision forms the basis for the separate statutory provisions and infrastructure for child offender within the penal system¹⁰⁶. It also calls for training of judges, police officers, probation officers and other authorities that come into contact with a child offender¹⁰⁷. Article 12 of the Beijing Rules calls for the specialized training of all law enforcement officials who frequently or exclusively deal with child offenders. Where the jurisdiction is large then a specialized police unit for this purpose should be set up¹⁰⁸.

1.2.6.8 Dignity

Treatment that is consistent with the child’s sense of dignity is central to juvenile justice. Article 40 calls upon State parties to treat child offenders ‘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’. The UNCRC also makes explicit mention of the right to dignity and worth in its preamble. The child should be treated in cognizance of this right at all stages of the criminal justice process from arrest through to trial and treatment.

The legal instruments make numerous provisions based on respecting the child’s dignity. A child shall not be subjected to inhumane and degrading treatment or punishment¹⁰⁹. Hence all forms of torture, capital punishment and corporal punishment are prohibited as far as a child is

¹⁰⁶ Ibid 23

¹⁰⁷ Ibid

¹⁰⁸ Rule 12.1 Beijing Rules

¹⁰⁹ Article 37 (a) UNCRC

concerned¹¹⁰. Clothing worn by child offenders in institutions should not be humiliating or degrading¹¹¹ and there ought to be supervision of the sleeping areas in the institutions to ensure protection of the child but the same should be unobtrusive¹¹².

Conclusion

The patchwork of correct practices that happens in a country is negated by the bad practices that violate the rights of the child offender. There needs to be streamlining of the approach towards juvenile justice. This thesis shall evaluate the gaps and recommend what still needs to be done to achieve a rights based approach to juvenile justice. As will be shown, the Kenyan and South African juvenile justice systems do not quite fit the requirements laid down in the international instruments. However South Africa has in policy¹¹³ and in practice made greater attempts to meet these requirements.

¹¹⁰ Ibid

¹¹¹ Rule 36 JDL rules

¹¹² Rule 33 JDL Rules

¹¹³ The South Africa Child Justice Act has in 2008 and brought into force the Child Justice Act

CHAPTER 2 DEVELOPMENT OF JUVENILE JUSTICE

2.1 Development of Juvenile Justice in general

Any understanding or review of the current juvenile justice systems in Kenya and South Africa and indeed in any country must begin with a basic discussion of how society has treated the child offender over the years and what this treatment has meant for the rights of the offender.

In Africa the idea that a child has rights and freedoms is relatively recent. A common African adage is that a child is to be seen not heard. Their rights did not exist outside the rights of the community¹¹⁴. In Western countries also children were commonly shipped off to sea or apprenticed in their early teens by their parents¹¹⁵. The situation improved drastically in the 20th century with the internationalization of human rights.

The rationale for the different treatment of children and adults in the criminal justice system has evolved over many years. The gradual juvenile system reforms in the United States and in Britain sought to address the effects of the industrial revolution which had led to ill health, poor housing and poverty¹¹⁶. The current situation arose from heart wrenching reports of children mistreated by adults in holding cells and sentenced to hard labor¹¹⁷. The reforms were founded both on philanthropy as well as a need for social control¹¹⁸. Thus separate courts and rehabilitation institutions for young offenders developed both out of a genuine concern for the children's welfare as well as a need to prevent these children from developing into criminals in their adulthood.

¹¹⁴ Jomo Kenyatta Facing Mount Kenya: The Tribal Life of the Kikuyu (UK, Vintage Publishers, 1962)

¹¹⁵ Cynthia P. Cohen, The Developing Jurisprudence of the Rights of the Child, (6 St Thomas L. Rev. 1993) 1,9

¹¹⁶ See P. Parsloe, Juvenile Justice in Britain and the United States (London, Routledge, 1978) 15

¹¹⁷ Caroline Ball, et al., Young Offenders: Law, Policy and Practise 2nd Edition (London, Sweet & Maxwell, 2001) 3

¹¹⁸ Ibid

The original ideas for a separate juvenile court stemmed from the welfarist approach¹¹⁹. This approach aims at meeting the needs of a child as opposed to focusing on its deeds¹²⁰. The child's welfare is its most important consideration. The legal basis for the concept is the doctrine of *parens patriae* which was discredited in *Re Gault* as being unclear in meaning and which could not be traced to 'the history criminal jurisprudence'¹²¹

The justice approach is more punitive compared to the welfare approach as shall be shown later in this chapter. The welfarist approach spread to the United States, the United Kingdom, Canada and Australia and dominated as far as the treatment of the child offender was concerned for around 70 years¹²².

In the U.S the juvenile court movement began in the late 19th century with the adoption of the juvenile court statute in Illinois in 1899¹²³. The reformers felt that the system instead of rehabilitating children criminalized them even more¹²⁴

The welfarist approach was characterized by the notion of child saving, the popular justification for the separate institutions for the child offender. The child was basically presented as a hopeless being with minimum intelligence needing rescuing from himself and the task of rescuing the child fell on the State. The child was incapable of legal blameworthiness and could

¹¹⁹ Ann Skelton & Boyane Tshela Child Justice in South Africa September 2008 pp 8,9

¹²⁰ Ibid

¹²¹ 387 U.S 1 (1967) (Fortas J)

¹²² Ann Skelton & Boyane Tshela Child Justice in South Africa September 2008 pp8,9

¹²³ Julian W Mack "The Juvenile Court" in Harvard law review Vol. 23, No2 (Dec 1909) p107

¹²⁴ Ibid

not truly be at fault for their criminal conduct. This attitude led to paternalistic legal regulation of child offenders. With this view the reformers rejected anything that conflicted with ‘child saving’. Any aspect of the adult criminal justice system was not to apply to the child¹²⁵. In the case of a child offender the society had to go beyond justice. It had to consider the personal circumstances of the child and decide what action was in his best interest that would save him from transforming into a career criminal¹²⁶. The juvenile court was considered the ‘institution that would intervene forcefully in the lives of all children at risk to effect a rescue’¹²⁷. And the separate institutions would simultaneously protect the community and save the child¹²⁸.

What this meant in practice was wide discretion given to judges and the individualized treatment of the child¹²⁹. Measures were taken when they were considered necessary to rehabilitate that particular child. The severity of each case depended on the particular circumstances¹³⁰. The child was to be taken into the hands of the State who as the ‘ultimate guardian’ was to guide the child towards ‘good citizenship’¹³¹. In this way the State was to deal with the child as a criminal only if the interest of the State and of the child called for this¹³².

However what was thought at one point to be helpful to the child ended up violating the rights of the child. The welfare approach meant that the child was exempted from trial by jury and all the

¹²⁵ Monya Bunch Juvenile Transfer Proceedings: A Place for Restorative Justice Values 47 How L.J 909 2004 1

¹²⁶ Ibid 3

¹²⁷ See Franklin Zimring The Common Thread: Diversion in the Jurisprudence of a Century of Juvenile Justice UC Berkeley School of Law 1999 1. Zimring refers to this notion as the interventionist justification that emphasized the good that would come from the specialized programmes that would effectively cure the child.

¹²⁸ Ibid 5

¹²⁹ Ibid 1

¹³⁰ Julian W Mack “The Juvenile Court” in Harvard law review Vol. 23, No2 (Dec 1909) p107

¹³¹ Ibid

¹³² Franklin Zimring The Common Thread: Diversion in the Jurisprudence of a Century of Juvenile Justice UC Berkeley School of Law 1999 109

constitutional rights accorded to the criminal defendant. In the U.S case of *Commonwealth v Fisher*¹³³ the Court stated that for the purpose of saving a child the child may be brought to court without the normal processes so that he may be placed under the guardianship of the State. Further the Court stated whether or not the child deserves saving by the State is not a question to be decided by the jury. “The act is but an exercise by the State of its supreme power over the welfare of its children’. The State was entitled to intervene when the parents were ‘incompetent or corrupt’¹³⁴ and in this way had forfeited his rights of custody and control over his child¹³⁵. The object of the Court was to help the parents ‘train the child right’¹³⁶The presence of the parent during the hearing was not meant to meet any fair trial requirements but to ensure that the parent faces the consequences of letting his child be a delinquent¹³⁷. Where possible the child should pay a fine for the offense his child had committed¹³⁸.

Under the welfare model the personality of the judge is very important. In *Mill v Brown*¹³⁹ the court held that the judge should be broad minded, patient and ‘the possessor of great faith in humanity’. The judge should make the child feel cared for, putting his arm around its shoulders on occasion¹⁴⁰. The Court was not merely to focus on whether or not the child had done any wrong but what has made him what he is and what can be done to save him from a ‘downward

¹³³ 213 Pa. St. 48, 62 Atl. 198 (1905)

¹³⁴ Ex Parte Crouse, 4 Whart. 9 (1838) (Gibson C.J)

¹³⁵ Mill v Brown 88 Pac. 609 (1907)

¹³⁶ Julian W Mack “The Juvenile Court” in Harvard law review Vol. 23, No2 (Dec 1909) p117

¹³⁷ Julian W Mack “The Juvenile Court” in Harvard law review Vol. 23, No2 (Dec 1909) p116 discussing the comments of Mr. Herbert Samuels in introducing the Children’s Bill into the House of Commons.

¹³⁸ Ibid

¹³⁹ 88 Pac. 609 (1907)

¹⁴⁰ Julian W Mack “The Juvenile Court” in Harvard law review Vol. 23, No2 (Dec 1909) p120

career¹⁴¹. Normal legal evidence would not suffice in this case. The mental and physical condition of the child was essential in determining its criminality¹⁴².

If there was need for institutionalization the place was to be ‘a large area, preferably in the country- because these children require the fresh air and contact with the soil even more than does the normal child... in a cottage plan...and in each cottage some good man and woman who will live with and for the children... Locks and bars ... must be avoided; human love, supplemented by human interest and vigilance, must replace them’¹⁴³

In the *Re Gault*¹⁴⁴ and *Re Winship*¹⁴⁵ cases the court exposed the naïve arrogance of the welfare ideal¹⁴⁶.

In *Re Gault* the applicant who was 15 years old was arrested for making a lewd call. At the time he was subject to a six months probation order. No effort was made to inform his parents that he had been taken into custody. The petition filed by the police was not served on his parents and did not give any factual basis for the action taken against the applicant. Characteristic of the welfare model the petition merely stated that the minor ‘is in need of the protection of this honorable court’ and that he is delinquent. The hearing of this petition ignored all fair trial requirements. It was held in judge’s chambers where the complainant was absent, no one was

¹⁴¹ Ibid p119

¹⁴² Ibid 120

¹⁴³ *People ex rel v Turner* 55 Ill. 280 (1870)

¹⁴⁴ 387 U.S 1 (1967) here the court held that the proceedings of the juvenile court had to comply with the due process requirements of the 14th amendment

¹⁴⁵ 397 U.S 358 (1970)

¹⁴⁶ Franklin Zimring *The Common Thread: Diversion in the Jurisprudence of a Century of Juvenile Justice* UC Berkeley School of Law 1999 109 Zimring argues that the reason that the juvenile court remains to date is because the second justification for its formation, to avoid harm to the child that would result from the adult criminal justice system as opposed to the notion of child saving

sworn in and there no recording was made. In further proceedings the same happened where even the different parties present at that time conflicted on exactly what transpired. The judge did not at any point speak to the complainant.

A referral report was filed in the court after which the applicant was committed to a state industrial school until he reached the age of 21. This report was not disclosed to the applicant or his parents. No appeal was allowed in juvenile cases in the State of Arizona where all these transpired. The offence with which the applicant was charged was considered a misdemeanor and the penalty that would apply for an adult for the same would be 5 to 50 dollar fine or imprisonment for not more than two months.

The Supreme Court stated that ‘unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure’¹⁴⁷. The fact that children were exempted from procedural rules applicable to adults did not always mean that they received compassionate and individualized treatment. This system often times did not produce fair and efficient results but instead resulted in arbitrariness¹⁴⁸. The Court further noted that observing the due process standards did not detract from the benefits of the juvenile court process. Aspects such as treating the child separately from adults and ensuring that a juvenile record will not disqualify the child from holding a post in the civil service were unique benefits of the system but they were not affected by observing constitutional guarantees on due process¹⁴⁹.

¹⁴⁷ Re Gault 387 U.S 1 (1967) (Fortas J)

¹⁴⁸ Ibid

¹⁴⁹ Ibid

The Court noted that the welfare ideal did not match the situation on the ground. It referred to the report by the Commission on Crime in the District of Columbia which showed high recidivism among child offenders despite the fact that the welfare model was meant to counter this. Where as in this case there was a wide gap between the penalty of an adult offender and a child offender for the same offense the same had to be justified by more than mere rhetoric. The Court found that the applicant's due process rights had been violated. A child offender had a right to adequate notice of the charges; a right to be notified of the right to be represented by counsel; protection against self incrimination and therefore testimony should be under oath and only 'competent, material and relevant evidence' should be admitted in evidence; right to confront and cross examine witnesses brought against him and the right to appellate review of his case.

In *Re Winship*¹⁵⁰ the Court stated that in establishing guilt in criminal cases the 'beyond reasonable doubt' standard applied to adult as well as child offenders. The standard preserved the presumption of innocence by preventing conviction on unreliable facts. Taking note of how a conviction stigmatized the convicted person the court stated that a man should not be convicted when there was reasonable doubt about his guilt. Affording the juvenile this protection will not obviate any of the benefits of the juvenile process¹⁵¹. The Court famously stated, "Under our constitution the condition of being a boy does not justify a kangaroo court".

Re Gault caused confusion about the efficacy of the welfarist approach and more and more support was given to the justice approach. This approach calls for a clearer and pre-set decision making procedure that allows for accountability. It focuses on the notion that everyone,

¹⁵⁰ 397 U.S 358 (1970)

¹⁵¹ Ibid

including children are responsible for their deeds as they are rational human beings free to exercise choices¹⁵². At its extreme the justice model emphasizes punishment as opposed to rehabilitation. An ignorant understanding of the justice model was captured by the statements of Michael Howard at the time the UK Home Secretary during the Venables and Thompson trials who stated that it was time to “condemn a little more” and “understand a little less”¹⁵³. The U.S is probably the best country that exemplifies taking the justice model to its extreme to the extent that in the U.S the adult/ child dichotomy is now blurry. The United States is the only State which at the moment imposes life without parole on child offenders. While Israel has the same penalty in its statutes it does not impose it. In addition in the U.S juvenile matters can be transferred to adult courts depending on the severity of the case.

At best the current policies in the U.K and the U.S towards the child offender are a blend of the rehabilitative and the retributive model; a blend of the notion of philanthropy and social control. Kenya and South Africa which were both colonized by Britain adopted this blend. For the longest time the juvenile justice systems in the two countries have been torn between ‘fear for the child and fear of the child’¹⁵⁴. This has led to the enactment and enforcement of different conflicting approaches towards the child offenders effectively cancelling out any benefits that may exist in either. This thesis argues for an approach that is disengaged from the whole justice versus welfare argument and focuses on protecting the rights of the child offender.

¹⁵² Ann Skelton & Boyane Tshela Child Justice in South Africa September 2008 9

¹⁵³ David Mc Callum and Jeniffer Laurence Has Welfarist Criminology Failed? Juvenile Justice and the Human Sciences in Victoria December 2006 p 4

¹⁵⁴ See Michael Grossberg “Changing conceptions of Child Welfare in the United States”, 1820-1935, in A Century of Juvenile Justice 3 Margaret K Rosenheim et al. eds., 2002. Author uses phrase in relation to the juvenile justice system in the USA but the same can be said of similar systems across the world.

2.2 Development of Juvenile Justice in Kenya

One cannot evaluate juvenile justice in Africa in general and in Kenya and South Africa in particular without an analysis of pre-colonial treatment of child offenders. Under African Customary Law childhood was not defined by the age but by rituals and stages for example if one had a household, could kill a lion or survive in a forest for a certain period of time or was circumcised¹⁵⁵. The system was communal and community interests took precedence over individual interests. Thus it was common for a child to be sent to live with a relative and help out in chores. Girls were also married off to survive the lean years¹⁵⁶.

Offenses were solved by elders and there was no form of institutionalization¹⁵⁷. In fact the worst punishment was ex communication from the tribe and even this was rare¹⁵⁸. ‘Crimes were treated as wrongs between individuals and families, to be solved in ways that promoted harmony and well-being in society’¹⁵⁹. This all change with colonization

The settler community in Kenya was greatly outnumbered by the indigenous people and lived in fear of attacks by the African majority¹⁶⁰. Consequently the introduction of separate treatment for child offenders in Kenya was founded on the one hand with a genuine need to protect and rehabilitate child offenders and on the other a need to protect the society from this children; a need that was tinged with racial stereotypes that treated African offenders differently from those

¹⁵⁵ Ann Skelton & Boyane Tshela Child Justice in South Africa September 2008 29

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Prof. Chris Maina Peter Public Lecture on “Protecting and Promoting Human Rights at Regional Level: Comparing the European and African Systems of Human Rights” Central European University Budapest 4 May 2010

¹⁵⁹ Ibid

¹⁶⁰ Chloe Campbell, “Juvenile Delinquency in Colonial Kenya, 1900- 1939,” The Historical Journal Vol 45, No.1 (London, Cambridge University Press, Mar., 2002) 129

of other races. Offenders of Asian descent often received lighter sentences while European offenders were not sent to the reformatory¹⁶¹. Many of the African youth at the reformatory were there for failure to register themselves or carry identity cards¹⁶² offences that did not justify institutionalisation.

The wish to rehabilitate the offenders applied means which were questionable as to their effectiveness. Caning only sentences greatly outweighed short custodial sentences¹⁶³. This was meant to avoid the exposure of the young offenders to more hardened criminals during custody¹⁶⁴.

The reformatory lacked a clear direction in its early years and basically put the children to casual labor in the farm and making cheap furniture for the settlers in the neighborhood. Although later there was introduced practical skills such as carpentry, masonry and thatching there was reluctance to introduce literacy education¹⁶⁵. This reluctance remains to date. The reformatory failed to a great extent to meet the rehabilitation objective. The Crime Committee of 1932 stated that the reformatory “was rather of the nature of a prison than a school, there is little if any reformation and quite inadequate education¹⁶⁶.”

¹⁶¹ Ibid

¹⁶² Presentation by Mr. Kwallah at the time the Director of Children Services Kenya on “The role of the Children Department in the treatment of juvenile delinquents” KENYA- UNAFEI during the joint seminar themed “Effective Coordination and Cooperation of Criminal Justice Agencies in the Administration of Juvenile Justice” 14-17 August 2001 Nairobi, Kenya.

¹⁶³ Prisons Department Annual Reports of 1925 to 1938

¹⁶⁴ Chloe Campbell, “Juvenile Delinquency in Colonial Kenya, 1900- 1939,” The Historical Journal Vol 45, No.1 (London, Cambridge University Press, Mar., 2002) 133

¹⁶⁵ Annual Report, Kabete Reformatory, 1928 Kenya National Archives, AP/1/701, 14-15

¹⁶⁶ Crime Committee Report, 1932 19

The need to reform the institution pushed by concern for increase in professional crime as well as the ongoing political struggle for independence at the time created concern as to the need to control the youth in the institutions¹⁶⁷. The third factor that influenced reform was similar reform process taking place in Britain at the time¹⁶⁸.

One of the reports that were resulted from the need to reform; the La Fontaine Report noted the move in Britain from “a highly disciplinarian model” to a more educational one¹⁶⁹. The report sought to determine whether the British system could fit in the ‘African human nature’ in Kenya.¹⁷⁰ The various ordinances¹⁷¹ that resulted from this basically aimed at imputing the British juvenile justice system in Kenya.

2.3 Development of Juvenile Justice in South Africa

In South Africa colonization caused customary practices to be swept away by English and Roman Dutch legal practices¹⁷². Imprisonment, deportation and corporal punishment became common ways of dealing with offenders¹⁷³. Just like in Kenya while the rest of the world was moving towards rehabilitation of the child offender with the increasing popularity of the welfarist approach, the colonial government in South Africa was moving towards more retributive ways of dealing with the child. The only difference between the treatment of the child

¹⁶⁷ Chloe Campbell, “Juvenile Delinquency in Colonial Kenya, 1900- 1939,” The Historical Journal Vol 45, No.1 (London, Cambridge University Press, Mar., 2002) 139

¹⁶⁸ Ibid

¹⁶⁹ Staff no longer wore prison uniforms and had a background in education.**

¹⁷⁰ Report on the applicability to Kenya of Methods pursued in borstal and other reformatory schools in England’ Kenya National Archives, AP/1/701, 29

¹⁷¹ Juvenile Offenders Ordinance (1933) Kenya National Archives AP/1/1699, Juvenile Ordinance (1934)

¹⁷² Ann Skelton & Boyane Tshela Child Justice in South Africa September 2008 30

¹⁷³ Ibid

offender from that of the adult offender was the place of incarceration¹⁷⁴. But there was some influence of the welfarist movement as evidenced by the policies and practices of William Porter, Cape Colony's Attorney General. He was instrumental in the setting up of a reformatory for child offenders under the Reformatory Institutions Act of 1879. Additional reform schools were established and governed under the Department of Education as opposed to the Department of Prisons a further testament to welfarist ideals of rehabilitation and education. The Prisons and Reformatories Act 13 of 1911 introduced industrial schools and has been lauded as being the first step towards recognizing that children should not be incarcerated. The Children's protection Act 25 of 1913 allowed police officers the discretion of releasing arrested children and provided for safe custody of children while they were in remand.

Both the 1911 and 1913 Acts still relied heavily on the incarceration but made provision for a magistrate to cease the hearing of a case against the child and commit the child to an industrial school. This I think constitutes elements of the welfarist approach that although well intentioned denied the child the right to due process. There was no separate court established for juveniles although the 1937 Children's Act did establish a children's court but this did not have criminal jurisdiction¹⁷⁵. As a concession however cases could be referred to it from the criminal court¹⁷⁶.

In later years the juvenile justice system in South Africa became inexplicably intertwined with the struggle against apartheid. Many young people contributed to this struggle¹⁷⁷ and were

¹⁷⁴ Ibid

¹⁷⁵ Ibid 31

¹⁷⁶ The Young Offenders bill of 1937 proposed abolishing the death penalty for child offenders, not imprisoning a child below 16 years of age and raising the age of criminal responsibility from seven to ten years. See also Ann Skelton & Boyane Tshela Child Justice in South Africa September 2008 31

¹⁷⁷ See Tony Roshan Samara, "Youth, Crime and Urban Renewal in the Western Cape," Journal of Southern African Studies, Vol. 31, No. 1(Taylor and Francis Ltd) 209. Tony Roshan Samara argues that the part that the youth played

detained for this¹⁷⁸. Tshepo L. Mosikatsana in his article relies on estimates indicating that between 1984 and 1986, 11000 children were detained and invariably tortured, 18000 more were arrested and charged with political activities while 173000 were detained awaiting trials¹⁷⁹. In most cases there was no trial¹⁸⁰. These children were sometimes as young as 11 or even younger¹⁸¹.

The early 1990s international pressure in the form of sanctions and boycotts and pressure from within brought a change of political climate¹⁸². There was a reduction in the cases of detention without trial for political activism and the execution of the death penalty was suspended¹⁸³. Negotiations for transition from apartheid to democracy began¹⁸⁴. The struggle had focused a lot on the promotion and protection of human rights for all South Africans. It was later that the rights of children in the Criminal Justice System were considered¹⁸⁵ largely through the efforts of human rights non- governmental organizations (NGOs)¹⁸⁶.

in the anti-apartheid struggle, their sheer size and continued marginalization necessitates the need for South Africa's commitment to the youth.

¹⁷⁸ See Tshepo L. Mosikatsana, "Children's Rights & Family Autonomy in the South African Context: A Comment on Children's Rights under the Final Constitution," 3 Mich. J. Race & L. 341 (1998).

¹⁷⁹ Ibid

¹⁸⁰ Ibid

¹⁸¹ Ibid

¹⁸² Lindsay Michie Eades, The End of Apartheid in South Africa (Westport, Greenwood Press, 1999) 77 Lindsay Michie Eades argues that the greatest pressure came from the negative effect that the apartheid system had on the economy.

¹⁸³ Julia Sloth- Nielsen, "The Juvenile Justice Law Reform Process in South Africa: Can a Children's Rights Approach Carry the Day?" 18 Quinnipiac L. Rev. 469 (1999) 1

¹⁸⁴ See Lindsay Michie Eades, The End of Apartheid in South Africa (Westport, Greenwood Press, 1999) 77

¹⁸⁵ See Anne Skelton, "Children, Young Persons and the Criminal Procedure" in J A Robinson ed The law on Children and Young Persons in South Africa (Durban, Butterworths, 1997)

¹⁸⁶ A major role was played by the Community Law Center, the National Institute for Crime and Rehabilitation of Offenders and Lawyers for Human Rights, the Institute of Criminology (The University of Cape Town).

2.4 Overall Message of the Development Process

Both South Africa and Kenya inherited to a large extent a complex blend of the juvenile justice system from the British. For the most part the children were kept in hygienic unhealthy facilities with more emphasis being placed on retribution rather than rehabilitation. From this blend of philanthropy and social control the law reform mechanisms in Kenya and South Africa attempt to abide by the developing international standards. This paper argues for a child rights approach to juvenile justice as opposed to philosophies of criminology; an approach that considers above all the rights of the child offender particularly their integration back to the community.

CHAPTER 3: THE ADMINISTRATION OF JUVENILE JUSTICE IN KENYA AND SOUTH AFRICA

The previous chapter discussed the development of child justice in both Kenya and South Africa moving from a traditional system based principally on rehabilitation and reintegration to a more retributive system. Both still in law and practice incorporate elements of both the welfare and justice system appearing torn between the two. This chapter shall assess the current laws on child justice in South Africa and in Kenya in an attempt to bring out what legal protection is accorded the child offender in these countries.

3.1 SOUTH AFRICA

Current legislation in South Africa on juvenile justice

With the recent coming into force of the Child Justice Act the previously fragmented provisions concerning child offenders were consolidated into one piece of legislation. Previously the provisions were provided in the Criminal Procedure Act¹⁸⁷, the Probation Services Act¹⁸⁸, the Correctional Services Act¹⁸⁹ and the Children's Act¹⁹⁰. The Child Justice Act was promulgated in 2010 and came into effect in April 2010. It applies to child offenders under 18 years of age as well as young adults 18 years or older but under 21 years¹⁹¹. Being a recent piece of legislation practice under the statute is not yet well established.

In South Africa in many ways, transformation preceded legislative reform. Diversion for example was first tested out in one province of the country in 1992. Pre-trial assessment by probation officers was first piloted in 1994. Both found legislative recognition much later with diversion being recognized in the Child Justice Act in 2010 and pre-trial assessment by the

¹⁸⁷ Act 51 of 1977

¹⁸⁸ Act 35 of 2002

¹⁸⁹ Act 111 of 1998

¹⁹⁰ Act N 38 of 2005

¹⁹¹ Section 4 South African Child Justice Act 75 of 2008

Probation Services Act in 2002. These initiatives acted as the catalyst for change. The CJA developed out of a growing awareness of child rights and of the concept of restorative justice¹⁹².

The minimum age of criminal responsibility in South Africa

The Child Justice Act sets the age of criminal capacity at 10 years¹⁹³ raising it from the previous 7 years¹⁹⁴. A child between 10 years and 14 years of age is believed to lack criminal capacity unless proven by the State beyond reasonable doubt that the child had such capacity at the time of committing the offence¹⁹⁵. Section 8 of the Act provides for possible review of the minimum age of criminal capacity by Parliament not less than 5 years after coming to effect of the section. This was as a result of cries by the civil society for the minimum age to be set at 12 years in accordance to the recommendations of the Committee on the Rights of the Child¹⁹⁶

In determining the criminal capacity of a child between 10 years and 14 years, the prosecutor must consider the seriousness and nature of the offense, the impact on the victim and effect of the crime on the community and the environmental circumstances of the child¹⁹⁷. These grounds are laid down so as to prevent prosecutors from instituting cases as a matter of course hoping to prove the criminal capacity of the child later on in the case¹⁹⁸. The prosecutor may still choose to divert the case even after he determines that the criminal capacity of the child at the time of committing the offence is likely to be proven beyond reasonable doubt¹⁹⁹.

¹⁹² Ann Skelton & Boyane Tshela Child justice in South Africa Monogram 15 Sept 2008 p 42

¹⁹³ Ibid Section 7

¹⁹⁴ This was under common law followed previously

¹⁹⁵ Section 7 (2) South African Child Justice Act 75 of 2008

¹⁹⁶ Jacqui Gallinetti Getting to know the Child Justice Act Child Justice Alliance 2009 p 21. See also general comment No. 10 of the Committee

¹⁹⁷ Section 10 South African Child Justice Act 75 of 2008

¹⁹⁸ Ann Skelton & Boyane Tshela Child justice in South Africa Monogram 15 Sept 2008 p 42

¹⁹⁹ Ibid

The inquiry magistrate or the Child Justice Court must satisfy himself as to whether criminal capacity has been proven beyond reasonable doubt. To do so he may seek an evaluation of the child's criminal capacity by a suitably qualified person who must assess the child's 'cognitive, moral, emotional, psychological and social development'²⁰⁰. Concerning the recent murder case of Eugene Terreblanche where one of the accused is a 15 year old the Minister of Justice in a gazette notice²⁰¹ stated that a competent person includes 'psychiatrists and clinical psychologists'. However he did not state whether they ought to have experience in working with children²⁰².

Where the age of the child is in doubt the probation officer may make an estimation of the child's age keeping in mind several factors such as any previous estimates made by the court, statements by the child himself, his parents or guardians and an estimation made by a medical practitioner²⁰³. If at any time during the proceedings it becomes apparent that the age estimation is incorrect then it shall be altered accordingly²⁰⁴. This is a vast improvement to the previous law that left it to the discretion of the magistrate to estimate the age of the child where this is in doubt without any stipulated factors to consider²⁰⁵. In *S V Hadebe and Another*²⁰⁶ the court stated that the judicial officer has to state the basis for the age estimation

²⁰⁰ Section 11 (3) Child Justice Act

²⁰¹ April 2010 Gazette notice

²⁰² See Child Rights Information Network (CRIN) [South Africa: Child Justice Act faces stern test in Terre Blance case](http://www.crin.org/resources/infodetail.asp?id=22364) available at <http://www.crin.org/resources/infodetail.asp?id=22364>

²⁰³ Ibid Section 13

²⁰⁴ Ibid Sections 13 (4), 16

²⁰⁵ See Section 337 of the Criminal Procedure Act

²⁰⁶ 1960 (1) SA 488 (T)

In recognition of the fact that a child under 10 years of age who commits a crime is a child at risk the Child Justice Act makes provisions for these children who by law do not have criminal capacity. Section 9 of the Act provides that the child may be assessed by a probation officer who may then refer the child to counseling, an accredited programme, other support services, to the children's court where the child will be dealt with under the provisions of the Children's Act as a child in need of care and protection²⁰⁷.

3.1.1 Procedural stages

A child alleged to have committed a criminal offence shall go through three stages of the criminal justice process; the pre-trial, trial and post-trial stages. Each of these is governed by different procedural rules.

Article 40 (1) UNCRC provides that a child alleged to have or who has committed an offence shall 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 take into account the child's age and the desirability of promoting the child's reintegration and the child assuming a constructive role in society.” To meet this requirement special concessions have to be made when dealing with an alleged child offender at every point of contact with the Criminal Justice system

3.1.1.1 Pre-trial stage

The South African Constitution provides that the detention of the child shall be as a measure of last resort and only for the shortest appropriate period of time²⁰⁸. In accordance with this the Child Justice Act makes several provisions to limit the detention of the child. Under the Child

²⁰⁷ See sections 155 and 156 of the South African Children's Act No 38 of 3005

²⁰⁸ Section 28 (1) (g)

Justice Act the child offender is secured to face the criminal justice system through a written notice, summons and arrest. The Act makes arrest the least favorable option and where an offence is minor, arrest is prohibited except in exceptional circumstances²⁰⁹.

Article 1 of the JDL Rules provides that ‘the juvenile justice system should uphold the rights and safety and promote the physical and mental well being of juveniles.’ In accordance to this the written notice²¹⁰ and the summons²¹¹ both provide a way for the child to be informed of the offences committed, the place, time and date of the preliminary inquiry, the procedures that shall ensue and the rights of the child without taking the child to the police station or detaining him for any length of time²¹². The child should know at the earliest moment possible what they are charged with, what to expect and what their rights are under the juvenile justice.

The written notice and the summons must except in exceptional circumstances be issued by the police officer in the presence of the child’s parents or guardians who must acknowledge receipt by signing the notice²¹³. Further the police officer shall inform a probation officer of the issuance of such notice or summons not later than 24 hours after issuance²¹⁴. This is meant to counter instances common before the coming into force of the Act where children were kept in custody without the knowledge of their parents and without even knowing what offence they were charged with²¹⁵.

²⁰⁹ Section 20 South African Child Justice Act 75 of 2008

²¹⁰ This is issued in accordance to Section 56 of the Criminal Procedure Act as amended by Section 18 of the Child Justice Act

²¹¹ Issued in terms of Section 54 of the Child Justice Act

²¹² Sections 18 and 19 South African Child Justice Act 75 of 2008

²¹³ Ibid

²¹⁴ Ibid

²¹⁵ Community Law Center [Children in Prison in South Africa; a Situational](#) 70

Pre- trial detention

The CJA tries to limit pre-trial detention providing that the child may be released on written notice to the parents where appropriate. In the case of Schedule 1 offences where appropriate the child shall be released to the care of the parent prior to the first appearance at the preliminary inquiry or be released on bail in the case of schedule 1 or 2 offences²¹⁶ and where the parents or guardian lack the financial capacity the child may be released on non- monetary conditions²¹⁷.

The JDL rules make provision for management of juvenile facilities including the physical environment and accommodation²¹⁸, provision of education²¹⁹ and medical care²²⁰ and monitoring of the facilities through regular and unannounced inspections²²¹ and an independent complaints procedure²²². Ideally therefore detention of a child where necessary should be in institutions that have these facilities. However in South Africa detention may be at a police cell or lock up²²³ contrary to best practice. Children as young as 10 may be held in police cells where a youth center is not available or is full²²⁴. A child 14 years or older charged with a Schedule 3 offence is to be detained at the police cell or lock up pending first appearance²²⁵. Further after first appearance detention in prison is allowed as a last resort²²⁶ considering such factors as the

²¹⁶ Section 21 Ibid

²¹⁷ Ibid Section 25

²¹⁸ Ibid Rule 31- 37

²¹⁹ Ibid Rule 38-46

²²⁰ Ibid Rule 49-55

²²¹ Article 72

²²² Article 78

²²³ Section 27

²²⁴ Section 27

²²⁵ Ibid

²²⁶ See Section 30 (1)

best interests of the child, the danger the child poses to himself and to the society, the risk of him absconding from detention center and previous charges pending against the child.

Where the child is detained at the child and youth center detention must constantly be reviewed at every court appearance²²⁷. At this time the presiding officer must make inquiries as to the conditions in which the child is being detained and when not satisfied with the suitability of these conditions he must make a remedial order²²⁸. Where the child is held in prison cells he must be separated from adults and boys must be separated from girls²²⁹. They are allowed visits from family, social workers and their legal representatives and their special needs should be catered to²³⁰. Whether these provisions will change the current situation where children are held together with adults²³¹ and not allowed visits with family as a form of punishment only time will tell

Pre-trial assessment

This process was introduced into the criminal justice system only recently by the C.J.A. Pre-trial assessment in South Africa is based on the concept of development assessment which focuses on ‘the child’s strengths and abilities rather than the pathology attached to the offence or family environment from which the child has come’²³². It is defined by the Probation Services Amendment Act 35 of 2002 as “an evaluation of a person, the family circumstances surrounding the alleged commission of an offence, its impact on the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor”.

²²⁷ Section 32 South African Child Justice Act 75 of 2008

²²⁸ Ibid

²²⁹ Section 28

²³⁰ Ibid

²³¹ Community Law Center Children in Prison in South Africa: a Situational Analysis 14

²³² Jacqui Gallinetti Getting to know the Child Justice Act Child Justice Alliance 2009 p 33

All children alleged to have committed a criminal offence even those under the age of 10 must be assessed²³³ unless such assessment is dispensed with by the prosecutor²³⁴ or the presiding officer²³⁵ where this is in the best interests of the child. The assessment must be done by the probation officer within stipulated timelines²³⁶.

The probation officer must inform the child of the purpose of the assessment, what to expect and of their rights²³⁷. The child's parents and legal representative may be present at the time of assessment²³⁸. The assessment report must be availed to the prosecutor before commencement of the preliminary inquiry. Such report is essential as it provides such information as the estimation of the child's age where uncertain, possible placement options and criminal capacity of the child where the child is older than 10 years but below to 14 years²³⁹. The report may also recommend release or diversion²⁴⁰.

Preliminary inquiry

Though this is the child's first contact with the court, it is still considered a pre-trial procedure under Section 43 of the Child Justice Act. It is defined as 'an informal pre-trial procedure which is inquisitorial in nature and may be held in a court or any other suitable place'²⁴¹. The inquiry relies heavily on information gathered during the preliminary assessment and ensures an

²³³ Section 34 South African Child Justice Act 75 of 2008

²³⁴ Section 41(3)

²³⁵ Section 47 (5)

²³⁶ See Section 43 (3) (b) (i) and Section 34 (3)

²³⁷ Section 39

²³⁸ Section 38

²³⁹ Section 40

²⁴⁰ Ibid

²⁴¹ Section 43

individualized response to each case as the child's specific circumstances and options available have to be considered. It allows the various role players involved to reach consensus as to how to proceed with the case²⁴². It also enhances the likelihood of diversion and provides a forum for the participation of the child and his parents²⁴³. At this stage also the decision may be made to release the child from detention²⁴⁴.

Every child charged with a criminal offence where the diversion option has not been taken must go through the preliminary inquiry²⁴⁵. The inquiry must be conducted within 48 hours of arrest or within the time set out in the written notice²⁴⁶. The information furnished at the inquiry shall be confidential. The inquiry magistrate may make a diversion order or order that the matter be referred to the Child Justice Court²⁴⁷. If the child is in need of care and protection then referral will be made to the children's court²⁴⁸.

3.1.1.2 Trial Stage

For purposes of this study the trial stage begins when a child is formally arraigned in court. There is no separate court dealing with child offenders in South Africa. A child justice court is simply the court with requisite jurisdiction for dealing with the child offender matter before it²⁴⁹. To counteract the effects of not having a separate court for dealing with child offender cases certain safeguards have been put in place for example the proceedings are closed off to all but authorized persons and the identity of the child may not be published²⁵⁰. The child must also be

²⁴² Jacqui Gallinetti Getting to know the Child Justice Act Child Justice Alliance 2009 p 38

²⁴³ Section 43 ibid

²⁴⁴ Ibid

²⁴⁵ Section 43 (3)

²⁴⁶ Ibid

²⁴⁷ Section 49

²⁴⁸ Section 50

²⁴⁹ Section 63

²⁵⁰ Ibid

assisted by a parent, guardian or appropriate adult in the court unless it's in the best interest of the child for their presence to be dispensed with²⁵¹.

Legal aid is not provided to the child as of right but the child must be given every reasonable opportunity to obtain legal representative (through the legal aid board if necessary as long as they meet the criteria)²⁵². Section 35 (3) of the South African Constitution provides that all persons accused of an offense to be provided with legal aid at the state's expense 'if substantial injustice would otherwise result'

In order to represent a child a legal representative must follow the child's instructions, explain to the child what to expect during the conduct of the proceedings and uphold the 'highest standards of ethical behavior and professional conduct'. This is meant to rectify the present situation where the child and/or their parents do not trust the state assigned attorney and choose to speak for themselves failing to recognize the prejudice that may result²⁵³. Frequently even in cases where the children receive legal representation they are not kept informed of the progress of the case and are oftentimes unaware of their lawyers' names²⁵⁴. In South Africa research has shown that 'the legal aid system is the single biggest cause of delay in bringing children's cases to trial'²⁵⁵

No child may waive their right to legal representation²⁵⁶. However if a child persists in waiving legal representation, the court may appoint a legal representative to assist the child. In this case

²⁵¹ Section 65

²⁵² Ibid Section 82

²⁵³ Community Law Center Children in Prison in South Africa; A Situational Analysis p57

²⁵⁴ Ibid 65

²⁵⁵ Ibid

²⁵⁶ Section 83 South African Child Justice Act 75 of 2008

the representative will not take instructions from the child but generally ensure procedural fairness by for example addressing matters of appeal and merits of the case²⁵⁷

Article 35 of the South African Constitution grants a constitutional right to a speedy trial and the Section 66 of the CJA abides by this by providing that the trial must be concluded as speedily as possible and postponements must be reduced in number and in duration. The Act sets out exact time lines depending on whether the child is detained in prison, at a child and youth care center or has been released from custody²⁵⁸. The case may still be diverted at this stage²⁵⁹.

A presentence report is required from a probation officer. The report recommends a possible sentence. If the court decides to impose a sentence different from the one recommended in the report, the reasons for this must be stated²⁶⁰. The report may be dispensed with where waiting for it may be prejudicial to the child. However where the sentence to be imposed is a custodial one the report is mandatory.

Sentencing should be aimed at reintegration, at rehabilitation. Detention should be a last resort even at this stage. Article 37 of the UNCRC provides that the detention of the child should be ‘a measure of last resort and for the shortest time possible’. The CJA provides a range of custodial and non- custodial sentences for child offenders found guilty. The non- custodial sentences include community based sentences²⁶¹, restorative justice sentences for example family group

²⁵⁷ Ibid

²⁵⁸ Section 66

²⁵⁹ Section 67

²⁶⁰ Section 71

²⁶¹ Section 72

conferencing²⁶² and victim offender mediation²⁶³, correctional supervision²⁶⁴, suspended sentences (with or without conditions) for not more than 5 years and fines or alternatives to fines like symbolic restitution²⁶⁵. Custodial sentences in a child and youth care center²⁶⁶ or prison²⁶⁷ may also be imposed.

There are factors that the court must consider when deciding whether to impose a custodial sentence including whether the nature of the offence indicates that the child ‘has a tendency towards harmful activities, whether the child shall benefit from a particular service offered at the child and youth care center and whether it would be safer for the child to be in custodial care due to the harm caused by the offence²⁶⁸. In *S v Kwalase*²⁶⁹ the court emphasized the need to have an individualized approach when it comes to sentencing child offenders. In several cases the Supreme Court of Appeal in South Africa has laid down factors to consider when sentencing child offenders. The best interest of the child principle shall apply but shall be superseded where circumstances necessitate by factors such as need for rehabilitation and an option that shall enhance reintegration. Deterrence shall be accorded lesser importance in this case²⁷⁰.

3.1.1.3 Post Trial Stage

Sections 80-84 of the Act provides for an automatic right of appeal for all sentences²⁷¹. The child should be informed of this right and the procedure necessary to effect this right²⁷². Section 85 of

²⁶² Section 61

²⁶³ Section 62

²⁶⁴ Criminal justice Act 51 of 1977

²⁶⁵ Section 74

²⁶⁶ Section 76

²⁶⁷ Section 77

²⁶⁸ Section 69(3)

²⁶⁹ 2000 (2) SACR 135 CPD

²⁷⁰ *S v B* (2006) (1) SACR 311 (SCA), *DPP KwaZulu- Natal v P* (2006) (1) SACR 243 (SCA) and *Ntaka v The State* (469/2007 [2008] ZASCA 30 (28 March 2008)

²⁷¹ Section 84

the Act further provides for the right of automatic review with an option of release on bail pending review

The Child Justice Act also provides that records of schedule 1 and 2 offences shall be expunged 5 years and 10 years respectively from the time of conviction as long as the child does not thereafter commit a similar or more serious offence²⁷³. Expungement prior to the lapse of the 5 yr and 10 yr period is possible through special procedure²⁷⁴.

Other pertinent issues

Diversion

This is a crucial and well utilized way of dealing with child offenders outside the criminal justice system in South Africa. There are various diversion options provided in the CJA and in order to determine what option will work best on a particular child the prosecutor must consider the child's religious and cultural background, the type of offence in question (there are different diversion options for schedule 1 and schedule 2 offences), their level of education, proportionality of the option to 'the circumstances of the child, the nature of the offense and the interests of society' and the child's age²⁷⁵.

The matter may be diverted at any time before the conclusion of the case so long as the child freely acknowledges guilt, the prosecutor agrees to the diversion, there is a prima facie case

²⁷² Section 84 (2)

²⁷³ Section 87

²⁷⁴ Ibid

²⁷⁵ Chapter 6 CJA

against the child and the child agrees to the diversion²⁷⁶. All offences including schedule 3 offences may be diverted in the later case only in exceptional circumstances²⁷⁷. When making a diversion order the presiding officer in question or the prosecutor must assign a probation officer to ensure compliance with the order²⁷⁸. If diversion is at the point when the case is at the child justice court then the case will be suspended and later stopped completely upon the probation officer informing the court that the child has successfully complied with the order²⁷⁹

A diversion register is kept to have a formal record of previously successful or failed diversion measures in the case of recidivist. The type of diversion options available range from an oral or written apology and restitution to intensive therapy and placement under the supervision of a probation officer²⁸⁰ but all must be accredited in terms of section 56 of the CJA

Children used by adults to commit crime

Section 35 of the Act provides that during the preliminary assessment the probation officer should determine whether the child was used by an adult to commit the offence. Where this has been ascertained the prosecutor should consider instituting charges against the adult in question²⁸¹. The fact that a child has been used by an adult to commit the crime may act as a mitigating factor in the case against him²⁸²

One stop child justice centers

The objective of these centers is stated as ‘to promote co-operation between government departments, and between government departments and the non-governmental sector and civil

²⁷⁶ Section 52 (1) Child Justice Act

²⁷⁷ Ibid Section 52(3)

²⁷⁸ Ibid Section 57

²⁷⁹ Ibid Section 67

²⁸⁰ Ibid Section 53

²⁸¹ Ibid Section 92

²⁸² Ibid

society, to ensure an integrated and holistic approach to the implementation of this Act²⁸³. They house centralized services for alleged child offenders such as legal aid services, police services and assessment services.

3.2 KENYA

Several statutes cover the field of juvenile justice in Kenya. These include the Children Act of 2001, the Borstal Institutions Act²⁸⁴, Community Service Orders²⁸⁵ and the Probations of Offenders Act²⁸⁶. In 2001 the Children Act was enacted creating a new legal framework for dealing with children including those in conflict with the law. The new Kenyan Constitution promulgated in August 2010 also has positive provisions covering child offenders.

The Kenyan Children Act²⁸⁷ contains general provisions like the best interest of the child principle²⁸⁸, non-discrimination²⁸⁹, right to health care²⁹⁰ and protection from child labor²⁹¹ which apply to children in conflict with the law. As far as institutional frameworks are concerned the Act in a positive step sets up the National Council for Children Services²⁹² which shall be responsible among other things for the design and formulation of policies concerning child welfare activities and ensuring that Kenya meets its full international and regional obligation as relates to children²⁹³.

²⁸³ Section 89 (3)

²⁸⁴ Chapter 92 of the Laws of Kenya

²⁸⁵ Act 10 of 1998

²⁸⁶ Cap 64 Laws of Kenya

²⁸⁷ Act 3 of 2001

²⁸⁸ Section 4 Children Act 8 of 2001 Laws of Kenya

²⁸⁹ Ibid Section 5

²⁹⁰ Ibid Section 9

²⁹¹ Ibid Section 10

²⁹² Ibid Section 30

²⁹³ Ibid Section 32

Minimum age of criminal responsibility

The age of criminal responsibility in Kenya is set at 8 years where those older than 8 years but aged 12 years and below are not criminal responsible for an act unless it can be proved that at the time of committing the offence they had the capacity to know not to do that act²⁹⁴. Section 14 (3) of the Penal Code makes a further provision; a male child below 12 is considered in capable of having carnal knowledge of another. Only this provision complies with the recommendations made by the CRC committee that the age of criminal responsibility should be set at 12 years. The Committee on the Rights of the Child in its concluding observations on the State report by Kenya states that it considers the age of 8 to be too low²⁹⁵.

Like South Africa, determining the age of the child is an amorphous process left to the discretion of the magistrate before whom the child appears. Often times the court orders for a medical report on the same. Research has shown that the conclusion arrived at by the medical expert are often not scientific and mainly result from an examination of the child's dental formula and by questioning the child²⁹⁶.

3.2.1 Procedural stages

3.2.1.1 Pre-trial stage

At the pre-trial stage the international norms call for detention as a measure of last resort²⁹⁷. This is enunciated in Section 53 (f) of the Kenyan Constitution. The Children Act goes on to provide that no child shall be held in imprisonment²⁹⁸ but it does provide for committal to remand homes

²⁹⁴ Article 14 Penal Code Cap 63 Laws of Kenya

²⁹⁵ Article 67 Children Act No. 8 of 2001 Laws of Kenya

²⁹⁶ Interview with Advocates Ms Onyango and Mr. Odhiambo at the Nairobi Children's court speaking of cases where a birth certificate recovered later shows the child to be of a different age than was stated in the medical report

²⁹⁷ Rule 13.1 and 19 of Beijing Rules; Article 37 (b) of the UNCRC; Rule 2 of the JDL Rules

²⁹⁸ Section 90 Children Act Act 8 of 2001 Laws of Kenya

and borstal institutions²⁹⁹ and makes no provision for diversion. What has happened in practice then is that detention is the most common method employed in dealing with the child offender in Kenya³⁰⁰.

The child may be released on bail pending trial unless the charge is murder or manslaughter, detention is necessary to keep him away from undesirable company or release 'would defeat the ends of justice'³⁰¹. This wide discretion basically limits bail to very few cases and in reality very few children know that they have this right even before trial³⁰². While in detention at the police station the child shall be kept separate from adults and a female child shall always be detained and conveyed in the company of a female officer³⁰³. Again due to the strain of dealing with a large amount of work and ignorance have ensured that this provision is not adhered to³⁰⁴

3.2.1.2 Trial stage

The Children's Act sets up a separate children's court to deal with children matters³⁰⁵ which shall be at a different building or at held at different times than the rest of the cases³⁰⁶. The Children's Court in the case of child offenders has no jurisdiction in cases of murder or where a child is accused of an offense jointly with an adult³⁰⁷. This later provision has seen many children tried and convicted in general courts which lack the protections and special provisions

²⁹⁹ Ibid Section 191

³⁰⁰ Interview with Paul Mutinda Police Constable placed at the Nairobi Children's Court on 19/10/10 at the Nairobi Children's Court

³⁰¹ Fifth Schedule, Section 5 Children Act

³⁰² Interview with Esther Wambui, police officer assigned to the Nairobi Children's Court on 18/08/10

³⁰³ Fifth Schedule, Section 5 Children Act

³⁰⁴ Interview with Paul Mutinda Police Constable placed at the Nairobi Children's Court on 19/10/10 at the Nairobi Children's Court

³⁰⁵ Section 73 Children Act No. 8 of 2001 Laws of Kenya

³⁰⁶ Ibid Section 74

³⁰⁷ Ibid Section 73

specific to child offenders³⁰⁸. Due to the heavy workload that the Magistrate's have in these courts do not exact due diligence in observing the rights of the accused child offender³⁰⁹. In addition these Magistrates do not have the special training and experience that comes with hearing child offender cases. In all other cases however the Children Act makes provision for remission of child offender cases at any point of the proceedings from other courts to the children court³¹⁰.

These Children's Courts are however located only in the two major cities in the country. Outside these two cities the Chief Justice may designate a magistrate to act as a Children's Magistrate in that jurisdiction³¹¹. However where a court other than a Children's Court hears a child offender case, it is required to apply all safeguards in the Act accorded to the child offender³¹². These safeguards include having the matter heard promptly, the right to be heard, to have the right to remain silent, to have privacy during the proceedings and a right to appeal³¹³. The Act also stipulates that the setting of the court in which the case is heard be friendly although there is no definition of what exactly this is. In reality though where the children's court is not at a separate building then the setting of the court shall not vary from the norm³¹⁴. Other safeguards include using language that does not label the child as criminal such as 'conviction' and 'sentence'³¹⁵.

³⁰⁸ Interview with Rose M., child advocate (Pendekezo Letu) on 28/06/09 Nairobi Children's Court

³⁰⁹ Ibid

³¹⁰ Section 185 Children Act No. 8 of 2001 Laws of Kenya

³¹¹ Ibid

³¹² Section 185 (5)

³¹³ Section 187

³¹⁴ A visit to the other courts not designated as children's court has shown that no effort has been made to change the appearance of the court from their usual state when they adult hearings are being heard

³¹⁵ Section 189

Access to the children's court while a child's case is on session is limited to advocates of the various parties, officers of the court, parents of the child and other authorized persons³¹⁶.

As far as legal aid is concerned the law provides that the child shall have legal representation in all cases³¹⁷. The Kenyan Constitution further provides that the State shall appoint an advocate to act for the defendant 'if substantial injustice would otherwise result'³¹⁸. However this is not the case in practice. Most children appear in court without any legal representation which places them at a great disadvantage given that the intimidating atmosphere and complex proceedings involved. The National Legal Aid Programme was set up to deal with this problem. However three years after its launch nothing much has changed on the ground³¹⁹

The Court is directed to make orders under the Act only where the same would be more beneficial than not making any orders at all³²⁰. Before making an order the Court shall consider among other things the age and understanding of the child, their physical, emotional and educational needs, their religious persuasion, cultural background and any harm they have undergone or are likely to undergo³²¹.

The Court before making its decision on the child appearing before it may request that an oral or written report be presented to it on the same³²². In the Nairobi Children's Court the Magistrate seeks a social inquiry report, a report drafted and presented by a probation officer before a court

³¹⁶ Ibid

³¹⁷ Section 18 (4) and section 77

³¹⁸ Article 50 (2) (h)

³¹⁹ Interview with Mr. Gachara, probation officer at the Nairobi Children's Court Aug 2010

³²⁰ Section 76 Children Act

³²¹ Section 76

³²² Section 78

upon the court finding the child guilty of the offence and to guide in sentencing³²³. The report looks into the social, educational and family background of the child and tries to discern the reasons behind why the child may have committed the offence³²⁴. Appeal from the decision of the Children Court shall lie with the High Court³²⁵.

3.1.2.3 Post trial stage

The Children Act provides a range of alternative sentences with capital punishment and life imprisonment being expressly prohibited³²⁶. The court may discharge the offender, place the child under probation, release the child to the care of a fit person, order community service, impose a fine or compensation or ensure that the child attends counseling. The custodial orders include committing the child to a rehabilitation school where the child is between 11 and 15 years, committal to a borstal institution where the child is above 16 years and placement in a probation hostel which is the least restrictive of the three³²⁷. No capital or corporal punishment may be imposed on a child under Kenyan law³²⁸.

In reality though the most common method of dealing with child offenders in Kenya is by imposing custodial measures³²⁹. Fines and other diversionary means are not common. Training of magistrates in the rights based approach of dealing with child offenders is also lacking which is a big factor contributing to this trend³³⁰.

³²³ Interview with Mrs Maingi, Provincial Probation Officer- Nairobi Province on 18/08/10

³²⁴ Ibid

³²⁵ Section 80

³²⁶ Section 18(4)

³²⁷ Section 191

³²⁸ Ibid

³²⁹ Interview with Mr. Gachara, Probation Officer at the Nairobi Children's Court Aug 2010

³³⁰ Interview with Esther Wambui, police officer assigned to the Nairobi Children's Court on 18/08/10

Children sent to rehabilitation schools shall be separated on the basis of sex, age and severity of offence³³¹. The rehabilitation schools shall be subject to supervision by the Director of Children Services who by virtue of this power may cause them to be visited on periodic basis³³². For this purpose the Act establishes inspection committees. A committal order to custodial institutions shall not exceed the period of three years unless by order of the court or go beyond when the child attains the age of 18 years³³³ and no one under the age of 10 shall be committed to a rehabilitation school³³⁴.

An order committing a child to custodial care may be revoked by the Children's Court acting on its own motion or through the application of the Director of Children's Services or any person before the end of the term for which the child was committed³³⁵. If the same was a child who is 'of a difficult nature' they may have their term increased for a period of up to six months, sent to a borstal institution or accorded appropriate medical treatment after application by the Director of Children Services³³⁶. A child sent to a borstal institution or whose term is increased shall be accorded appropriate professional assistance³³⁷.

The Children Act makes provision for after care stating that a child who has served their term shall be subject to supervision by an authorized person³³⁸.

³³¹ Section 48 *ibid*

³³² Section 51

³³³ Section 53 (3)

³³⁴ Section 190 (3)

³³⁵ Section 53

³³⁶ Section 55

³³⁷ *Ibid*

³³⁸ Section 54

3.3 Overall message on administration of juvenile justice

This chapter discussed the laws surrounding child justice in Kenya and South Africa. It's clear that to a great extent the laws offer protection to the child offender with a few noted exceptions.

The next chapter shall delve more in depth on the practice surrounding these laws and examine whether they match up to the laws and the internationally set standards on child justice

CHAPTER 4: AN EVALUATION OF THE JUVENILE JUSTICE SYSTEMS OF KENYA AND SOUTH AFRICA

The previous chapter explored the legal provisions of the two jurisdictions as to what protections they offer the child offender. This chapter shall explore the two juvenile justice systems against the backdrop of the international standards enumerated in chapter one of this thesis to explore whether the two have the bare minimum of what is expected of a juvenile justice system in theory and in practice. The chapter shall explore gaps between law and practice and what effect this has on the rights of the child offender. This chapter shall also explore the concept of restorative justice and African customary law particularly the concept of *ubuntu* that the South African Child Justice Act is built upon.

4.1 Pre-trial stage

At this stage the thesis shall discuss several concepts that traverse all stages of the criminal justice process; from pre-trial to post trial.

Minimum age of criminal responsibility (MACR)

The purpose of setting a MACR is to prevent children from suffering the adverse effects that come with entering the criminal justice system. In determining what this age should be regard should be had to the provisions of the General Comment No 10 and the Beijing Rules. Both South Africa and Kenya have set a minimum age that is below the international standard recommended by the Committee on the Rights of the Child; 10 and 8 years³³⁹ respectively. Though the international instruments do not stipulate what the MACR shall be the Committee on the Rights of the Child has recommended the age of 12 years as the minimum age³⁴⁰. In fact it appears that the Committee considers the maximum age of *doli incapax* as the MACR. This can

³³⁹ Kenya was specifically criticized by the committee on its minimum age. See CRC/C/KEN/CO/2

³⁴⁰ See General Comment 10 Committee of the Rights of the Child (CRC/C/GC/10)

be deduced from the reaction of the Committee to Isle of Man removing the presumption that children between the age of 10 to 14 were *doli incapax*. The Committee reacted by saying that this effectively lowered MACR from 14 to 10 years³⁴¹ .

Two other important aspects that arise here are one; how to prove the age of the child and secondly how to rebut the presumption of lack of criminal capacity for children considered *doli incapax*; set at 10 to 14 for South Africa and 8 to 12 years for Kenya.

When it comes to rebutting the presumption of innocence the practice in South Africa has been for the prosecutor to ask the mother of the child whether the child knows the difference between right and wrong. If she answers in the affirmative then the child's criminal capacity is considered proven³⁴². Clearly the presumption is too easily rebutted. As Van Oosten and Louw state understanding the difference between right and wrong is not sufficient. The child has to be able to control his behavior towards that which he considers right or wrong to be deemed lacking or having criminal capacity³⁴³. In the South African case *S v Ngobesi*³⁴⁴ the trial judge inferred the criminal capacity of the child from the fact that the accused had ran away from the scene of the crime. On review the sitting judge stated that this act did not in any way relate to the child's state of mind or cognitive capacity.

³⁴¹ Concluding Observation of the CRC Committee United Kingdom of Britain and Northern Ireland- Isle of Man U.N Doc CRC/15/Add.134 (2000) para 18

³⁴² Ann Skelton & Boyane Tshela Child justice in South Africa Monogram 15 Sept 2008 p 43

³⁴³ Van Oosten F and Louw A in J.A Robinson (ed) The Law of Children and Young Persons in South Africa Durban Butterworths 1997 p 125

³⁴⁴ 2001 (1) SACR 562

The Child Justice Act tries to rectify this flawed practice by making an entire provision on how to prove criminal capacity which includes evaluation by a suitably qualified person. The magistrate must be satisfied of the child's capacity beyond all reasonable doubt³⁴⁵. In Kenya the same flawed procedure applies. The child is asked a series of questions on his background, his activities and whether he knows what is wrong from right³⁴⁶. From this his criminal capacity is discerned. The Kenyan Children Act does not make provision for rebuttal of criminal capacity.

When it comes to age assessment the Child Justice Act lists documents and other factors the probation officer must keep in mind in estimating the child's age³⁴⁷. This shall be presumed to be the correct age unless evidence is brought to the contrary. The Act also provides for what to do in case of such error³⁴⁸. In Kenya the Children Act does not set standards on age assessment. What this does is to have children tried as adults without the requisite protection that comes with their tender age. The reverse is also true. Many adults have tried and succeeded in passing themselves off as children in court so as to obtain leaner sentences³⁴⁹.

At times when dealing with repeat offenders, police in Kenya have been known to increase the child's age so as to have children dealt with as adults. Eunice* a girl of 17 had been introduced to prostitution at an early age so as to fend for her siblings. She was arrested many times on the charge of soliciting. At the most recent arrest in February 2009, Eunice's age was changed to 18

* Not her real name

³⁴⁵ Section 35 South Africa's Child Justice Act

³⁴⁶ Interview Constable Mulinge at the Nairobi Children's Court 6/09/10

³⁴⁷ Section 13 Child Justice Act.

³⁴⁸ Ibid

³⁴⁹ Interview Constable Mulinge at the Nairobi Children's Court 6/09/10

at the police station so that she could ‘learn a lesson’. She was tried and sentenced as an adult to the Langata Women’s Prison in Nairobi³⁵⁰.

Another thing that we must consider is what to do when we find the child is below the age of criminal capacity. Clearly this is still a child at risk. Systems need to be in place to ensure that the child is not going to face the criminal justice system in future. The South African Child Justice Act calls for the probation officer to handle this child in an appropriate manner according to the needs of this child³⁵¹.

Detention as a measure of last resort

This is an aspect that will be examined autonomously as it transcends the three phases of trial from the pre-trial, the trial and the post trial phase. It’s important to keep the child away from the effects of institutionalization hence the concept of detention as a measure of last resort and for the shortest time possible.

This principle is embodied in the Beijing Rules and domestically under Section 28 South African Constitution and under Section 53 of the Kenyan Constitution. Regardless the biggest challenge to both countries is to put this well known principle into practice. In South Africa on the average 135,000 people in prison daily 1,100 are children³⁵². This violates not only this principle but also the protection the international standards accords the child not to be detained together with adults³⁵³ in an effort to prevent the ‘criminal contamination’ of the child³⁵⁴.

³⁵⁰ I represented this client at the Nairobi Children’s Court on February 2009.

³⁵¹ See section 155

³⁵² Community Law Center Children in Prison in South Africa; A Situational Analysis p 4

³⁵³ Rule 13.4 Beijing Rules

Pre-trial detention is also another major issue of concern. Pre-trial detention is standard practice despite the fact that this is meant to be an exception to the rule. In South Africa statistics collected as on 28 February 2007 show that there are more un sentenced children in prison (56%) than sentenced (44%)³⁵⁵. In Kenya as of 5 June 2009 43.3 % of the total prison population consisted of pre-trial detainees³⁵⁶. In many cases it is used as a wakeup call when the child is considered out of control. Release on bail although guaranteed in the two respective Acts³⁵⁷ is often denied on flimsy reasons often times when it comes to abandoned children ‘for their own good’³⁵⁸. Where bail is set it tends to be too high³⁵⁹. Research also shows that the more serious the offense the less effort is put into showing that the child will re-offend if released on bail³⁶⁰.

It is important to point out an inherent conflict between the Children Act³⁶¹ and the Criminal Procedure Code³⁶² within Kenyan law when it comes to release on bail for those children charged with capital offenses. Rule 9 of the Child Offender Rules (annexed to the Children Act) provides for release of the child on bail and where bail is denied the reasons for this should be recorded. Section 123 of the Criminal Procedure Code on the other hand holds that capital offenses such as murder are un bailable offenses. The Court in *R v Wambua Musyoka*³⁶³ stated that there was no conflict between the two statues by virtue of the Children Act having been

³⁵⁴ Commentary to Rule 13 Beijing Rules

³⁵⁵ Muntingh Lukas Child Justice Alliance: A Quantitative Overview of Children in the Criminal Justice System Child Justice Alliance University of western Cape 2007 11

³⁵⁶ International Center for Prison Studies Prison Brief for Kenya available at

http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wp_b_country.php?country=25

³⁵⁷ Section 21 South Africa Child Justice Act, Section 5, Fifth Schedule Kenya’s Children Act

³⁵⁸ Interview with Inspector Musyoki at the Nairobi Children’s Court on 23/5/09

³⁵⁹ Ibid, for South Africa see Community Law Center Children in Prison in South Africa; A Situational Analysis p 71,

³⁶⁰ Ibid

³⁶¹ Act 8 of 2001

³⁶² Cap 75 Laws of Kenya

³⁶³ Machakos High Court Criminal Case No. 24 of 2003

enacted after the Criminal Procedure Act. Hence the Children Act's provisions superseded the Criminal Procedure Code.

However the court in the case of *Victor Lumbasi v R*³⁶⁴ faced with this conflict stated that the court has the right to deny bail in cases of capital offenses and to order that the child be detained in a remand home until his case is determined. It is curious where the court adopted this right from as its clearly *ultra vires* the child offender rules. Clearly this is a conflict that provides court leeway to deny bail to child offenders contrary to the child offender rules.

Dignity

Children can and do commit horrible crimes. Article 40 (1) of the UNCRC however lays down that any reaction by the State to the child offender must "promote the child's sense of dignity". Responses to this provision include diversion and other alternatives to the criminal justice system

Diversion

Article 40(3) (b) of the UNCRC lays the basis for diversion by calling for States to seek 'whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings'. Diversion can take place at any point before conviction. In South Africa diversion is a well recognized and well structured system that started being practiced well before the comprehensive legal framework was put in place in 2010 in the CJA. In the period 2001-2002 16000 children were accepted into National Institute for Crime Prevention's (NICRO)

³⁶⁴ Bungoma High Court Criminal Case No. 57 of 2006

diversion programme³⁶⁵. In Kenya although the Children Act does not make express provisions for diversions it does give the trial magistrate the discretion to make a certain non- custodial orders/ alternative orders³⁶⁶. And in 2001, Save the Children (UK) initiated a pilot pre- trial diversion project in the country. The project however proved unsustainable as it was largely depended on donor support so essentially at the moment no diversionary measures are employed as regards child offenders in Kenya³⁶⁷.

Diversion allows a child not to go through the criminal justice system and all the attendant consequences that go with that while also giving him an opportunity to take responsibility for their action. The flip side is that diversion affects the accused child's right to a fair trial and due process and that's why the UNCRC provides that alternatives should only be applied provided that 'human rights and legal safeguards are fully respected'³⁶⁸.

4.2 Trial stage

Specialised legislation and procedure

When it comes to the trial stage several things are important to consider. One of this is the existence of specialized infrastructure and systems to deal with the child offenders in accordance with the provisions of 40 (3) of the UNCRC. Such specialized infrastructure includes specialized courts. 'These courts must strive for informality of proceedings such as may be sensitive to the need for effective participation by children and to prevent the stigmatization of children'³⁶⁹. The informality however must be of such is nature that does not compromise the 'children's due

³⁶⁵ Jacqui Gallinetti "Diversion" in Sloth Nielsen (ed) Child Justice in Africa: A guide to Good Practice" available at <http://www.communitylawcentre.org.za/publications>

³⁶⁶ Section 25 Children's Act

³⁶⁷ Interview with George Kogolla, one of the pilot staff for the diversion project 12/8/2010 at Youth Alive! Kenya Offices Nairobi, Kenya

³⁶⁸ Article 40 (3) UNCRC

³⁶⁹ George O. Odongo 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context' in Children's Rights in Africa: a Legal Perspective Ashgate Publishing Limited, 2008 p 156

process and fundamental procedural rights³⁷⁰. The courts also have the advantage of enhancing successful reintegration as they cater for the special needs of the child offender³⁷¹ such as ensuring the child's privacy during the trial³⁷².

States have discretion in determining what manner of form these specialized courts shall take. Some have designated a particular magistrate in adult courts to act as children's magistrate while others such as South Africa have set different times for juvenile cases to be heard separate from adult cases albeit in the same building. Few have constructed separate court buildings and systems as is the situation in Kenya. Kenya has gone even further calling for a 'friendly setting'³⁷³ in the children court and for words such as 'conviction' and 'sentence' not to be used as against a child³⁷⁴. However these children courts are located in the two major cities while the other towns have a magistrate designated as a child magistrate. This limits the number of children who benefit from the specialized protections offered by the children court. South Africa does not have separate courts at all preventing children from enjoying the benefits that come with the separate children courts.

It's noteworthy that Section 40 UNCRC calls for specialization in authorities meaning that police officers, magistrates, probation officers and other authorities that come into contact with the child offender within the criminal justice system ought to be trained on the rights based approach in dealing with this child.

³⁷⁰ Van Bueren, G (1995), The International Law on the Rights of the Child Marthinus Nijhoff, 1995 p 179

³⁷¹ Ibid 175

³⁷² Article 40 (2) (vii) UNCRC

³⁷³ Section 188 Children Act

³⁷⁴ Section 189 Children Act

In this area Kenya has applied an unstructured approach with such training in the few occasions it is carried out being conducted by civil society organisations. In 2001 Child desks were established in several pilot police stations in Nairobi. The objective was that the officers at these desks would deal exclusively with children matters and would be trained in how to deal with the children accused of committing offences³⁷⁵. These desks worked for a while but eventually failed due to lack of consistency in training officers as well as lack of monitoring and evaluation of the project to ensure sustainability³⁷⁶. The main reasons why this project failed however was the lack of ownership of the project by the government. Hence when the initial funders moved on the project went downhill³⁷⁷.

In South Africa the situation is not much different. The police have in the past had a bad track record of abusing the rights of the child offender³⁷⁸. It is hoped that the ‘one stop child justice centers’ rectify this by ensuring specialization by the police officers present at the center³⁷⁹. As stated in Chapter 3 these centers bring together probation officers, police officers, prosecutors and court officers in an effort to minimize the time the child spends within the criminal justice system by enhancing greater coordination between these crucial players³⁸⁰.

Preliminary inquiry procedure in South Africa is a very unique form of specialized infrastructure. The procedure setup under section 43 of the CJA is the child’s first contact with the court and

³⁷⁵ Community Law Center Child Justice in Africa; A Guide to Good Practise p 59

³⁷⁶ From interview with the Head of Prosecutions August 2010 Nairobi High Court

³⁷⁷ Interview with George Kogolla, one of the pilot staff for the diversion project 12/8/2010 at Youth Alive! Kenya Offices Nairobi, Kenya

³⁷⁸ Community Law Center Child Justice in Africa; A Guide to Good Practise p 57

³⁷⁹ Ibid

³⁸⁰ See also George O. Odongo ‘The Impact of International Law on Children’s Rights on Juvenile Justice Law Reform in the African Context’ in Children’s Rights in Africa; a Legal Perspective Ashgate Publishing Limited, 2008 p158

aims at developing an individualized response to the child. It also ensures that the child does not get lost in the system³⁸¹.

Legal Aid

Article 12 (1) of UNCRC states that a child shall have the right to be heard during trial. Given the complexity inherent within the procedures and the laws during the conduct of trial then this essentially necessitates provision of legal aid to the child. Research has also shown that the child's rights are less likely to be violated when there is an adult present during the entire criminal justice process from arrest and investigations to sentencing³⁸².

South Africa provides for provision of legal aid to the child charged with a crime 'if substantial justice would otherwise result'³⁸³. Kenya's new Constitution states the same³⁸⁴. Further Kenya's Children Act stipulates that the child should have legal representation in all cases³⁸⁵. Again like with other provisions, practice fails. In many cases children in Kenya appear before court without any form of representation or even without their parents present. This greatly hinders the child's right of participation. In Kenya, the National Legal Aid Programme was set up and one of their key areas of focus is the Nairobi Children's Court. However in the 3 years that the programme has been running not much has been done in the area of provision of legal aid to the child offender³⁸⁶.

³⁸¹ Jacqui Gallinetti "Getting to know the Child Justice Act" Child Justice Alliance University of Western Cape 2009

³⁸² Best Practise Guide to Juvenile Justice in Kenya Youth Alive! Kenya August 2008 (unpublished) 54

³⁸³ Child Justice Act Section 82

³⁸⁴ Article 50 (h)

³⁸⁵ Kenya's Children Act Section 77

³⁸⁶ Interview with Mr Gacheru, probation officer Nairobi Children's Court 13/8/2010 at Nairobi Children's Court Nairobi, Kenya

In South Africa the practice is different but with similar results. Although ‘State lawyers’ are provided the children don’t trust them as the lawyers are paid by the government³⁸⁷. In most cases the children do not even know of their right to legal representation and where they do know, they are advised by their parents/ guardians to speak for themselves³⁸⁸. In both countries where a lawyer has been assigned there have been questions raised over the quality of work that they offer. In some cases the child meets the advocate for the first time in the court room having not briefed them on their case beforehand³⁸⁹.

In South Africa the legal aid board has been called the “single biggest cause of delay” of child offender cases³⁹⁰. Legal aid attorneys have been said to have very little knowledge if at all on alternative sentencing options, to be poorly qualified and unsupervised³⁹¹. Children have said that the lawyers barely interview them and when they do they urge them to plead guilty³⁹². The new Child Justice Act may have laid down provisions stipulating what is expected of the legal representative of the child. However without the reform of the legal aid board then it’s doubtful that anything will change.

Fair trial requirements

Fair trial rights require that an accused child is informed promptly and in a language that they understand of the charges against them, not to be compelled to testify or plead guilty, that the case is heard within reasonable time, before an impartial and independent tribunal, be entitled to

³⁸⁷ Community Law Center Children in Prison in South Africa; A Situational Analysis pp4, 66-67

³⁸⁸ Ibid

³⁸⁹ Ibid. In Kenya this happens with a lot of the NGOs that claim to offer legal aid.

³⁹⁰ Community Law Center Children in Prison in South Africa; A Situational Analysis pp66,67

³⁹¹ Ibid

³⁹² Ibid

the presumption of innocence, have the right to be heard and defend themselves in person or through a representative of their choice and have a right to appeal or review by higher body³⁹³.

Whilst most of the fair trial requirements are respected in both countries the one that's constantly violated has to do with the hearing of the case within reasonable time. One reason for this is that the term 'reasonable' is open to different interpretations by different magistrates even when cases involve almost similar circumstances.

Given that it is crucial to limit the time that the child spends within the criminal justice system both the South African and Kenyan statutes set time limits for various stages of the process. For example in South Africa the child's pre-trial assessment is to be conducted within 48 hours of arrest³⁹⁴. This procedure which is meant to obtain the background of the child, also involves other fair trial considerations like the fact that the prosecutor must explain the purpose of the assessment to the child and that the child has the option of having his parents or advocate present during this interview. Section 35 of the South African Constitution also calls for the right to appeal and for the trial to be in a language the child understands. Section 66 of the CJA abides by this by providing that the trial must be concluded as speedily as possible and postponements must be reduced in number and in duration. Whether this will happen in practice with the enactment of the CJA only time will tell.

In Kenya rule 12 of the Child Offender Rules stipulates that cases shall be heard 'expeditiously and without any unnecessary delay'. In regard to this the section stipulates that a case being

³⁹³ Article 40 UNCRC

³⁹⁴ Section 43 (3) (b) (i) CJA

heard by the Children Court that is not completed within 3 months of plea taking shall be dismissed. Where the case is being heard by a court higher than a children court due to its seriousness then the child shall be remanded for a maximum of 6 months after which they shall be released on bail. Where this case is not completed within 12 months from the time of plea taking then the case shall be dismissed and the child shall not be liable for further prosecution on the same.

These very noble provisions have been a bone of contention in many a court case and many meanings have been attached to them in an attempt by the court to find a way around their strict implementation. In the case of *R v S.T (a child)*³⁹⁵ the court stated that these provisions on duration of child offender cases are meant to ensure that the cases are heard expeditiously and that to follow them strictly would be a travesty of justice. Where the court obtained this discretion from to impose on the clear and unambiguous provisions of the Child Offender Rules is unclear and definitely adversely affects the fair trial rights of the child granted by the Children Act. It definitely contravenes a well known rule of interpretation as enumerated in the case of *Stock v Frank Jones (Tipton) Ltd*³⁹⁶. Here the Court stated

“But dislike for the effect of a statute has never been an accepted reason for departing its plain language.”

Sentencing

International and regional instruments on the rights of the child have served to fetter the judicial discretion when it comes to sentencing. This it has done by stipulating principles that should be

³⁹⁵ Nakuru High Court Criminal Case No. 144 of 2003

³⁹⁶ [1978] 1 All ER 948

kept in mind when sentencing a child offender and also by expressly prohibiting some sentences from being imposed on a child.

The principle of proportionality which holds that ‘any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence³⁹⁷’ is violated where a child is detained in an adult facility and where he is detained where an alternative to detention would have sufficed. In South Africa the court on the same has held ‘The judicial approach towards the sentencing of juvenile offenders must [therefore] be re-appraised and developed in order to promote an individualized response which is not only in proportion to the nature and gravity of the offence and the needs of the society but which is also appropriate to the needs and the interests of the juvenile offender’³⁹⁸.

Article 37 of UNCRC prohibits the imposition of a life sentence with no option of parole on offenses committed by persons under the age of 18. Rule 17 (3) of the Beijing Rules prohibits imposition of corporal punishment on children. To their credit both South Africa and Kenya do not impose corporal or capital punishment³⁹⁹ as well as life imprisonment on a child offender⁴⁰⁰. Kenyan law further expressly prohibits imprisonment of any kind when it comes to the child offender instead opting for committal in rehabilitation schools and borstal institutions⁴⁰¹.

³⁹⁷ Rule 5 Beijing Rules

³⁹⁸ *S v Kwalase* 2000 (2) SACR 135 (C)

³⁹⁹ This was reasserted in Kenya in the case of *R v S.A.O Nairobi High Court Criminal Case No. 236 of 2003*

⁴⁰⁰ Section 18 (4) Kenya’s Children Act, Chapter 10 of the Child Justice Act stipulates what are the allowed sentences in the South African Juvenile Justice System

⁴⁰¹ Section 90 Kenya Children Act Act 8 of 2001

The reality on the ground is however different. A study conducted by the Center for Child Law in South Africa has shown that in the year 2005 32 persons who at the time of the commission of the crime were under the age of 18 were serving life sentences at various prisons in the country⁴⁰². In Kenya as previously stated with the inadequate means of ascertaining age and with the false changes in age by police officers many children are sentenced as adults⁴⁰³. There is also the additional fact that in Kenya a child who is convicted for a capital offense shall be detained at the pleasure of the president⁴⁰⁴ which allows for long periods of detention of that child and possibly life imprisonment⁴⁰⁵. In South Africa the extension of minimum sentences to 16 and 17 year olds who have committed serious crimes also affected the rights of the child not to be detained for a long period of time. The provisions⁴⁰⁶ essentially meant that detention for these children was a measure of first resort. However these provisions were later held unconstitutional⁴⁰⁷ but remain in effect until the constitutional court confirms the order.

4.3 Post Trial Stage

Once the trial court passes sentence and especially where the sentence handed down is custodial article 37 (c) of the UNCRC provides that ‘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’. Hence whatever the custodial sentence that the court imposes must take into account the child’s age and their inherent dignity. Thus

⁴⁰² Conference Report Child Justice in South Africa; Children’s Rights under Construction Compiled by Jacqui Gallinetti, Daksha Kassin and Louise Ehlers August 2006

⁴⁰³ Interview Constable Mulinge at the Nairobi Children’s Court 6/09/10

⁴⁰⁴ Section 25(2) Penal Code Cap 63 Laws of Kenya

⁴⁰⁵ George O. Odongo ‘The Impact of International Law on Children’s Rights on Juvenile Justice Law Reform in the African Context’ in *Children’s Rights in Africa: a Legal Perspective* Ashgate Publishing Limited, 2008

⁴⁰⁶ Section 51 (1), 51 (2), 51(6) (b) and 53 A (b) of the Criminal Law Amendment Act of 1997 as amended by Section 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007

⁴⁰⁷ Center for Child Law v Minister of Justice and Constitutional Development and others (11214/08) TPD

committal to prisons and together with adults will not suffice. Both countries have outlawed these two practices. In fact in the South African case of *S v Z*⁴⁰⁸ the court laid down the principles to be followed in sentencing. The court stated that the younger the child the less inappropriate a custodial sentence is. The same reasoning applies where the child is a first time offender. But what happens in practice tells a different story.

In South Africa ‘out of a daily average of some 135,000 prisoners ... some 1100 are children’⁴⁰⁹. Research also shows that more children are sentenced for economic crimes as compared to crimes of aggression⁴¹⁰. These could possibly have better been handled through diversion or other alternative sentencing options. Attempts are made to separate the children from the adults but in some prisons they have common areas and sometimes the separation basically involves a separate cell⁴¹¹. All other aspects such as educational and recreation facilities and other facilities to improve the conditions of the detention for the juvenile are missing. Children should also be separated from each other on the basis of their age and the seriousness of their offenses and this is not always done⁴¹². In Kenya there is only one custodial institution for girls that handles really serious cases such as murder and manslaughter (boys have two). Being the only such institution, issues of overcrowding will often arise. What this has done is to have some of these girls sentenced as adults and committed to the Langata Womens Prison that holds adult women offenders⁴¹³.

⁴⁰⁸ 1999 (1) SACR 427 (ECD)

⁴⁰⁹ Community Law Center ‘Children in Prison in South Africa; A Situational Analysis’ 4

⁴¹⁰ Ibid 5

⁴¹¹ Community Law Center ‘Children in Prison in South Africa; A Situational Analysis’ 31

⁴¹² Ibid

⁴¹³ From interviews with the advocate from Youth Alive! Kenya, Ms Kowino who is in charge of the juvenile Justice Project Period August 2010- September 2010

It is important to consider alternatives to custodial sentences especially when it comes to child offenders. The effects of custodial care on a child have been well documented over the years and more times than not background analysis of these children lives shows a history of perpetual exclusion and deprivation of services and benefits that other children enjoy which leads them to a life of crime⁴¹⁴. A sentencing option should take into account the best interests of the child.

When determining what alternative sentence applies, several principles apply. Firstly the option has to offer a real alternative to custodial sentences⁴¹⁵. Secondly it must be context conscious meaning that it should be suitable for the place where its being implemented taking into account the resources and cultural factors of the region⁴¹⁶. Thirdly it must be a sustainable option backed with the support of all relevant stakeholders, and lastly it must have ‘community support, be simple and accessible’⁴¹⁷. Alternative sentences are less costly, they enhance reintegration and are sensitive to the individual circumstances of the child⁴¹⁸. Given the impressionability of the child and their high potential for rehabilitation they are even more appropriate for child offenders.

Reintegration

Conventionally reintegration means working with children in custody or released from custody through programmes that are meant to reduce chances of re-offending. However more recently it has been said that a wider rather than a narrower approach to reintegration should be taken in the sense that stakeholders should start thinking about reintegration well before sentencing as social

⁴¹⁴ Community Law Center Child Justice in Africa; A Guide to Good Practise 41

⁴¹⁵ Ibid Chapter 8

⁴¹⁶ Ibid

⁴¹⁷ Ibid

⁴¹⁸ See Ibid

exclusion of the child starts way before this⁴¹⁹. It should be defined to include children who have come into conflict with the law or show high chances of doing so⁴²⁰. In the sense then reintegration essentially means ‘rolling back or reversing the process of exclusion through development of skills, social and economic bonds and support networks’⁴²¹.

There have been several reintegration programmes in both countries but these are all initiatives of civil society organizations. State reintegration initiatives are lacking in both countries. However one practice that enhances the process of reintegration is the expungement of records. A juvenile record is not meant to be accessible or affect the future opportunities of the child later in life. The CJA provides for the expungement of the records of the child for schedule 1 or 2 offenses upon application by the child or his parents/guardian, five years and ten years respectively after the date of conviction⁴²². Records of schedule 3 offenses which include murder, treason and sedition cannot be expunged. In Kenya, provision has also been made for supervision of the child after release by an authorized person⁴²³.

4.4 Restorative justice and African Customary Law

The concept of restorative justice is the new buzz word in criminal justice circles and the CJA states as one of its objects the entrenchment of restorative justice principles in the management of children within the criminal justice system⁴²⁴. It has been defined as ‘A theory of justice which focuses on the harm caused to the victim and the community by crime, and endeavors to

⁴¹⁹ Community Law Center Child Justice in Africa; A Guide to Good Practise 39

⁴²⁰ Ibid 30

⁴²¹ Ibid 39

⁴²² Section 87

⁴²³ Section 54 Kenya Children Act Act No. 8 of 2001

⁴²⁴ Preamble Child Justice Act 75 of 2008

find ways to repair the harm'⁴²⁵ The unique aspect of the Child Justice Act is that it brings in an 'Africanized' angle to restorative justice through the notion of Ubuntu.

Ubuntu is an integral aspect of Africa culture which is 'hard to render in Western language'⁴²⁶. The South African Constitutional Court in the famous case of *S v Makwanyane*⁴²⁷ defined it as '[A] culture which places sole emphasis on communality and on the interdependence of the members of the community. It recognizes a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be a part of. It also entails the converse however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights for all'.

This brings up the question of what role if any can African Customary Law play towards enhancing child rights within the child justice system. Customary law has been defined as the customs and usages traditionally observed by the indigenous African peoples and that form part of the culture of those peoples⁴²⁸.

The situation of African Customary Law in African countries at present is aptly portrayed in Nhlapo's statement 'Years after the advent of democracy, South Africa is still grappling with the

⁴²⁵ Ann Skelton "Restorative Justice in Child Justice Systems in Africa" in Sloth Nielsen J (ed) *Children's Rights in Africa; A Legal Perspective* Ashgate Publishing Ltd, England 2008 p 129

⁴²⁶ Archbishop Desmond Tutu *No Future Without forgiveness* quoted by BBC News at http://news.bbc.co.uk/2/hi/uk_news/magazine/5388182.stm "All we need is Ubuntu"

⁴²⁷ 1995 (3) SA 391 (CC) Paragraph 24

⁴²⁸ South African Law Reform Commission Interim Report on Traditional Courts and the Judicial Function of Traditional Leaders October 2002

tension between the western notion of retributive justice and the traditional African concept of restorative justice⁴²⁹. The same could be said about the situation in Kenya. What happened with colonization of the two countries by the British was to introduce a western concept of dealing with offenders that differed from the then existing African customary system in the sense that whilst the western concept emphasized retribution the African concept emphasized ‘reconciliation, restoration and compromise’⁴³⁰. In essence what is now popularly known as restorative justice was and still is deeply imbedded in the African way of life.

Bishop Desmond Tutu stated “Retributive justice is largely western. The African understanding is far more restorative- not so much to punish as to redress or restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people”⁴³¹.

Customary law is recognized by international and constitutional law⁴³² applicable to both countries. Article 22 and 27 UDHR and Article 27 all provide for the entitlement of persons to enjoyment and participation in their cultural life. The ACRWC in its preamble states ‘the African approach to children’s rights takes cognizance of the virtues of the African cultural heritage and the values of African civilization’. It also places upon the child the duty to ‘preserve and strengthen African cultural values in his relationship with other members of the society’.

⁴²⁹ Thandabantu Nhlapo ‘The Judicial Function of Traditional Leaders: A Contribution to Restorative Justice?’ A paper presented at the conference of the association of law reform agencies of Eastern and Southern Africa (ALRAESA), Vineyard Hotel, Cape Town 14 -17 March 2005 p 3

⁴³⁰ Ibid

⁴³¹ Cited in Child Justice in Africa; A guide to good practice p 29

⁴³² Section 30 and 31 of the South African Constitution and Section 44 Kenyan Constitution

Given its legitimacy, customary law has been more freely applied in adult justice systems than in child justice systems. Both countries have developed a hybrid system where traditional systems in the forms of traditional courts run alongside formal courts. There has however been hesitancy to apply African traditional dispute resolution mechanisms to child justice systems. It is true that there are practices within traditional justice systems that are in conflict with the model child justice approach and standards have to be set to protect anyone going through these systems⁴³³.

In the case of *Hlantalala v Head of Western Tembuland Regional Authority and others 1998 (3) SA 262 (Tk)* concerns about legal training of the elders and the issue of separation of powers in traditional courts were raised. However the court dismissed these as not really helpful as the traditional systems ought not to be judged by the same standards as magistrates' court since they were 'predicated on a different value system and seek to achieve a different result'⁴³⁴. The fact that these courts are accessible to the common man in terms of proximity to their homes and that they are held in a language that they understand and a style and culture that they are familiar with, in my opinion does justify the legal pluralism this court acknowledges in its judgment.

Apart from a hybrid system African customary law can also be incorporated in the mainstream criminal justice system in terms of applying traditional concepts within the formal justice system for example by diverting away cases that were meant for court in terms of an out of court settlement of the matter and negotiations overseen by the council of elders and other traditional leaders.

⁴³³ Ann Skelton 'Restorative Justice in Child Justice Systems in Africa' in Sloth Nielsen J (ed) Children's Rights in Africa: A Legal Perspective Ashgate Publishing Ltd, England 2008 p 142

⁴³⁴ Madlanga J *Hlantalala v Head of Western Tembuland Regional Authority and others 1998 (3) SA 262 (Tk)*

Kenyan law does recognize the place of African Customary Law as a source of law to guide the courts in their adjudicatory role⁴³⁵. South African Children’s Act also recognizes traditional leaders as having a role in ‘court processes aimed at protecting and promoting the rights of children’⁴³⁶. What lacks is resort to these mechanisms by the major role players, despite their rehabilitative features many preferring the formal justice systems.

The Child Justice Act came into force in April of 2010 while the new Kenyan Constitution was promulgated in August 2010. As discussed in this and previous chapters both of these have provisions that positively influenced child justice laws. It’s too early to tell any influence in practice.

4.5 Overall message

This chapter has shown that there is a gap between law and practice in both countries. There is also a gap between law and practice and generally accepted standards of child justice. The chapter has also shown the African dispute resolution mechanisms can and do have a role to play in the child justice systems of both countries. The next chapter shall discuss what needs to be done to fully protect the rights of the child offender in both countries.

⁴³⁵ Section 3 (2) Judicature Act CAP 8 of the Laws of Kenya

⁴³⁶ Chuma Himonga “Africa Customary Law and Children’s Rights: Intersections and Domain in a New Era” in Sloth Nielsen J (ed) Child Rights in Africa: A Legal Perspective Ashgate Publishing Ltd, England 2008 p85

CHAPTER 5: CONCLUDING REMARKS AND RECOMMENDATIONS

From this study several things stand out. First, both countries have a great gap between law and practice. The laws of both countries on child justice issues are to a large extent representative of best practice in the field but these laws and policies have not been implemented in practice. Both have had new legislation come into force during the conduct of this study; the Child Justice Act in South Africa and a new Constitution in Kenya which greatly influence the field of child justice. Only time will tell if their provisions are put into practice.

Both countries have a blend of the justice and welfare approach but with South Africa leaning more towards restorative justice. Both lean on the best interest of the child principle but South Africa has put in place more mechanisms that involve restoring the balance in the community taking into account the needs of the victim and the community at large. However in both countries, concerted efforts towards reintegration are lacking.

An important factor that has arisen is that both countries in their respective criminal justice systems employ the traditional African dispute resolution mechanisms. However the application of these mechanisms to child justice has been limited except where the same has been adopted in the name of ‘restorative justice’ in South Africa. There is wariness in using these systems as they are often compared against western standards and found to fail to meet the mark. To avoid any violation of rights within these systems the same should be formalized and regulated but in a manner that ensures that we don’t lose the essence of the same. It’s not a western system; it shouldn’t be measured against it. With its various advantages like accessibility, acceptability within the community and a stronger leaning towards rehabilitation rather than retribution it has a crucial role to play towards child justice.

General recommendations

Both countries need to build a knowledge base on children in conflict with the law. Through research and the creation of national databases the countries would prevent children getting 'lost' in the system. Research can be on the cost of institutionalization, the impact of non- institutional measures among others.

Both need capacity development of the various institutions and role players involved in child justice (police officers, probation officers, social workers and judicial officers). There is need for the standards of recruitment and practice and the code of conducts for these role players to have a focus on the rights based approach of dealing with child offenders. Given the gap between law and practice and seeing that new laws have come into place in both countries the role players need to be trained in these new standards that have been set. This training should be on a regular basis and incorporated in the government schedule to ensure sustainability of the process through government ownership.

There is also lacking in both countries an effective monitoring system especially of children in custodial care. In line with this accountability measures for law enforcement officers should be strengthened to prevent abuse of child offenders.

Both need to ensure that the justice and social sectors work more closely together. The social sector is relevant to the juvenile justice sector in many ways in terms of prevention of offending, diversion, aiding the child through the criminal justice process for example by conducting the social inquiry and in reintegration.

There is also need to raise awareness in the community and amongst the children themselves on child rights and specifically on the rights of the child offender. Ensure child participation in the process. Introduce and promote community based resolution mechanisms and both need to get a more accurate system of age assessment.

Both need to decentralize application of best practices from major towns. Children courts and one stop child justice centers should not only be in major towns but even in the rural areas. This will enhance accessibility.

Country specific recommendations

South Africa

At this stage with the coming into force of the Child Justice Act one of the main priorities for South Africa is to set up an effective monitoring and evaluation system to ensure that the Act is actually effected on the ground. The setting up and mandating of government bodies to oversee the implementation process is crucial as is regular review by governmental and non-governmental bodies.

There is also need to set up a separate juvenile court which is able to grant the child all the protections that meet international standards. Similarly there ought to be separate juvenile holding facilities that ensure that the child's rehabilitative, educational, medical needs are met in a setting that enhances the reintegration of the child back to society.

South Africa also needs to reform its legal aid board. This will ensure that the children get qualified, consistent and involved legal expertise in their cases. The process of obtaining legal aid should also be made more accessible to the child. This will enhance the child's right to participation in the judicial process.

Kenya

In Kenya the State should seek alternative dispute resolution mechanisms and involve more of traditional African dispute resolution mechanisms if need be as long as they are not contrary to the internationally recognized rights of the child. Further there is need to reinstitute the diversion programme in addition to applying more of the alternatives to custodial care that are provided for in the Children Act. This study shows that in as much as the alternatives are herein provided the court has too often opted for detention as a measure of first resort.

Another matter of priority is to get the legal aid programme up and running to ensure that every child within the criminal justice system is offered legal representation and through this is able to have his views heard during the criminal justice process.

As stated in the introduction Kenya and South Africa are considered the two countries in Africa with the most progressive child justice laws in Africa. However the practice negates the standards set by these laws. Further these laws in some ways as shown by this study do not meet the international standards on child justice. Rehabilitative methods available within the African traditional system are constantly ignored in favor of 'modern' retributive approaches. There is also a tendency in both countries to deal with child justice issues separate from other national

issues. This limits the attention and resources given to child justice at the national level. It is important to mainstream child justice issues into the national agenda.

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Annexure

Interview questions (conducted in Kenya)

1. What are the challenges facing child offenders in Kenya today?
2. What measures do you know of that have been taken by the State to counter these measures?
3. What changes have you seen if any in the juvenile justice field since the coming into force of the Children Act?
4. What is the role of the National Legal Aid Program in juvenile justice in Kenya? Have you seen any changes in the juvenile justice field since the inception of this programme?
5. What state run reintegration mechanisms currently exist in Kenya?
6. What support do the various role players in the juvenile justice system in Kenya need to better protect the rights of the child offender within the criminal justice system?
7. What needs to be done differently at the policy level to better protect the rights of the child offender within the criminal justice system?