CHRONICLE CHRONIQUE CRÓNICA

Contents

Editorial — Avril Calder

Saving Children

The last two editions of the Chronicle have opened with thought provoking articles on what happens to children long before they reach the courts.

A profound article by Camila Batmangelidh now builds on that theme. Camila is the founder of the not for profit organisation charity Kids Company which operates at the street level in inner London. Deaths of young people in London due to violence, largely from other young people, have marked 2008 in an horrific and unacceptable way. Her words describe exactly how a young person can commit such acts and that strengthening child protection is society's primary defence against criminality.

Further contributions build on this theme. Jean Schmitz of Fondation Terres des Hommes (Tdh)—with which we enjoy an excellent working relationship—brings us news of the implementation of a restorative approach to youth justice in Peru; and Judge Patrica Klentak of Argentina reports on an intervention with children on the street which is also bringing encouraging results.

André Dunant, representing IAYFJM, delivered a talk at the Defence of the Child International's conference in Brussels in

October asking why so many judges around the world struggle to apply the law and the appalling consequences for many young children that result.

Regional co-operation—'Pacific specific'

This winter's Chronicle also introduces a new theme—regional cooperation in the development of juvenile justice and child protection. The region is the South Pacific and the contributing countries giving us a flavour of that regional cooperation are Samoa, New Zealand and Australia.

The co-operation began in 1995 when three members of the judiciary in those parts met and informally laid the foundations for the South Pacific Council of Youth and Children's Courts (SPCYCC).

Thirteen dedicated years later the SPCYCC is a strong and very active organisation, which has many territories, states and countries as members and meets annually for several days I'm most grateful to Justice Vui Clarence Nelson, Supreme Court Judge in Samoa, for sending me a report of the 2008 conference.

SPCYCC has moved from being solely a forum for the exchange of information amongst judicial leaders. It has succeeded in promoting the particular needs and challenges of child and youth offenders and those in need of care and protection in separate and qualitatively different systems from adult systems. Last year's conference marked a further stage in the evolution of the organisation as it now provides 'Pacific specific' youth justice training. As Judge Andrew Becroft, Principal Youth Court Judge in New Zealand, says 'the Council is becoming a significant player as to justice issues in the South Pacific'.

In addition we publish the Charter of SPCYCC and articles about Youth Justice in Samoa by Justice Nelson, in Tasmania by Chief Magistrate Arnold Shott and in New Zealand by our correspondent Tracey Cormack, Research Counsel to Andrew Becroft. All of these add to our cannon of brief guides to juvenile justice systems.

Europe

As our President hopes, our Association has begun to play a role in promoting regional cooperation too—in Europe where, under the generous auspices of the *Assozione Italiana dei Magistrati per i Minorenni e per la Famiglia* the second meeting of representatives from member countries took place in October 2008 in Brescia, Northern Italy. The theme of the meeting was 'The Juvenile Judge in Europe: penal and civil competences'. Joseph Moyersoen, Secretary General of the Italian Association and a member of our Council played a crucial role in setting up the seminar and has kindly provided an account.

The much bigger political co-operation in Europe is reflected in the recent adoption by the Council of Ministers of the Council of Europe of 'European Rules for Juvenile Offenders subject to Sanctions or Measures'. A detailed commentary on the rules has also been published. The Rules seek to harmonise approaches to juvenile justice in member states. In addition there is the new Kiev Declaration on the Future of the Council of Europe Youth Policy:2020. There are web references to both in Contact Corner.

Judge Tomas Alvå of Sweden has also kindly added to our brief guides to juvenile justice. Please contact me if you would like to add to this series.

Family Court issues

You will remember that Anil and Ranjit Malhotra, international lawyers and members in India, have a keen interest in the problems of non-resident Indians and the plight of children caught up in international disputes. Their article sets out the rapidly developing position in India where there is 'no uniform approach to resolving the issues of custody, access and contact which arise when parents are separated and live in different countries'.

In September I was privileged to be able to represent our Association at the 30th annual congress of the Polish Family Judges Association and to present papers on both the Youth and Family Courts at the magistrate court level in England and Wales to the several hundred Polish Judges attending. Another speaker, Dr Magda Arczewska has generously contributed a history of the Polish Family Courts—now in their 31st year—and in the next edition the President of the Polish Association, Judge Ewa Waszkiewicz will tell us how the courts are working.

May I once again thank all the contributors and Editorial board for their help in preparing this edition of the Chronicle and wish everyone a happy 2009. **Avril** acchronicleiayfjm@btinternet.com

News from the President — Renate Winter

Dear Colleagues, dear friends,

The year 2008 is over now, as I write my editorial for our Chronicle. It was not an easy one, the year 2008, not for the economy, if we look at the global crisis, not for human rights, if we look at the increasing use of torture, of abduction, of detention without trial, of more and more violence in families, in institutions, in politics.

It seems to be a very typical reaction of governments, individuals and the media that in times of economic hardship justice becomes more retributive, especially in regard to children in conflict with the law. Is it, because tolerance and understanding for those causing problems are decreasing when financial problems are on the rise? Is it because it is easier to save from the marginalized ones? Is it because hardship creates harder people?

In France, the juvenile and family court judges started and partially won a bitter fight when the government decided on a new law on juvenile justice, derogating the Ordinance of 1945, for which France was famous due to the special assistance granted to children. It seemed that the plan was to get a kind of an Anglo-Saxon model, where the age of criminal responsibility would be set at 12 years; where older children between 16 and 18 years of age under certain conditions could be treated as adults in a special court (tribunal correctional); where specialized judges and prosecutors are not foreseen anymore; where the judges would be dependent on the good will and the financial possibilities of the administration to get assistance for children in conflict with the law instead of punishing them; where the discretion of those who know best about the problems of a given child, the judges dealing with a case, would be limited by mandatory legal prescriptions for punishment instead of alternatives; where the notion of a "child" as set in the Convention on the Rights of the Child (CRC), systematically will be replaced by the notion of "minor", indicating a completely different set of mind.

In Belgium, in Italy, in many East-European states the opportunities for family court judges to protect children as foreseen in the law are hampered by the fact that there is no money available, not enough funds to implement a legally possible child friendly decision of the judge, be it the family judge or be it the juvenile judge in penal cases. Only rather vague commitments, if any, could be deducted from the reaction of officials to the complaints of the juvenile judges.

During an opening address at a huge international conference on juvenile justice and child protection in Spain a high ranking prosecutor of that country stressed the necessity to penalize children as young as possible because of the global trend of increased youth criminality that wouldn't stop at the borders of his country. He completely and maybe deliberately (?) ignored the fact that in his own country (as in many other European ones) the level of youth criminality is decreasing according to all official statistics. Such behaviour of course raises the question—in whose interest could a state prosecutor possibly announce such plans? Especially when no judge joined this declaration…..

Some conferences and seminars on child issues have taken place in Africa as well, where it could be clearly seen that even in the rare cases where child friendly legal dispositions were available, their implementation was weak at best, not only because of lacking resources, but first of all because of a non child friendly concept of the population as well of the judiciary. (Beating children in families, in institutions, at school, at work is common; attempts to avoid such practices are mostly not even understood.)

In England and Wales, despite of (or because of?) possibilities for judges to pronounce orders holding parents accountable for the offences of their children, the level of deprivation of liberty for children is still

exorbitantly high, the highest one in Europe according to statistics.

In many Latin-American countries the tutelary system is still in use despite modern legislation, the situation of street children in Asia has not improved and many many children worldwide, trafficked or used as child soldiers, are doomed.

As you can see, dear friends and colleagues, the resumé of 2008 for juvenile justice and child protection doesn't look good. On the other hand, our Association has achieved a few very positive things. Members of the IAYFJM assisted Terre des Hommes in establishing and running a very promising project in juvenile justice in Peru using mediation and community service orders as alternatives to trial and punishment (*see page 11 Ed*). In two pilot regions, training for all stakeholders took place and consequently collaboration between police, prosecution, courts and social services worked very well. Terre des Hommes even won a state prize for its excellent work and IAYFJM can also be proud, having contributed to this success story that has already started to expand to other Latin-American countries and will continue to do so in 2009.

In this regard I would like to now draw your attention to the first Latin-American Congress on Restorative Justice concerning children that will take place in November this year in Lima/Peru. This might be a very good opportunity to further the policy of our Association and I am looking forward to the participation of as many colleagues as possible, especially from Latin America.

In October that year IDE, the Institute of the Rights of the Child, together with the United Nations Office on Drugs and Crime (UNODC), BIDE and Innocenti Research Centre/UNICEF, organized a very important and largely successful seminar on child victims and witnesses, a group of children almost forgotten in the legislation of many UN member states. The background for this seminar was a new UN Model Law, Commentary, Manual, and Guidelines and even 'distance learning kits' on how to deal with child victims and witnesses during legal proceedings. Some hundred international participants discussed these very new and most necessary legislation and assisting tools. A complete documentation will be available soon.

East European countries as well have shown interest in upgrading juvenile justice and child protection mechanisms. IDE in cooperation with the United Nations Development Programme (UNDP), again assisted by members of our Association, organised a seminar for high-ranking professionals of Belarus on how to efficiently deal with children in their best interest in a coherent system respecting the principle of minimal intervention. This seminar was only the first in the region. As there will be a follow-up in 2009, we have reason to hope that this as well might become a regional programme.

Prof. Jean Trepanier from Montreal has finally started to lay the foundations for the project on writing a code of ethics for juvenile judges. A working group with members from all continents will be established. The work will be done via e-mail to save costs. Once again: please, anyone interested in collaborating with this group kindly address jean.trepanier.2@unmontreal.ca . One member per continent will be chosen. UNODC has already signalled interest in this project, which might become a big step forward in getting a universally recognized Code of Ethics at the end of the day! (End of 2009 maybe?)

Another project I tried to initiate should be achieved as well this year. I had several promising discussions with representatives of the International Association of Women Judges, being a member of the Association myself, who seemed to be very interested in collaborating with our Association, especially on issues concerning girls. I will contact the President and the Executive Council and see, if common legal problems or practical ones in daily life at court can be addressed jointly.

Speaking of international issues, I can proudly confirm, that this last year several of our members participated in many, mostly international, conferences, reports of which you will find in the Chronicle. As I believe that the IAYFJM has a lot to contribute in the field of juvenile justice and child protection due to the special knowledge and competence of its members, I am especially grateful to all members, dedicating time and effort to represent us internationally and to inform our members about the most recent developments. The repeated engagement of the IAYFJM has earned us quite some reputation as is shown by many invitations to participate in developing new ways of dealing

with children in conflict with the law or children in difficult circumstances.

This brings me to the last point I would like to address and to make a priority of: it is mostly the family judge who deals with children at risk. It is mostly the family judge who needs international collaboration in cases of abduction, divorce of inter-country marriages, and as a consequence, to inter-country visiting rights, who need legal assistance through letters rogatory etc. I think that IAYFJM should devote a special edition of the Chronicle, a blog, a seminar, a discussion via e-mail or any other means of communication, to these topics, where international development is most rapid. I protection.

would be very grateful to every member who would inform me on how to proceed (renatewinter@gmx.net) or who would join such an undertaking.

Please let me know!

As we have already had a lot of programmes and declarations, such endeavour might become a contribution from the judiciary and its auxiliaries to get from theory to action.

With all these plans in mind and hoping for active participation and contributions from you, the members, allow me to wish you all a most happy and successful New Year

Renate

A birthday tribute to Horst Schüler-Springorum

Dear Horst,

You turned 80 not long ago, on the 15.10.2008, to be precise. What an excellent opportunity to congratulate you in the name of the IAYFJM, an organization you cherished, greatly assisted and presided, first as president then, for quite a while, as honorary president for the outstanding work you have done and you are continuing to do in the field of juvenile justice and child protection.

There are so many people who know you, who highly respect you for your great achievements as university professor, as researcher, as author of numerous articles and books on juvenile justice, criminology, sentencing and enforcement of sentences, standards on human rights and juvenile justice, victim –offender-mediation, as drafter of and advisor to universally recognized international Conventions, Rules, Guidelines and laws, again on juvenile justice and child protection.

There are many stories out there about you, the man who wrote about “Criminal Policy for Humans” It was difficult for me to pick the one that would characterise you best, at least in my eyes.

Once, during an international congress, a group of rather young and not too experienced judges (including me) discussed with you, the doyen and “father” of juvenile justice, about punishing children in conflict with the law. We complained about the return to retributive systems worldwide which we believed done with for some time. Our statements were very emotional, impatient; we couldn’t understand colleagues who argued now for more and harsher punishment instead of assistance as they have done before, just because politics started to change. We were very disappointed and concluded that it didn’t make sense to fight a system, stronger than us, when the “big shots” seemed to quickly adapt.

I remember you, calming us down, understanding and explaining human behaviour with the experience of a lifetime.

“If you look at the history of juvenile justice”, you said, “you will see that politicians as well as people in general react like a pendulum to human behaviour outside the norms. They go from one extreme to the other. From retributive principles to the tutelary system; from assistance to punishment; from responsibilising children to not attributing them any responsibility; from holding persons accountable only when adult to holding children accountable at a very young age. Back and forward, all the time.

This was never and is of no consequence for the development of a better juvenile justice system. What is of consequence, is, if you change or if you stick to what you believe is the right approach, even if people call you naïve or old fashioned or not understanding the necessities of today’s world. This is what matters.”

These were simple words, dear Horst and you said them with the patient smile that characterizes you so well.

Patience, perseverance, endurance.

Only the wisdom of a life-long hope in humankind despite numerous negative experiences, the constant curiosity to learn something new, the unconditional love for justice, real justice, can furnish the courage to pronounce so seemingly outmoded words.

Thank you, Horst, you have taught a lot of lessons. This one was the most important one.

Thank you. Waiting for more to come!

Renate in the name of many of us.

The baby in the handle of a hairdryer—exploring violent youth crime

Camila Batmanghelidjh

Kids Company is a registered charity operating through two street-level centres in south London, as well as offering therapeutic and social work services in over 30 schools. We aim to provide an environment where relationships of empathy and attachment can be fostered between children and trusted adults. The support we offer is tailored to the needs of each individual child. No matter how disturbed a child is, he or she will never be turned away.

A severely abused young boy described a dream to me in which he was trying to retrieve a tiny baby from the handle of a hairdryer. When I explored with him why the baby was in the hairdryer handle he said: 'it was the only place the infant would be safe and warm.' This was a remarkable dream for a boy who had been subjected to horrific levels of abuse by a violent paedophile group involving his own father. He was often left naked and freezing whilst being subjected to degrading sexualised 'punishment'.

This is the victim aspect of his experience; sadly he can also be described as a perpetrator. He has a history of violent criminal offences which are on the whole impulsive and demonstrate the level of uncontrollable fury he could reach during which he punched, stabbed and tormented his victims. The assaults on others he managed by being completely cut off and disconnected from his feelings. It is as if he was frozen emotionally, just as he had frozen physically, and a kind of unanimated, vacuous mind waited to be propelled into outrage and fury as a way of living.

He described his daily life as being 'deadly', as if he was a walking corpse until someone managed to bring him into life by infuriating him and then something devastating would unleash to shock him, his victim and everyone around him. Subsequent to his attacks on others he would be left with a legacy of disbelief and shock as he came face to face with the result of his own savagery.

When his victims pleaded with him to stop the boy felt even more furious and escalated his attacks. Further exploration revealed that he found the pleading victim repulsive, it reminded him of when he was abused as a young child and begged for mercy. He saw in the victim his victimized self reflected back at him and he had nothing but contempt towards the child within him and by proxy towards his victim; that is why he could never access empathy and as he failed to summon up sorrow he could not feel remorse.

Much of our therapeutic work had been about finding and reclaiming the child in him who originally was in part destroyed by his own carers, but then, was through self-hatred obliterated by the boy himself. It is precisely the inability to take care of his own baby parts that he was able to remain so lethally dangerous. The baby in the hairdryer handle is a start, there is no trust in an adult to give warmth and nurture, but the handle of a hairdryer for him was an alternative womb in which the baby could be kept safe.

The questions for the justice system: is this boy, with his immense capacity for violence, making a criminally poor choice? Is he morally flawed? Or should he be described as having a 'mental incapacity' which challenges his ability to exercise pro-social choices?' As our understanding of the human brain acquires greater clarity; we are beginning, through our ability to see the brain in great detail and to measure its neuro-chemical functioning, to have a better understanding of mental capacity and social responsibility. Current parameters defined by the justice system attribute to every human being the same brain capacities. It is thought

that some exercise, strength of character and make-positive moral choices, therefore they are law-abiding. Others are believed to show weakness of character, making poor moral choices and consequently behaving criminally.

The justice system is built on the assumption that punishing the criminal will restore a sense of balance to the wronged victim simultaneously acting as a deterrent and a point of educational reference, correcting the deviance exercised by those thought to make poor moral choices. Punishment is therefore seen as a route to correction. However, brain science is now potentially challenging this whole narrative.

The challenge is primarily focused around the fact that the human brain is fundamentally a structure waiting to be sculpted through human relationships. When a baby is born some areas of the brain know what to do in order to ensure basic survival but most neurons are waiting to be programmed. If a child is exposed to loving care and consistent nurture then the neurons will develop expertise in pro-social exchange.

The intimate and synchronized care-relationship between a well-bonded mother and baby is the foundation of all empathetic pro-social repertoire. The capacity for empathy emanates from the front part of the brain closest to the skull, right behind the eyes (pre-frontal cortex). The programming in this front part of the brain ensures that the more emotional centres of the brain situated deep inside the skull (the limbic area) are soothed when over-aroused or agitated. Hence a well-balanced human being is one who can use the front soothing repertoire to balance out the over emotional limbic area. Most human beings 'self-regulate', even-out and make appropriate their emotional responses by using the calming repertoire which has been sculpted into their brain through maternal love.

For my client, the young fifteen year old boy, the damage was profound. He was deprived of maternal love because his mother was an out-of-control crack-cocaine addict. Instead of appropriate nurturing responses and being 'held in the mind' of a mother enthused with maternal reverie the baby had to survive a bizarre, violent, catastrophic carer.

At first, the infant struggles to remain connected to the maternal life-line, adapting and coping with her idiosyncratic responses, but then the struggle seems unrewarding and futile so the child resolves to disconnect the attachment and somehow survive. This is the point where the human being begins to lose contact with humanity and becomes merely a surviving animal encapsulated through precocious self-care. In body the boy grew, but his mind was already deprived of a primary self-soothing potential.

This made for a lonely, detached and unavailable toddler and then along came the abusive father and the violations. The emotional part of this boy's brain stored the blows, the sheer intensity of fright he repeatedly experienced resulted in vast amounts of flight-fight hormones flushing his body and brain. Adrenaline combined with trauma encapsulates the traumatic memory as if the incident is untouched by dimensions of time. The unmetamorphosised memory with exact and intrinsic detail is stored, sealed by stress chemicals into the emotional parts of the brain.

Many of the children Kids Company works with present with more than sixteen significant traumatic events sealed in this way. The abuse is stored, so is the revenge. The toddler cannot prevent being penetrated by a grown man but the desire to harm the man is memorized and the assault leaves the child with a profound energetic imbalance. He has unwittingly become the container for another man's hateful action. He cannot return the hatred to where it belongs and in doing so redress the balance like a Judge would do for a victim in punishing the perpetrator.

The child stores the damage not only done to him but also the damage passed on by the perpetrator to the victim. Cellularly these children memorise the energetic tension, the aggression, and on a brain level they memorise the event. The damage, the revenge, they are all getting 'banked'.

Lack of tenderness, affection and apology means no one from the outside helps restore a sense of dignity to the violated child. The young boy used to sit in front of me, staring right through me as if I was conversing with a corpse. In court Judges and lawyers used to notice his emotionless expression and attribute to it the callousness of a potential murderer. But what they failed to notice is that before killing he was on one level killed and he simply parades the murderousness he was exposed to.

The legacy of repeated violation and the memorising of trauma is that the brain experiences emotional challenges which result in either hyper or under-aroused neuro-functioning. Often boys and girls who have been abused and deprived of care describe a sense of 'tension build up', an accumulation of agitation as if they are 'a glass too full'. Usually an external event; a 'wrong look', a minor insult or a perceived injustice; can tip this already tension-fuelled state into an expression of fury. The children have a word for it, they say I 'switched' or 'flipped', and what they mean is that somehow they became completely overwhelmed.

During this state of being neuro-chemically overpowered, the brain begins to function from its more primitive emergency driven structures located closest to the base of the skull joining the top of the spine. This is when the over-powered child grinds their teeth presents with dilated pupils, a sweaty upper lip; their muscles contort and they engage often with ferocious violence. The violent incident can take up to 45 minutes during which the young person has no personal brain-repertoire to use to stop themselves or calm themselves down.

They are suicidally brave, prepared to die and fear nothing; hence potentially very dangerous. Only very powerful outside forces can physically stop them. The more perverse aspect of this journey is that once the child has been violent they actually experience calm. Violent acting-out rewards them with soothing. This can be captured using measurements of brain electrical activity prior to the violent acting-out. In the emotional centres of the brain there is evidence of hyper-arousal and subsequent to violent acting-out, the arousal levels diminish giving the child an artificial sense of calm.

For those with psychopathic personalities there is some suggestion that the emotional centres are under-stimulated and that extreme violence activates them in this way creating the rewards of being 'brought to life' by violence. A similar pattern of arousal, violence, and then soothing is evident in those who turn the violence onto themselves rather than the victim. In this way attempting not to harm others whilst gaining relief from self-harm.

The question for the criminal justice system is this: can you make a pro-social choice when you are so over-powered by your own brain? Because, after all, you do need the appropriate functioning of your brain to assess the situation and make appropriate choices.

This type of hyper-agitated brain is too impulsive to learn from punishment because it has to memorize the relatively mild punitive experience and, in a moment of great tension prior to carrying out a crime, call upon the memory of the punishment in order to use it as a personal deterrent against re-offending. The brains of children who have been violated and abused are not that organized they simply register punishment as another form of adult hatred and expel it like a noxious stimulus because they don't have room for mild irritations compared to the major traumas they have experienced and try to keep out of their consciousness.

So what is the way ahead? As youth violence continues to escalate internationally and governments feel under siege as a result of kamikaze kids prepared to violate and kill without remorse. The law-abiding citizen is held hostage unable to match the violence of the disturbed youth who dominates the public space. Randomly the public gets stabbed on the bus, pushed on the railway line, attacked, seemingly for nothing; for having potentially looked at the youth or made a comment like 'you should give your seat up for older people on the bus'. What the unsuspecting public fail to understand is that in their normal behavior they may unwittingly match the characteristic of some of the memorised, traumatic events the young person has been exposed to.

The innocent look on the bus maybe experienced as the glance of an intrusive abuser who prepares for the assault. The comment made in public may unwittingly plunge the young person into a catastrophic loss of power as onlookers anticipate a response. The indignity of being powerless in a group setting mimics being naked as the paedophiles commented and observed and then violated. The brain in the body of a normal youth could be an emotional bomb waiting to be triggered.

The justice system has always recognised psychiatric illness as challenging the ability to exercise appropriate personal responsibility. Now that we have a better understanding of brain development we need to make the links between chronic childhood neglect and abuse and the propensity to behave violently.

Paradoxically, this understanding could create a greater ability for the perpetrator to exercise responsibility. Our work, with the fifteen year old boy has been about helping him to understand why he was violent, the reason for his feelinglessness and to explain to him the clinical damage his brain has had to accommodate because of the neglect and the abuse he so courageously lived through. Once these young people are helped to understand the mechanism which leads to their violence they can be encouraged to recognise the cues and divert the need for violence. Intensive exercise, boxing, martial arts are a good source of diversion.

The primary tools of self-regulating energy and emotion can be taught to vulnerable young people whilst the therapeutic work fosters the attachment that is needed to reprogramme the soothing repertoire these young people are deprived of. With this understanding the young person can exercise greater responsibility for control.

This means that therapeutic work with such damaged individuals has to be holistic and multi-dimensional. Beginning with removing as many external reasons for stress as possible i.e stabilizing housing, food and safety issues so that the need for emergency functioning is reduced in relation to the outside world; then commences the internal repair. The priority is to achieve a good night's sleep; often these young people have night terrors during which traumatic memories are re-enacted in nightmares. They consistently attempt to self-medicate using illegal substances and/or pharmaceutical medications which block the hyperactivity of the adrenal glands to help break the vicious cycle created by stress.

Once the young people achieve better sleep at night the day needs to be carefully programmed. The primary task is to keep them physically active, affording the young person consistent opportunity to expel tension; and in conjunction with art-psychotherapy and drama-therapy to work with the stored traumatic memories and afford them transformative potentials through the therapeutic process. Manageable chunks of the traumatic memory are summoned into the session allowing the therapist to act as a compassionate companion whilst the young person expresses the frozen emotional responses. The need to restore balance through revenge is an important part of the process. But it has to be symbolized through the therapeutic encounter; so the child may stab the clay model of the abuser rather than the abuser itself.

But therapy on its own is not enough, these young people need a consistent, caring, attachment figure in their lives through whom they can rediscover 'a caring mind'. In effect, what the original mother couldn't do which is to carry the baby in her mind. The worker needs to deal with the baby in the body of the adolescent who will now resist because of mistrust and infect the relationship with the abuse experienced; so the attachment provider needs a lot of help and support to sustain the relationship with these initially terrified and toxic babies.

Can the justice system redesign itself to meet this challenge? The truth is that the police inherit the cases that the social care agencies have failed to intervene on. When the biological carer fails to honour their commitment, the state must have a robust alternative which is fundamentally based around an emotional intervention.

Realistically, to carry out the repair work in the context of the criminal justice system risks criminalizing the vulnerable child.

The best intervention must primarily reside in prevention. Therefore the strengthening of the child protection systems so that issues of abuse and neglect are robustly dealt with is the primary defence against violent criminality.

Many countries have not prioritised the well-fare of vulnerable children because, in truth, the abused child behind closed doors does not impact the voter and does not vote. Therefore, internationally there is a trend to notice the abused child fundamentally at a point where their violence is externalised towards the voter.

In Britain, on average, some 550,000 children a year are referred to Child Protection systems and only approximately 30,000 on average are placed on the Child Protection Register. This is in a country which is economically very advanced. Developing countries often compensate and protect against child abuse by involving the extended family or the wider community as collective carers. The Scandinavian countries have barely any extreme violence from adolescents and when they do, it is treated as a child mental health issue.

So there is a real link between the efficiency of the child protection intervention and the level of child violence. However, the key to a productive intervention is to go back to simple loving care. Over-professionalisation of care is just as much an error as the under-acknowledgement for the need to have state care. The art of doing the job well is to have professional and accountable structures in which the attachment of adult and child is fostered with the genuine capacity to facilitate loving care.

What brain science is demonstrating is that substantial repair work can be done especially in adolescence because the adolescent brain goes through a reorganization on a neuronal level allowing new programming to be taken up provided it's being delivered like one would care for a toddler, with the same intensity of attention and contact.

The therapeutic task is to create a mind capable of thinking about the feelings of the self and others. Only in the availability of a mind can the thinker have skills to analyse a situation and make appropriate choices.

What would motivate a fifteen year old ready to give up his own life to have a vested interest in preserving someone else's life? Only when this young person experiences something worthwhile for which he wants to remain alive would he consider not damaging his own prospects by harming others.

Every human-being ultimately only lives to be loved and eventually to reciprocate by loving. This is the fundamental motivation to remain pro-social. If young people have no love to live for, and no love to give, then there is no point for them in preserving life, either their own life or others.

What punishment could the state hand out which is more potent than passive suicide which most of these young people have already succumbed to? So, the forceful arm of the state creates very little motivation to reform, whereas love which we are all too ashamed to define in our political spaces could actually be the real reparative potential.

At Kids Company we have developed the community model enabling this healing process to be mobilized using a substitute home structure at street-level which young people attend but don't sleep in. Our staff collectively, repair severely traumatized adolescents. An independent evaluation over three years by the University of London demonstrates that 90% had reduced their involvement in criminal activity; 91% were reintegrated into education and 95% have improved relationships. Last academic year 151 of our young people, who otherwise would not have had access to further and higher education, were actively attending college or university.

The job is doable - but will our politicians have the moral courage to invest in the well-being of children in a meaningful way, giving to other children what they expect for their own child? Only when we get child protection right will we get the results we wish for at the criminal justice end.

Maybe then, fifteen year old boys who have been abused won't think the only safe place for a baby is the handle of a hairdryer.

Camila Batmanghelidjh is a psycho-therapist and the founder of two children's charities.

Restorative Juvenile Justice Project in Peru—an account of an innovative experience

Jean Schmitz

In general terms, it can be said that Peru has an ample, solid legal framework with adequate parameters regarding respect for the rights of children. However, on matters related to adolescent offenders, undoubtedly there are still differences between theoretical formulations and routine practice.

The most relevant deficiencies in juvenile justice are arbitrary detention and mistreatment, which are practices pertaining to the retributionist paternalistic model, inadequate public defence, a lack of specialized legal operators, the absence of technical teams to provide support for judges, the scarcity of services and programs for children and adolescents at risk and, lastly, difficult inter-institutional coordination, which have counterproductive effects such as excessive lawsuits, excessive imprisonment, inadequate attention paid to the victim and the rejection and mistrust of the justice system among the population.

In this context, in June 2003 the *Terre des hommes* (Tdh) foundation began to promote the concept of Restorative Juvenile Justice (RJJ) within the juvenile justice system in Peru. More than five years have passed and the notion of RJJ increasingly attracts interest and gains new followers among legal and social operators. Promoting and developing this new tendency is quite a challenge in a context that is essentially a combination of retributionism and paternalism remaining from the previous century.

Due to the complexity of acting in such a context, it was decided that a pilot project would be carried out, gradually and jointly with all of the institutions involved[1], in the districts of El Agustino in Lima, the country's capital city, and José Leonardo Ortiz[2] in Chiclayo (on the northern coast of Peru). The purpose of the project is to validate an RJJ model in which adolescents in conflict with the criminal law are provided with effective, timely defence from the police stage through the judicial stage, promoting the handling of cases out of court and measures other than deprivation of liberty, as well as the development of mechanisms for compensating the victim and restoring social peace.

The project proposes an intervention agreed upon and integrated with the juvenile justice system, collaborating, exchanging and coordinating closely with the system's traditional legal and social players, as well as incorporating other players not considered initially: the victims, municipal and regional governments, public institutions (school, hospital, etc.) and civil society (NGOs, associations, clubs). More than nine agreements have been signed within the framework of the project by Tdh, *Encuentros Casa de la Juventud* and the most important public institutions, thereby highlighting the fact that the administration of justice is no longer only a matter for legal professionals.

1 The Tdh and *Encuentros Casa de la Juventud* project is being carried out according to an agreement with the Office of the Attorney General, the Judiciary, the Ministry of the Interior, the Ministry of Justice, The Ministry of Women and Social Development, the Academy of Magistrates, the Office of the Public Ombudsman, local governments in the areas where the project is being carried out, and the regional government of Lambayeque (Chiclayo).

2 These districts were selected taking the following criteria into account: a significant rate of juvenile violence, the presence of a basic module for the administration of justice (decentralized justice), a population of over 100,000 inhabitants and the existence of experience in community organization. Since March 2008, the project has covered the entire city of Chiclayo.

Carrying out a project in this type of confrontational context, with a significant juvenile violence rate and under pressure or demand for harsher repressive and punitive policies, has not been easy. Starting this innovative project very carefully and gradually was a necessary strategy.

The project is aimed at convincing the Peruvian state and its justice system that, for the vast majority of infractions of the criminal law, the restorative approach not only has the advantage of a lower cost than the retributionist model, but also that of creating conditions for effective, lasting rehabilitation of adolescent offenders.

Initially, a situational assessment of the Juvenile Criminal Justice System was made, which was followed in mid 2003 by an intense RJJ training process for police and legal operators[3], as well as social agents[4], in cooperation with the Academy of Magistrates, the Attorney General Office's school and the National Police. The training process, which was carried out over several years, has made awareness-raising regarding the new RJJ approach possible among professionals, generating knowledge, implementing new practices and promoting active participation. In order to reinforce this process further, a quarterly magazine called *"Justice para Crecer"* (Justice to Grow) has been published since 2005.

In January of 2005, Tdh and *Encuentros Casa de la Juventud* began the project. Taking into account the results and recommendations of the situational assessment, an intervention strategy was prepared considering three lines of action: continuous training, political advocacy, and direct involvement with adolescent offenders and their victims. For direct involvement with the adolescents, interdisciplinary working teams were formed.

Firstly, an Immediate Defence Team (IDT), composed of a defence attorney, a social worker and a psychologist, intervenes as soon as notice that an adolescent has been detained is received. They inquire about the causes and personal circumstances that led the adolescent to commit the offence. They seek information on his/her interests and personal, family and social resources in order to avoid police custody and request that the adolescent be released to his/her parents or legal guardian under subpoena. The adolescent, whether or not he/she is an offender, continues to be a "developing individual", whose best interests must be overseen.

The Victim Care and Assistance Team (VCAT) tries to approach the victim of the offence and, only in cases which warrant it (excluding homicide, rape and other extraordinarily serious offences), evaluates the feasibility of arriving at an agreement between the victim and the adolescent offender through a meticulous mediation process.

The Educational Support Team (EST) has the role of working with the adolescent and his/her family to prepare a socio-educational program in an open setting, with guidance and counselling activities, during which the EST maintains on-going dialogue with them. The EST also identifies support mechanisms at the personal and socio-family level and determines and establishes agreements with social services and programs in the community (education, health, job training, recreation, etc.).

Over nearly four years of work, more than five hundred adolescents have been served through the project. What does this mean in terms of added value, results and concrete benefits for the offenders, the families, the victims and the community in general? I shall limit my explanation to a presentation and description of the most relevant results and benefits that mark the difference between this model and the previous juvenile justice model.

Timely, effective, fair intervention that is respectful of the rights of the victim as well as the offender has made it possible to avoid taking numerous detained adolescents to court, with the resulting reduction in the caseload, enabling the judges to tend exclusively to adolescents responsible for more serious offences that merit a different type of treatment[5]. In order to support this statement, it should be pointed out that the office of the prosecutor for family matters pertaining to the El Agustino basic justice module had authorized diversion in only 6

3 Prosecutor, Judge and Public Defender
4 Psychologist, Social worker, Educator

5 Different treatment does not necessarily mean deprivation of liberty, but rather other measures in an open setting such as probation, release to the custody of third persons or community service.

cases[6] during the four-year period preceding the start-up of the project. This is not even two per year, a completely insignificant figure[7]. None of them was complemented by an educational guidance program and a follow-up could not be conducted to evaluate results and adherence. Almost four years later, the right to defence has been guaranteed for a total of 614 adolescents, all served by the IDT in both districts at the police level. Of this total, 67 cases have been set aside and 148 have ended with diversion (121 at the prosecutorial level and 27 at the judicial level).

During the 2001-2004 period, there was a heavier caseload at the judicial level, since a third of the adolescents who had committed minor offences were charged in court and 74.75 % of all cases were taken to court. Since the implementation of the project, only 40.53 % of the cases involving adolescents were handled at the judicial level. In addition to promoting handling cases out of court (through diversion), the project has had positive effects in terms of rehabilitation and reintegration of adolescents.

The management of the project in the El Agustino basic module has been awarded good governmental practice recognition and first place in the CAD 2008 (*Ciudadanos al día*/Up-to-date Citizens) competition in the "Citizen Security" category.

The participation of the IDT and the EST prioritises the educational approach, avoids stigmatisation and fosters social inclusion, impeding the adolescent from pursuing a life of crime and reducing rates of violence and criminality.

The absence of family and a defence attorney working with input from other disciplines severely limited the possibility of using diversion, due to the lack of a family member responsible for the adolescent. However, through the project, it was possible to guarantee the presence of one of the parents or another responsible party, as well as a defence attorney (IDT) in almost all cases. Interdisciplinary elements assisted the prosecutors in opting for handling cases out of court, using diversion instead of taking adolescents to court.

With the project, it has been possible to approach victims of offences gradually, initiating mediation processes for reparation of damages. During the entire project period, 17 effective contacts with victims have been made. There were agreements or successful mediation in 8 cases, while 5 were partially successful and 4 victims did not accept the mediation process. Despite the fact that these figures are quite low, they still show that mediation is feasible and effective.

In the traditional system, the legal operators acted vertically and separately. There was no coordination of their work and no alliances with community institutions that facilitated the social insertion of the adolescents. As a result of the project, 48 community institutions collaborate actively, developing services and intervention programs or providing indirect support to adolescents referred by the project.

During the period preceding the project, adolescents frequently eluded the process when they were summoned, increasing the risk of repeat offences and generating a strong perception of impunity among the victims and the community.

Another relevant result of the project is the effective contribution of an articulated network of public and private organizations in the process of rehabilitating adolescents and the reparation of damages. Thanks to the network developed in El Agustino, which groups over 30 organizations in the district, we were able to respond to the needs of adolescents in relation with the issues of education, health, jobs, administration, recreation, culture and others.

Lastly, to the extent possible, the RJJ project has always been able to guarantee that adolescents' opinions were respected and that they freely chose to participate in the project, keeping them informed about the type and scope of the service they would be provided, as well as the consequences of compliance or non compliance with the justice system.

It should be pointed out that the RJJ project has faced a series of problems and limitations. In first place, among the major problems, are corruption and mistreatment at the police level. Physical and psychological mistreatment of adolescents leads to the

6 Diversion is a measure that offers an alternative other than criminal proceedings and the application of a penalty. It is the simplest, surest form of excluding adolescents with high potential for rehabilitation who have committed minor offenses from judicial proceedings, by diverting them to an educational program.

7 Exploratory study describing the juvenile criminal system in El Agustino, COMETA, January 2005.

same; that is, it produces rage and retaliation in the future. Mistreatment is not only directed toward the offenders, but also toward their victims in some cases when they file a complaint at the police station and are not given the respect and interest they deserve.

Another significant problem that complicated the start-up of the project was the absence of multidisciplinary teams (psychologist and social worker) to provide support to the prosecutor and the judge. In practice, the operators of justice in Peru must make decisions alone, without specialized professional assistance. In the pilot areas, we were fortunate that the vast majority of the operators of justice accepted the proposals made by our teams, although with mistrust at the outset.

Additionally, the lack of specialized prevention, treatment and rehabilitation services and programs for adolescents addicted to alcohol and drugs created serious problems for us, especially knowing that over 40% of adolescent offenders acknowledge that they consume them. There are few services with quality and they are very expensive and not widely available.

Pressure from the majority of the media, politicians and the general public on the justice system, particularly on the operators of justice (prosecutor and judges), represents a very serious risk that promotes the retributionist, repressive, punitive model.

Lastly, I will present some lessons learned over nearly four years, as they have been systemized by the psychologist and project coordinator, Olga Salazar Vera:

—The myth that working with adolescent offenders without recurring to custodial measures is synonymous with impunity and danger must be discredited.

Experience shows that it is advantageous, since it fosters building responsible behavior among adolescents in their natural social setting, strengthens family support ties and helps to restore or develop healthier relations with their community. It facilitates finding new spaces for socialization with their peers, as well as discovering new and better options for their personal development.

—The role of the adolescent's legal defence is distorted if it is limited to seeking liberty or persuading him/her to confess his/her guilt to mitigate the severity of the sentence.

The defence must take into account the adolescent's response capacity, encouraging him/her to take a responsible attitude toward the law and justice. It is a matter of understanding that, from the time when he/she is detained, he/she must collaborate and submit to the investigation process determined by the justice system to clarify the facts and responsibility for the offence, even when he/she declares innocence.

—At the same time that adolescents are encouraged to respond responsibly to the law and justice, presuming their innocence until investigations determine their level of responsibility for the events is indispensable.

An adolescent who is invited to tell his/her version of the truth, with the promise that he/she will be heard and taken into account, is an adolescent who develops a greater sense of justice in relation with the process and, therefore, a more legitimate perception of the authorities.

—In the social integration process, it is important that adolescents have the opportunity to deconstruct their images or paradigms of the authorities in order to reconstruct them based on a new experience.

It is highly important that the responses of the justice system be timely, coherent and pertinent. The more the justice system delays in resolving a case, the lower will be the adolescent's possibility of perceiving the sanction as a fair consequence.

—The technical teams must contribute elements related to the adolescent's psychological and social situation in order to assist the prosecutor or the judge in making the best decision on his/her case.

Technical reports must identify each adolescent's potential for facing and overcoming his/her problem. They must be realistic reports that do not cover up difficulties. They should be purposeful and, above all, offer recommendations on the most appropriate educational actions for his/her development process.

—The use of cultural and artistic expressions as a means of transformation and change for adolescents is a significant educational and restoration resource.

An important educational and restoration resource, which we knew of and rediscovered in this experience, was the use of cultural and artistic expressions as a means of transformation and change for adolescents.

—Municipalities or local governments play an important role throughout this process of achieving justice, educating and promoting restoration and integration processes.

I would like to highlight the important role of municipalities or local governments throughout this process of achieving justice, educating and promoting restoration and *integration* processes.

The project has not ended; it is under construction and it is hoped that the state, as well as regional and municipal governments, will take advantage of the experience acquired and extend it throughout the country, knowing that this model is not a panacea for the entire problem of juvenile violence, but rather it is a novel, significant contribution that has shown results for offenders, their families, victims and the community in general.

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www.justiciaparacrecer.org

*Here and throughout this edition of the Chronicle members are denoted by an asterisk.

Children who mainly live on the street—experience in the Juvenile Court in Martinez Station, Argentina

Judge Patricia Klentak

Introduction:
In Argentina the implementation of the Convention on the Rights of the Child (CRC) brought about the need for changes in regulations and institutional practices affecting children.

In the Juvenile Court in which I sit, we developed between 2004 and 2006, a structure for working with children of the street set in the institutional framework of the court.

The aim of the work is to build and apply a model of intervention based on the diagnostic signs of the resilience of children, measuring both protective and risk factors. We took into account:

- the need for special care in childhood[1],
- the right each person has to the protection of his/her rights, regardless of race, colour, gender, language, religion, political or any kind of opinion, national or social origin, economic situation, birth status or any other condition[2]
- the struggle for the implementation of article 4 of the CRC—giving priority to the allocation of financial and human resources to it.

the investigation
We researched 38 children belonging to 7 families. The group included siblings and cousins. We looked at appearances in the youth court and reports from schools, health centres, dining rooms and Institutions with which the children came into contact. After diagnosis of each child's position an action plan was designed and overseen by Social Services ie the Executive.

the central points
The investigation and subsequent intervention schemes were centred on the following points:

1. family (protection and participation);
2. resilience (Grotberg classification criteria);
3. children in the street;
4. work in social networks;
5. human rights.

1. the **family** is regarded as the primary group of social organization because of its unity, continuity over time and recognition by the community around it.

2. resilience: Intervention is directed at strengthening both the child's and the family's positive aspects so as to foster the family's own initiatives, freedoms and commitments to themselves and society. Resilient children despite having been born and living in high risk situations, can grow up psychologically healthy and successful (Rutter, 1993).

Legally resilience is relevant so that children can exercise their right to achieve their full bio-psycho-social development.

In our work, we deal with the essential elements of resilience thus:

- we measure **risk** based on adversity, trauma or threat to human development (poverty, death of a relative, addictions, leaving school, social break up, lack of access to health and housing system, etc)

[1]Geneva Declaration of the Rights of the Child (1924), adopted by the General Assembly (November 20th 1959), in the Universal Declaration of Human Rights, in the International Convenant on Civil and Political Rights (sections 23, 24 and subsections), in the Convenant on Economic, Social and Cultural Rights. (section 10).

[2]Universal Declaration of Human Rights & International Convenants on Human Rights.

- we consider **positive adaptation** to overcome adversity as measured by the child reaching developmental milestones or when there haven't been signs of disruption.

Where positive adaptation occurs, despite adversity, it is considered a resilient adaptation. The dynamics of the **process** of resilient adaptation is based on the following resilience conditions:

a. I HAVE:

- people around me who I trust and who unconditionally love me;
- people who set limits so that I learn to avoid dangerous situations or problems;
- people who show me, through their behaviour, the right way to act;
- people who want me to get by in life;
- people who help me when I'm ill or in danger, or when I need to learn, etc.

b. I AM:

- a person for whom other people feel affection;
- happy when I do something good for others;
- I demonstrate affection;
- respectful for myself and the others;
- capable of learning what my teachers teach me;
- nice and communicative with my relatives and neighbours.

c. I STAND:

- willing to be responsible for my actions;
- certain that everything is going to be alright;
- knowing that I have different feelings which I recognize and express, confident that I will find support in the people around me.

d. I CAN:

- talk about the things that scare or worry me;
- find the way to solve any problem;
- control myself when I feel like doing something dangerous or incorrect;
- find the right time to act or talk to somebody;
- make mistakes and play pranks without losing my parents` love;
- feel affection and I can express it.

3. children in the street:

Professional intervention is aimed at strengthening an identity different from the one acquired on the streets, and that isn't otherwise reinforced. To develop an alternative identity, it is very important to build spaces that provide an environment where children feel integrated, heard, are participants and are self-assured.

Most of society thinks that offering clothes, food, love and comprehension is enough for dissuading a child from going back to the streets, but this is a simplistic analysis since the child learns how to develop values and identify reference points that give sense to being on the street—without these it would be impossible to tolerate lack of protection, hunger, cold, violence, the police, repeated disdain, etc.

This 'street bond' goes towards making up a child's personality, identity and culture, and restricts the use of intervention strategies which may be really effective with them.

The intervention is centred on the child, and it covers socio-educative measures directed towards the process of personal growth—encouraging in the child a critical awareness of his/her **reality**—and group and community involvement. The development of a critical awareness by a child of both young and adult people in their neighbourhoods is promoted too.

4. social networks:

Social networks were conceived as a group of people, capable of offering real and lasting help and support and included members of the family, neighbours, friends and others, including institutions. The structure, therefore, offers primary, secondary and institutional networks, each of which has its own dynamics.

5. human rights: (in practice).

The interventions are aimed at protecting the following children's rights:

- right not to be discriminated against (article 2, CRC).
- right to family support (articles. 5, 8.1, 9.1 CRC).
- right to proper development (article 6 CRC).
- right that intervention by the courts be the last resource (principle of subsidiarity Article 5)
- right to be heard (article 12, CRC).

- protection of the child's best interests (article 3, CRC).
- right to have an identity (article 7 and subsections, CRC).
- right to the enjoyment of health (article 24, CRC).
- right to education (article 28, CRC).
- right to his/her progressive autonomy (article 12, CRC).
- right to be cared for by his/her parents (articles 7, 18, 9, CRC) and that they take their parental responsibility (articles 5, 18 and 27.2).
- right to play and to engage in recreational activities (article 31).

methodology

To be considered for the program the criteria which had to be met were that the children or their families or cohabitants presented with some kind of adversity—present or past—such as poverty, violence, improper behaviour, addiction; and that they belonged to psychologically unhealthy environments or were at high risk of physical or mental ill health.

The analytical variables were:

- family members
- economic situation
- nature of street activity
- family violence
- health
- education
- free time

In addition, the Court Medical Department tested resilience with questionnaires for children and parents and/or guardians. Each question was assigned a letter related to the Grotberg initial classification (1995) and the conditions: I HAVE, I AM, I STAND and I CAN. Later, the responses were added up (only the positive ones), and interpreted by a trained assessor. Those who exceeded 80% in all the questioned areas were considered resilient.

analysis

The group of street children at Martínez Station presented the following characteristics:

- 67% were girls; 33% boys;
- 52% were between 10 and 15 years of age;
- 25% were between 5 and 9 years of age;
- 97% lived with their families composed of **either,** parents and siblings **or** the mother and /or grandmother and siblings. For these children and families the streets were used as a way to subsist, the children returning home at night;
- 80% did not report violent incidents in the family;
- 100% of the family groups lived in urban slums;
- 100% live at structural poverty levels;
- 100% received some welfare contribution. The most from the church (37%) and from the Family Head Plan (*Plan Jefes de Familia*) provided by the Executive Branch (27%);
- 87% of their parents had an unstable employment record;
- 80% were in good health;
- 77% received some education;
- 26% attended out-of-school support although absenteeism was high;
- 65% of children were taken by adult relatives to perform their activities on the street;
- 92% were taken by adult relatives **who remained with them** and coordinated the criminal acts (this is based on street observations of the group). The adult might be mother, grandmother or aunt;

According to the tests performed the studied group had resilient habits:

- between 8 and 12 years the girls showed significantly more resilience than boys
- between 13 and 18 years adaptive/acquired resilience was demonstrated; boys and girls scored similarly.
- whatever the age, girls presented more resilient capacities than boys of the same age.
- overall the conditions of the resilience test showed: I HAVE (42 %), I AM (26%), I STAND(7 %), I CAN(25%).

conclusion

The situational diagnosis made about the children at Martínez Station makes us conclude that generalizations are unwise and that it is necessary to go into the characteristics of the analyzed group; in this case, children who go back home at night.

They belong to stable family groups where, in general, parents meet the minimum requirements concerning child health care.

Most of them are in good health and the detected health problems are generally related to the environment—lack of hygiene and overcrowding.

These families are entitled to benefit from social assistance policies, and they make use of either the public or private assistance offered. They are excluded from the labour market—except for the working assistance plans—and, with this working exclusion they justify the presence of their children on the streets.

Most of the children go to school and to summer camps. They all go to institutions where lunch and tea are offered *(Comedores)*.

There are close ties between the nuclear family and their extended families, and they have a strong sense of belonging. When inquiring about family violence, most of them do not report violent incidents, although they exist, especially psychological violence; and to a lesser extent, sexual violence. Therefore, in this situation, the following question arises: Why do these children beg?

We found a solid family structure, which across generations has resorted to begging. This is, socio-culturally speaking, their means of subsistence, and so they create a family organisation to support their children in begging—mostly with relatives. These children give the money received to the adults, generally to their parents and/or grandparents. When asking them to describe the activities they do on the street, none of the children mentions begging (although they do it), but they refer to 'selling flowers', 'taking care of cars', etc.

Besides, there are extreme cases as for e.g. sexual exploitation by tourists and others, and reports about sexual abuse, etc, which lead us to think of the existence of external networks that incite these activities outside the families.

None of the children in the research group have returned to the street; some of the parents have modified their own conduct and have stopped sending their children on to the streets to offend; some children are placed with other family members and some sent to foster homes.

Following the procedural penal reform in the Province of Buenos Aires in 2007, the Juvenile Courts are no longer competent to hear cases about the violation of social or economic rights. These now come under the Zonal Services, which depend on the Provincial Government.

However, in penal cases the juvenile court does implement the socio-educative measures indicated by the results of this research.

recommendations

The above research marks the need :

- to approach this matter multi-disciplinarily and inter-institutionally;
- for internal legislation and public policies concerning childhood to recognize the principle of subsidiarity (article 5 CRC) concerning judicial intervention;
- to improve the coordination of the granting and monitoring of the assistance given to these families;
- to promote better coordination in the intervention of the judicial organs (Juvenile Courts, Criminal Courts, Prosecutor General's Office, Petty Criminal Courts, etc.) in the cases where crimes committed in relationship with these children are alleged (e.g. child prostitution, child exploitation on the street, etc) so as to dismantle the networks of external support which, in some cases, keep these children and their families in the described circuit;
- to draw up standard guidelines to fit institutional practices to the application of the CRC; and
- to incorporate the promotion and measurement of resilience in prevention strategies.

Judge Patricia Mabel Klentak* is a Juvenile Court Judge in Martinez Station, Argentina.

Why do so many judges have difficulty applying the law?

André Dunant

This is the text of a talk given by André Dunant who was representing the Association at a recent congress in Brussels with the theme: 'Ending Violence against children in juvenile justice systems—from words to action'

By way of introduction, here is a story. It seems to me to illustrate precisely the gulf of misunderstanding that separates two judicial systems.

The story is called 'Better to steal a Mercedes than a single sheep'.

In Guinea Conakry, anyone who steals a sheep is liable to between 3 and 10 years in a closed prison and in such cases the penal code does not allow parole.

The sheep is worth about €20, about the same as a sack of rice.

Someone who steals a top-of-the-range Mercedes is liable to the same sentence, but is eligible for parole.

My own conclusion is that if you're the leader of a small gang, you'd better send your members out to highjack a de luxe Mercedes rather than one sheep! The penalty they face is less and the proceeds of the crime would be 20,000 times greater.

Several African states have criminal laws similar to Guinea Conakry's. And this kind of calculation doesn't surprise anyone in the know; but not everyone understands it.

As everyone knows, pre-trial detention[1] is simply a procedure which meets the needs of a criminal inquiry by preventing collusion and the risk of the suspect fleeing. Now some magistrates—in the northern hemisphere just as much as the southern—illegally abuse pre-trial detention, looking on it as punishment before trial.

In the great majority of cases—especially those involving young people—pre-trial detention is not needed. So why so often in practice does exactly the opposite happen?

Why on every continent do so many of my wretched colleagues—judges and prosecutors—refuse to apply the law? I'm not even thinking of the Convention on the Rights of the Child which every country—except the USA and Somalia—has ratified and which is therefore an integral part of their national law. No, these colleagues, who I have come across in more than fifty separate countries, persistently refuse to apply their own penal code and codes of criminal procedure.

Here are two prime examples:

- In Conakry a 14 year-old boy called Adama stole a mobile phone from an unlocked car. Why wasn't he granted bail, given that the authorities knew that he lived with his family right next to the Niger market?
- In Bujumbura, Ismain who was 15 years old stole four bananas. He was sentenced to five years in prison without the chance of parole. What were the magistrates thinking of? This boy was no robber, he had simply committed a very low value theft. The judges explained to us that, under the part of the penal code covering 'qualifying thefts', young people who steal a few bananas on foot risk ten years in prison if there are two of them but 'only' five years if they take away a piece of wood from the side of the road. By applying the code in this mechanical way, magistrates are helping to create hooligans or bandits—the anti-social citizens of the future—and are filling up schools of crime (prisons) with boys who

[1] La détention provisoire ou préventive

> have no business there. Not only is this not justice in any sense, it is completely counter-productive. Mitigating circumstances—if only the tender age of the accused and the small value of the crime—should allow a big reduction in the theoretical penalty with a later grant of parole. Under the next version of the penal code, judges will be able to hand down 'community service'[2] sentences.

To keep things in proportion, if a judge, a prosecutor or an official in a highly responsible position is found guilty of serious corruption, is he going to be sentenced to 50 or 80 years in prison? No, he won't be. You know very well that he'll escape without any penalty.

Of the two —the boy with the bananas or the dishonest magistrate—who merits the greater condemnation from society?

It brings me close to despair to see how often judges in court are shocked at the scandalous, illegal length of detention. The judges are often appearing on the scene for the first time, after a long period of pre-trial detention. Up to that point everything has been under the direction of the prosecuting authorities.

When pronouncing judgement, the judge can do no more than take note of the damage that has been done by his colleagues in the Public Prosecutor's Office.

Here is a simple example. A 14 or 15-year-old took a bicycle to have a ride round his neighbourhood. The Deputy Prosecutor ordered him to be locked up in the nearest prison in a near-by district 25 kms away. The Deputy Prosecutor was then moved to another post (in several countries, the frequency of career moves of this kind is horrifying). The replacement Prosecutor gave priority to the files that were on the top of the pile or (with or without a bribe) to cases where a lawyer or someone with influence was involved. That young boy is still locked up. No instructions have been given, despite the provisions of the procedural code which is very precise and strict on this point.

In this African country the law requires the suspect to be brought before the judge every month, otherwise the pre-trial detention is unlawful. But that doesn't happen. This is a denial of justice, itself a punishable offence. But no sanctions are placed upon the magistrates. And we keep talking about juvenile justice! So what justice is it that we talk about?

- I've met two young people who have been in pre-trial detention for four years. For their detention to be lawful, they should have appeared before a judge each month—48 times. Not only had they never seen a judge, but their files contained not a single act of investigation since their arrest.

In some African countries, the only excuse put forward by the prosecutor to attempt to justify these atrocious and unlawful detentions is the lack of resources to go 20 or 30 kms to question the young person in the place where he is being held. Taxis cost virtually nothing and the Ministry of Justice should certainly have a small budget for magistrates' expenses. What are one or two euros in taxi fares against two, three or even four years of unlawful detention in prison for a theft of something of derisory value in conditions which one would hate to see imposed on our own children, mixed up with adults who sometimes abuse young people?

Why didn't the police, with the prosecutor's agreement, immediately take the boy with the bicycle home to his parents? He didn't deny what he'd done. He lived with his family at a known address and was going to school. He would have complied with all the demands of the prosecutor and then the tribunal. In similar cases, judges from different backgrounds are completely at odds with each other—a total lack of understanding. Indeed, how can this judicial practice be understood?

- Forty-six years ago, during four months in 1962, I came across similar situations in Cameroon. I said to myself that with independence newly achieved, justice would develop very quickly. Sadly, today in many African, Middle-Eastern and Asian countries justice for young people is in a worse state than it was fifty years ago. However, we mustn't despair. Here and there progress is always possible, even if it is measured in inches.

[2] Travaux d'intérêt général (TIG)

- Let's look at a different continent. In the second city of a state in Southern Asia, three young girls from 7 to 9 years of age had—contrary to the law—been living in an adult prison for respectively one, two and almost three years. Yet, despite repeated calls for help from the prison governor, no judge or prosecutor had taken steps to put an end to this intolerable situation. By the way, what took UNICEF and an overseas expert aback was that no-one, apart from the prison governor, was at all disturbed by these facts.

How is it possible to justify locking up young girls or boys of 6 or 7 with adults in prisons with 'minimal comforts' simply because they have been picked up by the police in the street or at a railway station and have not been able to give the names of their family or their village? They may stay in prison between one to three years. And why are they let out after three years? 'Because it's the law.' we were told in that country. 'We don't have the right to hold them for more than three years' !

Who can help to make matters better? How? With people, legislation and resources?

I'm not going to list the classic alternatives which we all know about here—only the ones that are easiest to implement, but are so rarely made use of in so many countries.

- **parole**: simple not burdensome, converting the avoidance of prison (the school of crime) into a right not a favour.
- **community service** offers an obvious benefit to the young person, his family and the community. Although it has the trappings of modern justice, community service has a history in traditional agricultural societies. It is hard to understand the reluctance of some countries to introduce it. In a region of about 400,000 people, a single social worker was able to supervise 200 community service workers a year, with a success rate of 98%.
- **supervised liberty, probation and educational help** all require social workers and probation officers. It needs an enormous effort to provide them. We need to convince Parliaments and the authorities to provide the money and resources.
- the same applies to **mediation** and **reparation** in criminal cases.
- **bail** and **release on parole or licence** are most often generously granted by the penal code. And as a right not a gift. So how can we explain that in some countries it is almost never granted? All the steps have been taken correctly and conditions met, but the request gets no response from the authority which has to take the decision—amazingly this is sometimes the Ministry of Justice—neither a yes nor a no. Some people call this, ironically, the principle of the 'implicit answer'.
- leave aside for the time being **house arrest with electronic tagging**. It seems too sophisticated for those countries that complain of a lack of personnel, premises and equipment and often even pens and paper.

But here is my main message—

It is not enough to alert prosecutors and judges to a better approach to juvenile justice. We need a non-government organisation to finance an advocate to take a case where there has been a flagrant violation of rights to a superior judicial authority (eventually to the Supreme Court). The publicity that would result from the judgement of the Appeal Court or the Supreme Court would have a bigger impact than all the training courses in juvenile justice. Judges are often more alive to judgements of the Appeal or Supreme Courts than to the law itself; and the Convention on the Rights of the Child.

Through well-funded cases, the non-government organisation would get precedents from high judicial authority.

In a few countries—sometimes by going as far as the Supreme Court—non-government organisations have gained judgements limiting the length of provisional detention; and that has benefited many other young people.

With a few exceptions, advocates in ex-Soviet countries and those of sub-Saharan Africa and the Middle East are, sadly, often reluctant to argue against a decision of a judicial or administrative authority.

If an error has been committed (and to err is human) or there has been an abuse or violation of the law, it is the duty of social workers to intervene to put the matter right and stop the abuse quickly. Various steps are needed, seeking the support of a lawyer if necessary to follow the route of judicial or administrative appeals if the case arises.

From a general view-point, and this is my provisional conclusion, we should:

- begin by **amending** the law, if necessary;
- apply the existing law **properly;**
- try to **change the mind-set of colleagues** and seek to influence them positively and those above them in the hierarchy, Members of Parliament, etc;
- and, overall, there is a universal factor called **political will**, which is too often cruelly lacking.

André Dunant* is a former President of the Juvenile Court of Geneva and of our Association. Since 1996, he has been an International Juvenile Justice Consultant and is in charge of many training and fact finding missions in Central and Eastern Europe, Africa, Middle-East and Asia for UNO, UNICEF, European Union, Council of Europe, Terre des homes and many others.

Juvenile justice in the South Pacific

Charter South Pacific Council of Youth and Children's Courts

Adopted by resolution of the South Pacific Council of Youth and Children's Courts, Fiji, 2005

Introduction

The South Pacific Council of Youth and Children's Courts is an independent and autonomous judicial grouping of the Heads of Youth/Children's Courts, open to all self-governing countries of the South Pacific, and the states and territories of Australia. Where there is no Youth/Children's Court in a member country, the country may be represented by the Judge or Magistrate with a leading role in developing the law relating to children or youth in that country, as approved by that country's relevant Head of Jurisdiction.

The Council, which first met in 1995 and which adopted its present name in 2004, meets annually. The Council is chaired on a rotating basis alternately between Australia/New Zealand and Pacific Island venues. Council meetings are hosted by the Chair of the Council for that year. The Chair will act as the Council's secretariat for the year prior to the next Council meeting.

Purposes:

1. To promote and support the administration of justice and protection systems for children and young persons and the maintenance of the rule of law.

2. **To promote and support** the development of justice and protection laws for children and young persons.

3. **To promote and support** the dissemination and development within the region of culturally appropriate best practice in justice and child protection law and procedure for children and young persons.

4. **To further the dissemination** of knowledge of the laws of the various countries, states and territories within the region.

5. To advance the standard of judicial education on issues of justice and protection for children and young persons.

6. To support and foster relations between the judiciary within the region.

7. To raise the profile of justice and protection issues within the region for children and young persons.

Annual meeting of the heads of the South Pacific Council of Youth and Children's Courts held in July 2008, Apia, Samoa.

Front - Magistrate Oliver of the Northern Territory, Aust; Principal Childrens Ct. Judge Dick of Queensland, Aust; Chief Magistrate Shott of Tasmania, Aust; Family Ct. Judge Malosi of NZ; Principal Youth Ct. Judge Becroft, NZ; Judge Clarence Nelson; Samoa; Judge Pereira of the American Samoa District Ct; Judge Grant of Victoria, Aust; Magistrate Garo of Solomon Islands; Jusge Dingwall, ACT, Aust; Childrens Ct. Magistrate Mitchell, NSW, Australia.
Standing - Magistrate Mote, Kiribati; Senior District Ct. Judge Vaai, Samoa; Chief Magistrate Palu from Tonga; S. Kaimacuata and S. Faoagali of Unicef Pacific (observers); Magistrate Kenning of Cook Islands; A. Norton, Unicef (observer); Magistrate Wilson, Vanuatu; Judge Reynolds, Western Australia.
Back - Messrs Godinet and MacRae of Child Youth & Family, NZ (presenters and trainers for the workshops); Magistrate McEwen of South Australia; Messrs Tanielu and Collins of South Auckland, NZ (presenters & trainers); Inspector Faalogo, NZ Police (presenter trainer

Juvenile justice in the Pacific*18 July 2008*

Magistrates and judges from across the region share advice on working towards the development of justice systems for young people.

Juvenile justice in the Pacific was addressed at the recent annual meeting of the heads of the South Pacific Council of Youth and Children's Courts (SPCYCC).

Held in Apia, Samoa, from 7 to 11 July 2008, this meeting brought together magistrates and judges from both developed and developing countries in the Pacific who shared advice and provided support to their counterparts.

"The meeting is a very important initiative in developing and supporting juvenile justice systems in the Pacific," said Kevin Maguire, Legal Adviser in the Commonwealth Secretariat's Justice Section.

The Apia meeting was facilitated by Justice Nelson of the High Court of Samoa who prepared a diverse programme which included visits to the new Young Offenders Rehabilitation Centre in Samoa and consideration of the influence of modern technology on today's youth.

Samoa's new Community Justice Sentencing Act was also examined followed by an inspection of the Community Justice Village programmes in action, which have been established to reintegrate and rehabilitate offenders into the community taking into account Samoan customs and traditions.

The meeting was supported by the Secretariat, and held at the same time as the Commonwealth Law Ministers Meeting in Edinburgh, Scotland, which considered and approved a 'Framework for the Implementation of a Functioning Juvenile Justice System'.

This framework includes recommendations that regional groups such as the SPCYCC should be formed to support juvenile justice systems in the Commonwealth.

The UNICEF office in the Pacific was also represented and supported at this meeting.

Young Offenders Act 2007, Samoa — Judge Clarence Nelson

The Samoa Ministry of Justice and Courts Administration (MJCA) have undertaken a review of the way in which young persons are dealt with in the criminal justice system. The Young Offenders Act 2007 is the result of the findings and recommendations of the review process.

The Act recognizes the desirability of treating young persons differently from adult offenders by intervening at an early stage to provide a rehabilitation system that assists and encourages young persons to avoid further offending. The Act establishes a division of the Samoa District Court called the Youth Court which is the main court dealing with young offenders.

In preparing this Act the MJCA has undertaken a wide consultative process with key stakeholders, including community groups. The Acts reflects the wide consensus reached during the consultative process that the community has a role to play, where appropriate, in applying Samoan custom and tradition in the rehabilitation of young persons.

The Act encourages Courts to seek alternatives to imprisonment and requires a court, where appropriate, to refer a young person to attend a pre-sentence meeting, which will be conducted in accordance with Samoan custom and tradition. In the meeting all participants have a say about the most effective way to punish the wrongdoing but at the same time attempt to put into place a plan to prevent the young person from further offending. The Court will have the record of the pre-sentence meeting before it so that it can take the views reached in the meeting into account when deciding the most appropriate penalty.

The Act provides to the Courts a range of community based sentencing options as an alternative to the imposition of fines and imprisonment. Where imprisonment is seen as the only viable option, young persons are required to be held in the newly established Youth Remand facility where they are held separately from adult prisoners and are taught life skills and customary Samoan practices.

The Act also provides for a system whereby in appropriate cases the Police can warn an offender instead of prosecuting. Warnings may be either formal or informal depending on the circumstances of the matter. Such warnings cannot later be used against offenders in criminal proceedings.

PART 1
PRELIMINARY

Section 1 Provides for the short title and date of commencement of the Act.

Section 2 Provides for the definition of particular terms used in the Act in particular defining a “young person” as being over 10 but under 17 years of age.

Section 3 Provides that no person under the age of 10 years may be charged with a criminal offence.

PART II
YOUTH COURT

Section 4 Establishes a Youth Court and provides that proceedings may be conducted in a manner consistent with Samoan custom and tradition and is to be conducted in the Samoan language unless the young person’s first language is English.

Section 5 Prescribes the jurisdiction of the Youth Court. All charges against a young person except for murder are to be laid in the Youth Court.

Section 6 Sets out the processes of the Youth Court in particular it is empowered to determine its own procedures except defended hearings must follow the rules of criminal procedure. It enables a Judge to transfer a young person to a higher court in

certain circumstances. It empowers the Court in s 6(3) to dismiss a charge if its hearing has been unreasonably delayed. S 6(4) provides that where a charge is admitted a pre-sentence meeting must be held unless prior to charging a reasonable and just reconciliation has already occurred.

Section 7 Permits Courts to require the young person's parent, parents/guardian or caregiver to attend before the Court. This is to ensure that the Court has all the information it requires about the young person before it and to ensure these persons are part of the process as to how to best deal with the young person.

Section 8 Provides that, unless the Court decides otherwise, proceedings are not open to the public or the media. This is to protect the privacy of the parties and to encourage full disclosure and participation by all.

Section 9 Sets out the rights of a young person appearing in the Youth Court. The section ensures the young person has access to independent legal advice and where appropriate to legal aid. It also ensures that the young person's parents/guardian/caregiver may attend.

PART III

PROBATION SERVICE

Section 10 Sets out the role and responsibilities of the Probation Service under the Act. The Service has a vital role to play in all facets of the young person's exposure to the criminal justice system. Probation officers are responsible for setting up pre-sentence meetings, reporting to the Court on the meetings, recommending appropriate sentences and supervising or arranging supervision for any activities or sentences imposed on the young person.

PART IV

PRE-SENTENCE MEETINGS

Section 11 Provides that where a charge is proved against a young person the Court may require the young person to attend a pre-sentence meeting, arranged by the Probation Service, held in accordance with Samoan custom and tradition. Attendees at meeting are:– victim, victims family, police, probation, representatives of defendants village and/or church, defendant, plus members of his family especially his parents/guardian/caregiver.

Section 12 Sets out the purpose of the meeting, which is to discuss the offending, seek views concerning reconciliation and arrive at a recommendation as to a punishment that is appropriate to the circumstances.

Section 13 Sets out the judicial principles restorative and otherwise that are to be addressed at the pre-sentence meeting.

Section 14 Requires the Probation Service to report back to the Youth Court and provide a record of the pre-sentence meeting.

PART V

SENTENCING OF YOUNG PERSONS

Section 15 Sets out the options that are available to a Court for sentencing. This section provides a system of punishment that avoids the young person having a conviction against his or her name so long as the young person complies with any penalty the Court imposes. Alternatively the Court may, where it considers it necessary sentence under section 16.

Section 16 Provides sentencing options for a Court where it decides to convict or declines to impose sentence under section 15 or where a young person does not comply with a sentence imposed under s.15. Includes an imprisonment option but provides that imprisonment should only be a last resort and when imposed, it should be to a youth facility but where this is not possible, for young persons to be kept separate from adult prisoners.

PART V1

WARNINGS AND FORMAL POLICE WARNINGS

Section 17 Permits a police officer, after considering the seriousness of the offence, the previous offending of the young person and the views of the victim to issue an informal warning instead of charging the young person.

Section 18 Sets out the procedure for issuing a formal warning to a young person. The formal warning must be delivered at a police station by a senior member of the police in presence of the young person's parents/guardian/caregiver.

Section 19 Requires written notice of the warning or formal warning to be served on the young persons and young person's parents/guardian/caregiver. The notice must

explain the meaning and effect of the warning given.

Section 20 Permits the Commissioner of Police to cancel a warning and charge the young person. This is a check to avoid allegations of favouritism or the like against members of the Police and to enable the Commissioner to correct any inappropriate use of the warning system.

Section 21 Provides that where a young person has been given a warning that it cannot later be used against the young person in any criminal proceeding.

PART VII

MISCELLANEOUS

Section 22 Contains provisions relating to the terms of bail which may be imposed on young persons.

Section 23 Gives the Head of State acting on the advice of Cabinet the power to make regulations. Regulations can be made for the purposes of the way young persons are to be dealt with under the Act, the operation of the Youth Court and the manner under which young persons undergoing terms of imprisonment are to be treated.

Section 24 Permits a young person to appeal to the Supreme Court against a conviction and/or sentence imposed upon him or her under this Act

Section 25 Repeals the sections of the Crimes Ordinance 1961 where they have been replaced by the provisions of this Act.

The Act is administered by the Ministry of Justice and Courts Administration and a copy (in English) is available from Judge Nelson or Avril Calder

Judge Clarence Nelson is Supreme Court Judge in Samoa, South Pacific

Opening ceremony of SPYCC

President of the Samoa Lands and Titles,
Ct. T. Kerslake, **Acting Chief Justice Vaai, who opened the Conference**,
Judge Kenning from Cook Islands and
Judges Becroft* and Malosi from New Zealand

with traditional welcome

Presenters preparing for work

& traditional entertainment

The New Zealand Youth Justice System

Tracey Cormack

1. Approach

The New Zealand Youth Court deals only with criminal proceedings against young offenders.

In New Zealand, youth justice is a hybrid justice/welfare system. The young person, their family, victims, community and the State are involved in taking responsibility for offending and its consequences.

The fundamental objectives in dealing with young offenders, set out in s4(f) of the CYPFA, are as follows:

- that those children or young people who commit offences are held accountable, and encouraged to accept responsibility for their behaviour; and
- that they are dealt with in a way that acknowledges their needs and will give them the opportunity to develop in responsible, beneficial and socially acceptable ways.

The Youth Court operates under the *Children, Young Persons and Their Families Act 1989*, the CYPFA, which sets out eight guiding principles relating to youth justice. These principles are that:

- criminal proceedings should not be instituted against a child or young person where there is an alternative means of dealing with the matter;
- criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person or his or her family or family group;
- any measures for dealing with the child or young person should be designed to strengthen the family of that child or young person; to foster the ability of the family (including the extended family) to develop their own means of dealing with the offending by their children and young persons;
- a child or youth offender should be kept in the community so far as is practicable and consonant with the need to ensure the safety of the public;
- the young person's age is a mitigating factor in determining whether to impose sanctions and the nature of those sanctions;
- any sanctions imposed on a child or young person should take the form most likely to maintain and promote the development of the child or young person within his or her family and family group; and take the least restrictive form that is appropriate in the circumstances;
- any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of that offending;
- the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

2. Jurisdiction—age groups

- the age of criminal liability is 10.
- a 'child' is a person of 10–13 years.
- a 'young person' is a person of 14–16 years (who is not married).
- the Youth Court only deals with 'young people'.
- whether a person is a child, young person or an adult is determined by their age at the time of offending.
- a child can only be prosecuted for murder or manslaughter; and only if he or she knew that the act or omission that comprised the offending was wrong or contrary to the law.

- child offenders (aged between 10 and 13 years) can be arrested by police, and if necessary delivered into the custody of the New Zealand social welfare agency, Children, Young Persons and Their Families Service, CYFS. If the nature, magnitude and quantity of their offending raise serious concern as to their care and protection, a Family Group Conference can be convened, and then if necessary they can be dealt with by the Family Court. Child offenders are dealt with in the Family Court on the basis that their offending is caused by lack of parental care and protection.
- a "young person" can be charged with any offence.
- when offending occurs after a person's 17th birthday, that person will be prosecuted as an adult in the District Court—but see section 6, below.
- for serious charges (purely indictable offences) or electable offences (ones for which the young person is entitled to elect trial by jury because the charge attracts a potential penalty of 3 or more months imprisonment), there is a preliminary hearing held in the Youth Court. For purely indictable offences, the Youth Court has the discretion to offer its specialist jurisdiction to a young person either:

  1. at any stage before, during or after the preliminary hearing, where the young person indicates a desire to plead guilty; or
  2. at the conclusion of the evidence, if a Youth Court thinks the evidence is sufficient to put the young person on trial.

3. Sanctions system

a. non–charging interventions

In New Zealand, "non-charging" interventions involve warnings by Police, diversion conducted by the police and family group conferences.

- **informal warning:** In some cases the police are able to take no action other than issuing an informal warning.
- **formal warning**: Police deal with 44% of cases of youth offending by issuing a formal warning, then releasing the young person. This is often given by the attending officer and followed up by a letter from the Youth Aid Officer acknowledging the warning. This is in keeping with the principle that young offenders should be diverted from the formal justice system wherever possible. It also reflects the nature of much youth offending (i.e. relatively minor).
- **Diversion / 'Alternative action'**: If a warning is insufficient or inappropriate, then, given the statutory injunction in the CYPFA not to issue criminal proceedings if there are alternative means of dealing with the matter (unless the public interest otherwise requires), the Police must consider a diversionary programme for the young person. About 32% of all offences are dealt with by diversion. These initiatives involve the young person carrying out locally-based plans that are co-ordinated by Youth Aid Officers, a specialist division of the Police. The plan may include an apology, reparation and/or community work—indeed any measure using local resources and organisations that will hold a young offender accountable and prevent re-offending.
- **'Pre-charge' Family Group Conferences**: Family group conferences (FGC) are informal meetings of the young offender, his or her family, the young person's lawyer (Youth Advocate), the victim, Police, social workers and members of the community.

  About 8% of cases are referred to a FGC if there has not been an arrest and the Police intend to lay charges. Usually, if the FGC plan is completed, no charges are laid in the Youth Court.

b. charging in the Youth Court:

Around 16% of offences by young people end up in court. Where the young person is arrested and charges are laid in the Youth Court, there must be a referral to a FGC if the matter is ''not denied'', or proved after a defended hearing. The Youth Court proceedings are then adjourned until the FGC has been held. A plan for each young person is formulated at the FGC and presented to the Youth Court. In about 95% of the cases, the plan is accepted and the case is adjourned for the plan to be completed. If the plan is satisfactorily completed, the young person is often absolutely discharged under s282 CYPFA.

Sometimes the FGC may recommend formal orders being made under s283 CYPFA or, on occasions, such formal orders are necessary because of the young person's failure or inability to complete an agreed FGC plan.

Orders available to the Youth Court.

- dismiss the charges and make a formal order to that effect.
- admonish the young person
- an order to come back to the court at any time within 12 months to be subject to any other order.
- a fine
- reparation
- restitution
- forfeiture of property
- disqualification from driving
- confiscation of a motor vehicle
- an order that the young person be placed under the supervision of CYFS (supervision) for up to six months
- a supervision order with an attached programme of activity (supervision with activity);
- an order that a young person be incarcerated in a CYFS residence (supervision with residence);
- conviction and transfer to the District Court for sentence

Apart from the ''convict and transfer to the District Court for sentence" order Youth Court orders are **not criminal convictions**.

Detention of Young People

- **imprisonment**

Where a young person—who must be of or over the age of 15 years—is convicted and transferred to the District Court for sentence, a prison sentence (maximum 5 years) may be imposed, provided the offence was a 'purely indictable' one.

Where a young person is subject to an order of supervision with residence, the maximum term of incarceration in a CYFS residence is 3 months, which is immediately followed by 6 months supervision.

- **adult prison**

Detention following conviction and transfer to the District Court may be in an adult prison or a youth detention centre. For supervision with residence orders, detention may only be in a youth detention centre.

4. Youth Justice Procedure

questioning of young persons

The Police must inform young people of certain rights (i.e. if they do not give their name/address they may be arrested; they are not obliged to make a statement or accompany Police to do so; they may withdraw consent to give a statement at any time; they may give a statement in the presence of a lawyer or other nominated adult) after making general enquiries, but directly upon forming a suspicion that the young person has offended, or where they already hold such a suspicion and are questioning the young person.

restrictions on arrest

There are significant restrictions on the right of the Police to arrest a young person where there is good cause to suspect that he or she has committed an offence. Under s214 CYPFA, a young person can only be arrested:

- to ensure the young person's appearance before Court (e.g. where the young person refuses to give name and address details); or
- to prevent the young person from committing further offending or to prevent the loss/destruction of evidence or witness interference; and
- where a summons would not achieve the above purposes.

However, where:

- an offence is purely indictable; and
- a Police Officer believes arrest is required in the public interest,

there is no such restriction, and the Police Officer may make the arrest, provided he or she has good cause to suspect the young person of offending.

bail

The young person should be released at large, on bail or into the custody of his/her parents/guardians (or other person approved by a social worker) unless there is a risk of absconding, further offending or interference with evidence/witnesses.

remand—detention options

- remand into the custody of the New Zealand social welfare agency, Children, Young Persons and Their Families Service, CYFS.
- remand in police custody, where the young person is likely to abscond or be violent and there is no suitable facility for his or her safe custody with CYFS.

- **Family Group Conference**

FGCs (described above in section 3) are used in one of six situations**:**

i. where a **child** is charged with criminal offending, such that the number, nature or magnitude of that offending gives rise to care and protection issues. The matter is then referred to the Family Court and a FGC is ordered, which may result in the Youth Court charges being dropped.

ii. where the Police have arrested a **young person** and are considering laying charges, they must first participate in an ‘‘intention to charge” FGC. This may result in the young person carrying out an informal course of action, designed to resolve the effects of his or her offending. If successful, generally the Police do not then lay charges.

iii. if a **young person** denies a charge and is remanded in custody and—pending resolution—there is an adjournment of proceedings, then an FGC will be directed to consider whether the young person should be remanded at large, on bail or in custody.

iv. at the **young person’s** first appearance in the Youth Court, if the charge is ‘not denied’, a FGC must be ordered to consider what should be done and whether the matter can be resolved without a full trial or formal orders. This is by far the most common type of FGC.

v. if no FGC has had an opportunity to consider how a matter should be disposed of and the Youth Court is about to make formal orders, an FGC must be given the opportunity to make recommendations as to the orders that should be made.

vi. the Youth Court has the discretion to order an FGC whenever it thinks fit.

closed to public

The Youth Court is closed to the public. Accredited news media reporters are entitled to attend and may report the proceedings with the leave of the Youth Court Judge. It is prohibited to report the young person’s name, school, names of parents, guardians, victims or other identifying particulars.

parents / responsible adults

Parents and extended family are encouraged to attend FGCs in order to support the young person and encourage them to take responsibility for their offending, and later to follow through on promises made at the FGC.

Parents and guardians are entitled to attend the Youth Court, and may make representations on behalf of the young person.

Parents and guardians may also be involved during police questioning in some cases where the young person asks to have them as their nominated person to attend and provide support.

legal services / legal aid

A young person is not entitled to legal aid, but is entitled to be represented by a Youth Advocate irrespective of means and free of charge in Court. This is paid for by the State.

5. Statistics

Offending by children and young persons accounts for about 22% of total offending over the last 10 years**.**

offence types

Only a small percentage of offending by young people is ‘serious’ offending.

- just over 50% of offences by young people are dishonesty offences
- 20% of offending is for shoplifting
- property offending makes up 1 in 7 offences
- 9-10% of offending by young people is for violence offences
- drug offences, anti-social behaviour and property abuse each make up about 1 in 20 offences by young people.

serious youth offenders

- up to 80% of young offenders commit about 20% of offences. They are described as ‘adolescent-limited’ offenders or ‘desisters’.
- 5-15% of young offenders commit 40-60% of offences. These offenders are referred to as ‘persistent’ or ‘serious’ offenders.

trends in offending

Apprehensions for violent offending have increased for all age groups, except 10-13 year olds in the past 10 years.

Serious assaults rose in 2004, 2005 and 2006, which is a trend that is causing concern.

Generally, during the last ten years there have only been small increases in the overall rates of apprehensions and offending by young people.

6. Reform

The Children Young Persons and their Families Amendment Bill (No.6) seeks, among other things, to amend the definition of 'young person' in the 1989 CYPFA to include 17 year olds. This government Bill was introduced on 3 December 2007 and had its first reading on 4 March 2008

If passed, this will bring the CYPFA into line with the United Nations Convention on the Rights of the Child. Article 1 of that convention provides that a "child" is a person below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

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An outline of Tasmania's youth justice jurisdiction

Chief Magistrate Arnold Shott

The State of Tasmania has a population of almost half a million people and it is one of Australia's six States. Each State, along with the Australian Capital Territory and the Northern Territory, has responsibility for its own youth justice processes.

As the substantive and procedural law and Court structures differ between these jurisdictions I shall confine myself to an overview of the Tasmanian youth justice scheme. Tasmania's primary statutory enactment that controls the State's youth justice processes is the *Youth Justice Act 1997* (the Act).

1 Objectives and Principles of the Youth Justice Act 1997

The objectives of the Act and the general principles of youth justice that it prescribes align with the views of Maconochie[1], a nineteenth century penal reformer. The significant concepts of the Act are in sections 4 and 5:

Section 4: Objectives

4 (d) to ensure that a youth who has committed an offence is made aware of his or her rights and obligations under the law and of the consequences of contravening the law;

4 (e) to ensure that a youth who has committed an offence is given appropriate treatment, punishment and rehabilitation; and

4 (h) to ensure that, whenever practicable, a youth who has committed, or is alleged to have committed, an offence is dealt with in a manner that takes into account the youth's social and family background and that enhances the youth's capacity to accept personal responsibility for his or her behaviour.

Section 5: General principles of youth justice

5 (c) that the community is to be protected from illegal behaviour;

5 (g) detaining a youth in custody should only be used as a last resort and should only be for as short a time as is necessary; and

5 (h) punishment of a youth is to be designed so as to give him or her an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways;

Further, when determining the order that should be made in respect of an offending youth, the Magistrates' Court must, following section 47(4)(c) of the Act, have regard to:

the impact the sentence will have on the youth's chances of rehabilitation generally or finding or retaining employment.

[1] Captain Alexander Maconochie, born in Scotland in 1787, naval officer, geographer, and penal reformer was, for almost four years from March 1840, superintendent of the notorious penal colony on Norfolk Island, South Pacific.
'Maconochie's notions of 'penal science' rested on the beliefs that cruelty debases both victim and the society inflicting it, and that punishment for crime should not be vindictive but designed to strengthen a prisoner's desire and capacity to observe social constraints. Criminal punishments of imprisonment should consist of task and not time sentences…Cruel punishments and degrading conditions should not be imposed and convicts should not be deprived of self-respect…His concepts and many of his practical measures are now the basis of Western penal systems, and were largely adopted in the *Declaration of Principles* at Cincinnati, USA, in 1870, embodying the fundamentals of modern penology'.—*Australian Dictionary of Biography, Online Edition*

For a detailed biography, see: J V Barry *Alexander Maconochie of Norfolk Island*, Oxford University Press, Melbourne, 1958; and *Captain Maconochie RN, KH Norfolk Island* London, 1847; reprinted by Sullivan's Cove, Hobart, Tasmania, 1973

2 Age Groups

The Act defines a 'youth' in section 3(1) as

'a person who is 10 or more years old but less than 18 years old at the time when the offence the person has committed, or is suspected of having committed, occurred'

Criminal responsibility in terms of age is set by section 18 of the *Criminal Code:*

> **(1)** No act or omission done or made by a person under 10 years of age is an offence.
>
> **(2)** No act or omission done or made by a person under 14 years of age is an offence unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make [doli incapax].

Youths are subject to both State and Federal laws, although prosecutions under Federal law are rare.

3 Structure of the Youth Justice System

Public authorities that have specific responsibilities to engage with offending youths include:

a. Tasmania Police
b. Youth Justice (a Division of the State's Department of Health and Human Services), and
c. The Tasmanian Courts.

a Tasmania Police

The Police Department takes a major role in two programs[2]:

Early Intervention and Youth Action Units (EIYAU), which incorporate Youth Justice, Community Policing, and District Police and Community Youth Clubs which provide an effective early intervention approach to children and young people 'at risk'.

Officers from the EIYAU conduct the majority of Formal and Informal Cautions to ensure a consistent approach and appropriate outcomes for young offenders. The EIYAU reviews all files submitted on juvenile offenders, assesses the available options and works closely with other government and non-government agencies to address individual issues relating to youth offending behaviour.

Inter-Agency Support Teams (IAST)

The Police Department initiated and maintains a lead role in this important youth program. The teams consist of relevant State and local government service providers who work together towards developing practical, multi-agency responses to support children, young people and their families with multiple and complex problems. IASTs' support strategies have included reengagement with education and support from community mentors. At the end of March 2007, there were twenty-three IASTs operating in Tasmania providing support to 359 children and young people (256 boys and 103 girls).

b Youth Justice

Youth Justice Services[3] provides assistance and supervision for young people in conflict with the law through the provision of

- community conferencing;
- community service orders;
- supervision support; and
- custodial services for young offenders at the Ashley Youth Detention Centre.

The focus of the service is on working with the community and young people, with an emphasis on encouraging offenders to take responsibility for their offences (section 4(h) of the Act)

c. the Courts.

The Magistrates' Court of Tasmania (Youth Justice Division) has responsibility for hearing and determining almost all charges that are brought against youths. The Supreme Court of Tasmania exercises both an original jurisdiction in respect of the most serious crimes, as well as an appellate jurisdiction.

4. Procedure—'the 3 Cs'

Youth justice processes involve three strands—the 3 Cs:

a. Cautioning
b. Conferencing
c. Courts

The choice of strand is taken initially by Tasmania Police.

a. cautioning

If a youth admits an offence and a police officer believes that formal action is not warranted, the officer may informally caution the youth against further offending and proceed no further. An informal caution is a bar to any other processes under the Act.

[2] See for example *Annual Report 2006-07* of the Department of Police and Emergency Management (page 27)

[3] See for example *Annual Report 2006-07* of the Department of Health and Human Services (page 76)

However, if the officer considers that more formal action is warranted, the officer may:

a. require that the youth be formally cautioned against further offending;
b. require the Secretary to convene a community conference to deal with the matter;
c. file a complaint for the offence before the Court.

The Act contains a number of significant safeguards for the protection of the youth and to safeguard the integrity of the process. For example, an admission of guilt must be in writing and signed by the youth, the youth is entitled to legal advice and must be properly informed of the nature of a caution which may be cited if the youth has to be dealt with for a subsequent offence.

The Youth Justice Act 1997 in sections 9 and 10 provides for a responsible adult to be present when the youth is cautioned, section 11 allows the responsible person to be an Elder of the Aboriginal community and section 12 allows the responsible person to be from a religious, ethnic or other community group authorised by the police officer.

b. conferencing

Our system of youth conferencing is based broadly upon the New Zealand model.

A community conference is convened if a youth who has admitted an offence undertakes to attend. Its facilitator is required to invite those persons who are likely to aid the process and achieve a successful outcome.

a. a community conference is required to consider the objectives and principles in the Act and aims for sanction(s) agreed by:
b. the youth;
c. the police officer or representative of the Commissioner of Police; and
d. the victim, if present.

Section 16 of the Act empowers a community conference to impose one or more of the following sanctions:

i. a caution against further offending;
ii. the youth to pay compensation for injury suffered by the victim or any other person as a result of the offence;
iii. the youth to pay compensation or make restitution for loss, destruction of, or damage to property affected by the offence;
iv. the youth to perform community service for a specified period, not exceeding 70 hours;
v. the youth to apologise to the victim (provided the victim agrees); and
vi. the youth to undertake to do anything else appropriate in the circumstances of the case.

c. courts

Cases come to court after the laying of a written complaint / information and are heard by a single professional magistrate.

Section 47 of the Act provides that:

1. if a youth is found guilty of an offence, the Court may impose a range of sanctions—all disposals are technically available regardless of age:

a. dismiss the charge and impose no further sentence;
b. dismiss the charge and reprimand the youth;
c. dismiss the charge and require the youth to enter into an undertaking to be of good behaviour;
d. release the youth and adjourn the proceedings on conditions;
e. impose a fine;
f. make a probation order;
g. order that the youth perform community service;
h. make a detention order;
i. in the case of a family violence offence, make a rehabilitation program order.

2. In addition to imposing a sentence under subsection (1), the Court may make one or more of the following orders:

a. a suspended detention order;
b. a restitution order;
c. a compensation order;
d. subject to this Act, any other order a court may make under another Act in respect of the offence of which the youth is found guilty.

3. Compensation takes precedence over a fine if the youth has insufficient resources to pay both.

4. In determining what orders to make under subsections (1) and (2), the Court must have regard to all the circumstances of the case, including:

a. the nature of the offence; and
b. the youth's age and any sentences or sanctions previously imposed on the youth by any court or a community conference; and
c. the impact the sentence will have on the youth's chances of rehabilitation generally or finding or retaining employment.

Orders that can be readily adapted to use in the **Court Mandated Drug Program** described below are:

- orders that release offenders and adjourn the proceedings on conditions,
- probation orders,
- community service orders, and
- suspended detention orders.

5. Court Mandated Drug Diversion (CMD)—overview

In mid-2007 the Magistrates' Court of Tasmania began to trial the Court Mandated Drug Diversion Program (CMD) in conjunction with relevant government Agencies and Non-Government Organisations. The trial is for two years and is being continuously evaluated by professional consultants who are external to government and the Court.

CMD is part of the Australian Federal Government's Illicit Drug Diversion Initiative (IDDI), which takes different forms throughout Australia. The Tasmanian form is described here.

CMD is a Court-based program that focuses upon those people who are eligible for the program in that they have both

a. charges pending; and
b. an illicit drug problem.

An offence that is charged must relate to the offender's demonstrable illicit drug use, but illicit drugs need not have been directly involved in the offending that has brought the person before the Court. CMD excludes offenders who abuse licit drugs or for whom alcohol is the primary substance of abuse.

aims of CMD

A significant number of offenders appearing in Court face complex problems, aside from any legal issues. The primary goal of the CMD program is to break the drug-crime cycle by involving offenders in treatment and rehabilitation programs. It aims to increase offenders' access to drug, alcohol, or other welfare services and develop a 'joined up' service-delivery system between Government and the NGO sector.

Other CMD goals are to:

- provide offenders with an opportunity to acknowledge and address offending behaviour caused by drug abuse, thereby improving physical and psychological well-being;
- help offenders to reduce and abstain from illicit drug use,
- reduce drug-related offending behaviour,
- improve offenders' relationships with family and friends,
- improve offenders' chances of gaining or retaining employment; and
- provide offenders with the tools to recognise and prevent relapse into substance abuse and criminal behaviour.

eligibility

The program is available only to those persons who have been found guilty or have pleaded guilty to a charge. Moreover, a candidate must be assessed as suitable for the CMD program, based on a specialised criminogenic and drug and alcohol assessment. Specifically, the offender:

- must have a drug problem that would be responsive to an intervention program;
- must give their informed consent to participate; and
- should live within reach of the CMD service-delivery points.

Other eligibility criteria are:

- the offence charged must be able to be dealt with summarily;
- the allegations must not be of sexual assault or of significant personal violence and the offender should not have similar exclusionary offences pending before a Court. However, offenders previously convicted of sexual assault or significant violent offences can be included in the program if they are otherwise eligible and suitable;
- the commission of family violence offences does not exclude an offender from entry into the program;

- the offender must not currently be engaged in treatment for substance abuse, except for maintenance pharmaco-therapy programs for opioid dependence; and
- the offender must be eligible for bail and suitable for release on bail into the program, although the offender may, if appropriate, be detained in custody by way of remand for assessment.

structure and processes of CMD

CMD is structured into three categories:

Category 1: a bail option.

Category 2: a sentencing option that does not involve immediate custody.

Category 3: a Drug Detention Order (DTO). This option is not available for youths[4].

If a magistrate believes that an offender could be suitable for the CMD Program, the offender is referred to a Court Diversion Officer who arranges for the offender to be assessed as to eligibility and suitability for the Program.

An eligible (there is no minimum prescribed age) and suitable offender who is a youth may enter the Program in either categories 1 or 2, although in practice it is usual for entry to be at Category 1. An offender who is a youth may subsequently be referred to Category 2.

category 1

The offender is released on bail under the *Bail Act 1994* for a period that does not usually exceed 13 weeks, with an obligation to reappear before the Court during that period to enable progress to be assessed. During the period, the offender is subject to intense case management and counselling conferences, as well as obligations to submit to both scheduled and random urinalyses for drug detection.

Successful completion of the period of bail is likely to lead to the imposition of a penalty that acknowledges the offender's success.

category 2

A final order is made that contains conditions similar to those described for Category 1.

In both categories, breaches of the conditions constitute offences.

Conclusion

The aim of the CMD Program is the rehabilitation of offenders whose offences relate to the offender's demonstrable illicit drug use. Their rehabilitation is not only in their own interestsbut in the interests of the entire community. Seeking rehabilitation is grounded in the view that human behaviour can respond to a mix of incentives—both rewards and punishments. There are currently 13 on the programme; many have already exited it. The aim of CMD and its mechanisms are a welcome current application of the policies practised approximately 170 years ago by Captain Maconochie when Superintendent of Norfolk Island.

Arnold Shott is the Chief Magistrates for the Australian State of Tasmania and a member of SPYCC

References

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Department of Police and Emergency Management Annual Report 2006-07: http://www.police.tas.gov.au

Magistrates' Court of Tasmania: http://www.magistratescourt.tas.gov.au

[4] For details of category 3 see *Sentencing Act 1997, Part 3A, section 27B*

Juvenile Justice in Sweden

Judge Tomas Alvå

In Sweden there is a longstanding tradition of sanctioning offenders aged between 15 and 20 differently from other criminals. This applies especially to the age group 15 to 17, but also to a smaller degree to young offenders aged between 18 and 20. Sanctions are adjusted to the young offender's immaturity, limited experiences and special circumstances. Even though the sanctions are also tailored to fit the crime, the primary focus when sanctioning a juvenile is to prevent him or her from developing a criminal lifestyle.

Children

Children under the age of 15 are not tried in criminal proceedings. Children under the age of 15 suspected of committing crimes are handled by the police and prosecution-office under section 31 of the Young Offenders (Special Provisions) Act. The purpose of an investigation under that section is to help the social services take proper measures for the child, to retain stolen property or to investigate crimes that the child has committed together with someone older than 14.

Justice or welfare approach

a. welfare approach

Different agencies in society cooperate in sanctioning youth offenders. The social services have the overall responsibility for the social situation of young persons, and also the primary responsibility for the young offenders. Regardless of whether a crime has been committed or not, the social services can take measures for a young person pursuant to the Social Services Act or the Care of Young Persons (Special Provisions) Act. While measures taken under the Social Service Act require the consent of the young person and his or her custodian, coercive measures can be taken under the Care of Young Persons (Special Provisions) Act. Such measures can be decided by an administrative court after application from the social services.

b. juvenile criminal procedures

Rules for the handling of juvenile cases in the judicial system (the police, the prosecution-offices and the courts) are found in the Young Offenders (Special Provisions) Act, which also defines the role of social services in this procedure. If a young person is suspected of a crime, the social services will be notified. The social services must at the same time be informed of whether the young person is willing to participate in mediation. As a rule – but not always – youth offending team social workers will be present when the young person is questioned by the police. Prior to the questioning, a young person aged between 15 and 17 should have a public defender appointed for him or her by the court, unless it is obvious that a public defender is not needed. At the latest, six weeks after the young person has been told that he or she is a suspect, the prosecutor has to decide whether or not to institute criminal proceedings. Prior to deciding whether to waive prosecution or to institute proceedings, the prosecutor will be given a report by the social services about the young person. Such a report must give a brief description of the young person, an account of prior measures from the social services, a statement about the need for further measures and a detailed description of the measures that the social service intend to take. The young person will then be notified of the decision. The report is also important for the court when deciding a sanction for the young person. Sometimes – but not always – the social worker responsible for the report will be heard by the court.

Sanctions system

Until January 1st 2007 the most common sanction (apart from fines) of a young offender aged between 15 and 17 was that he or she was handed over to the care of the social services. The care of the young offender would then be either voluntary care under the Social Service Act or – if such a decision already had been made by an administrative court – coercive care under the Care of Young Persons (Special Provisions) Act. For obvious reasons, the content of this sanction could consist of everything from less extensive to very intrusive measures

Sometimes the courts received less detailed information from the social services about the care that was planned, and sometimes the care that was given would vary from what was intended when the judgement was passed. For those young offenders who were not in need of care, the choice of sanctions was either fines, suspended sentences or smaller periods of deprivation of liberty.

The legislation of 2007 emphasizes the court's role in deciding the sanction and allows for more diverse sanctions of youth offenders. The sanction of handing over the young offender to the care of the social services is now known as *social service sanction*. Such a sanction is only used when the young person, after skilled assessment, has been found to run the risk of continued criminal behaviour and is therefore in need of strong measures by the social services. The extent of the care is made transparent by either—if the care is under the Social Service Act—a signed youth contract; or—if the care is under the Care of Young Persons (Special Provisions) Act—a care plan. The youth contract or the care plan is attached to the judgement.

If there is no need of strong measures by the social services or if a social service sanction would be too intrusive compared to the crime committed, the choice of sanction for the young offender is either fines or—first and foremost—*youth service*. The latter sanction, which is to be used for the age group 15 to 17 and only if the young offender agrees to it, consists of unpaid work that includes components that clarify the conditions of youth service for the young person and enable the young person to reflect on his or her life situation and discuss the crime he or she has committed. The court decides the number of hours of youth service ranging from 20 to at most 150. The social services are to draw up an individual work plan for the young person and are to check that the work plan is complied with. The court can combine a social service sanction with youth service, if needed due to the severity of the crime.

A young person aged between 15 and 17 should be imprisoned only if it is absolutely necessary due to the crime committed. In such a case a young person is sanctioned to *custodial youth care*, which is closed institutional juvenile care under the Enforcement of Custodial Youth Care Act. The longest term of custodial youth care is four years.

Statistics

In 2007 the courts or the prosecutors handed out sanctions (including waiver of prosecution) to approximately 27,200 young persons aged between 15 and 20, which is 22 percent of the total number of persons tried for crimes (but only ten percent of the population). Compared to the year 2006, the number of young offenders increased by 1,800 offenders or by seven percent. Young offenders in the age group 15 to 17 increased by ten percent. The most common crimes committed by youth offenders in 2007 were theft offences (including shoplifting). Close to a third of the young persons tried for crimes had committed a theft offence. Other common crimes for young offenders were assault (eleven percent), illegal driving (ten percent) and use of narcotics (nine percent). Some crimes were typical juvenile crimes. In 2007 most robberies (circa 55 percent) and car thefts (circa 50 percent) were committed by offenders younger than 21 years old.

The new sanctions for young offenders were used for the first time in 2007. Approximately 1,800 young persons were sentenced to social service sanctions while 2,500 young persons were sentenced to youth service. Also 89 offenders in the age group 15 – 20 were sanctioned to custodial youth care. The average term of closed care was ten months. 46 percent of offenders sanctioned to custodial youth care had committed robbery.

Statistics from 2002 show that among young offenders aged between 15 and 17 approximately 37 percent re-offended within three years of being convicted. More than 40 percent of those in the age group 18 to 20 re-offended within three years.

More than 14,000 crimes committed by children under the age of 15 were reported to the police in 2007, and approximately 2,800 investigations under section 31 of the Young Offenders (Special Provisions) Act were made.

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Meeting of Youth Court Judges—Brescia, Italy

Joseph Moyersoen

On 1 December 2007, under the aegis of the French Association, a meeting of youth and family magistrates from a number of European countries was held in Paris to discuss and compare approaches in different states.

This group was able to meet for a second time on 24 October 2008 in Brescia, during the XXVIII Congress of the Italian Association, to discuss civil and criminal powers.

Magistrates from the seven countries that took part in the Paris discussions were there—Austria, Belgium, England & Wales, France, Italy, Portugal and Switzerland. Two colleagues from Argentina also joined in the discussions.

The group's work was in two parts. The first compared different systems of juvenile justice in Europe with regard to civil and criminal powers; the second considered the future working of the group.

The first discussion found evidence that the situation differs significantly across Europe. In Austria, England & Wales and Switzerland, juvenile judges have jurisdiction only in criminal matters; but in Belgium, France, Italy and Portugal, they also have civil jurisdiction, particularly in matters of child protection.

It is interesting to note that in Austria—where historically juvenile judges exercised both forms of jurisdiction—Parliament is considering returning to that position.

Discussion of the second issue was very fruitful and fulfilling. All participants expressed a strong wish for the group to continue in future, because of their own need to make comparisons of this kind.

This comparative work aims to identify the direction that reform should take at a national level through knowledge of what is happening in other European countries, as well as developing a group able to engage in discussions with the European Union—which will become involved in the future administration of juvenile justice, as it forms part of the third pillar of the EU's competences.

The proposal is to convert this informal discussion group into a European Section of the IAYFJM and to set out terms of reference to guide the group's future work. These are in preparation.

These terms of reference will need to be discussed and agreed by IAYFJM and National Associations in European countries in order to give their representatives a mandate to play an active part in the work of the group.

The idea is for the group to continue meeting at least once a year in one of the participating countries and to consider an issue identified in advance, in order to promote in-depth discussion.

There are clearly many steps on this journey, but it is one worth travelling as it may help magistrates and Judges in the National Associations to become more effective, aware and knowledgeable.

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Comparison of the Age of Criminal Responsibility in Europe

Country	Minimum age for *educational* measures of the family/youth court (juvenile welfare law)	Age of Criminal responsibility (juvenile criminal law)	Full criminal responsibility (adult criminal law can/must be applied; juvenile law or sanctions of the juvenile law can be applied)	Age range for youth detention/custody or similar forms of deprivation of liberty
Austria		14	18/21	14-27
Belgium		18	16**/18	Only welfare institutions
Bulgaria		14	18	14-21
Croatia		14/16*	18/21	14-21
Cyprus		14	16/18/21	14-21
Czech Republic		15	18/18 + (mit. sent.)	15-19
Denmark****		15	15/18/21	15-23
Estonia		14	18	14-21
Finland****		15	15/18	15-21
France	10	13	18	13-18 + 6 m./23
Germany		14	18/21	14-24
Greece	8	13	18/21	13-21/25
Hungary		14	18	14-24
Ireland		10/12/16*	18	10/12/16-18/21
Italy		14	18/21	14-21
Latvia		14	18	14-21
Lithuania		14***/16	18/21	14-21
Moldova		14***/16	14/16	14-21
Montenegro		14/16*	18/21	14-23
Netherlands		12	16/18/21	12-21
Norway****		15	18	15-21
Poland	13		15/17/18	13-18/15-21
Portugal	12		16/21	12/16-21
Romania		14/16	18/(20)	16-21
Russia		14***/16	18/21	14-21
Serbia		14/16*	18/21	14-23
Slovakia		14/15	18/21	14-18

Slovenia		**14***/16**	**18/21**	**14-23**
Spain		**14**	**18**	**14-21**
Sweden**		**15**	**15/18/21**	**15-25**
Switzerland		**10**	**18/25*****	**10-22/17-25/30**
"The former Yugoslav Republic of Macedonia"		**14***/16**	**14/16**	**14-21**
Turkey		**12**	**15/18**	**12-18/21**
Ukraine		**14***/16**	**18/21**	**14-21**
United Kingdom: England & Wales		**10/12/15***	**18**	**10/15-21**
United Kingdom: Northern Ireland		**10**	**17/18/21**	**10-16/17-21**
United Kingdom: Scotland	**8**	**16**	**16/21**	**16-21**
Belarus		**14***/16**	**14/16**	**14-21**

- Criminal majority concerning juvenile detention (youth imprisonment etc.);
  ** Only for motoring offences and exceptionally for very serious offences;
  *** Only for serious offences;
  **** Only mitigation of sentencing without separate juvenile justice legislation;
  ***** Special custodial measure for 18-25 years old young adults.

Source: Council of Europe CM(2008)128 addendum 1, Table 1

Thirty years of family courts in Poland— an historical perspective

Dr Magdalena Arczewska

Introduction[1]

The family undertakes many tasks for the benefit of its members and society generally. In return, it expects to have its identity acknowledged and accepted as a social entity. As the basic institution of society, the family requires special protection from government, especially in legal proceedings so it is not surprising that over time the family courts system and the institution of the family judge— a judge dealing with the cases related to family issues[2]—have evolved. However, it has to be pointed out that over many years no general model of family courts or of the family judge has evolved.

The aim of the following article is to present the historical origins of family briefly courts and to describe in more detail, the origins and development of family courts in Poland.

Establishment of the family court as a separate judicial institution

A brief historical perspective

Since ancient times, a judge has been able to influence family life and relationships under civil law, yet until the XXth century there were no family courts as such. Historically the participation of a judge mostly took the form of legalization of some important actions, such as adoption or care of minors. Such a sphere of judges' activity in Roman Law was defined as voluntary action, *iurisdictio voluntaria*[3]. In some legal systems this name exists even now[4], although other names, such as uncontested, or non-trial are evident too.[5].

In ancient Rome, judge type actions were, at first, undertaken by consuls. However, in order to decrease the number of duties of the consul's office, in 367 BC the office of municipal praetor was introduced. The praetors supervised legal proceedings and provided off-trial protection. Sentences/decisions were passed made by jurymen, who were ordinary citizens chosen by the lawsuit's parties. Minor cases were decided by so-called *aediles curules.*

In the Western Roman Empire, the praetors gradually lost judicial power, which was transferred to officers subordinated hierarchically to the emperor.

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1 This article is based upon the author's doctoral dissertation: M. Arczewska, *Społeczne role sędziów rodzinnych* (Social roles of family judges), University of Warsaw, 2007. Related texts have been published Details from the author.

2 H. Nakamura: *Die Familiengerichtsbarkeit. Die Aufgabe des Gerichs in familienrechtlichen Konflikten*, in *Effektiver Rechtsschutz und verfassungsmäßige Ordnung, Die Generalberichte zum VII. Internationalne Kongreß für Prozeßrecht*, Herausgegeben von Walther J. Habscheid, Würzburg 1983, p. 472, W. Kockler: *Pozycja nieletnich w prawie Republiki Federalnej Niemiec*, in „FamiliJant" 2004, Nr 1/6, p. 33 – 42, N. Gerstberger: *Regulacje prawne dotyczące nieletnich w Austrii*, [in:] „FamiliJant" 2004, Nr 1/6, p. 29 – 33. J. E. Munzebrock: *Prawo nieletnich w Królestwie Holandii*, [in:] „FamiliJant" 2004, Nr 1/6, p. 21 – 29.

3 J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska: Postępowanie cywilne (Civil Procedure), Wydawnictwa Prawnicze PWN, Warszawa 2003, p. 39.

4 In Germany *Freiwillige Gerichtsbarkeit.*

5 Off-trial proceedings are court initiated involve no legal arguments, one judge and one party

Town halls represented the authority of the emperor and used the power of the state to enforce a verdict/decision. Each case could get to a higher level officer on appeal.

Although in Europe in the Middle Ages, judicial power was in hands of the monarch, rulers sometimes handed some of their judicial authority to officers. Various states had separate judicial systems. With the growth in the number of cases courts gradually gained more authority so that. in modern times (mostly in the XVIII century), the role of monarchs in judicial systems decreased and judicial power was handed over to institutions completely independent of the monarch. In principle, the judicial system developed in Europe in modern times has not undergone further important changes. The idea of family courts system came into being not in Europe, but in Northern America

In North America courts for minors, as a **higher** organizational form of court were introduced at the end of the XIX century. In 1899 in Chicago a special court was established to deal with youth cases as a response to the growth of juvenile delinquency. The functioning of such a court proved that legal institutions, with the use of social sciences' achievements could successfully solve problems related to minors. Positive experiences in this area led to the application of specific methods of dealing with family issues. The first family court was established in 1914 in Cincinnati in the state of Ohio—thanks to the personal engagement of Judge Charles W. Hoffman, who then became the chairman of the court. In 1916 family courts were established in other cities in Ohio—Acron, Toledo and Youngstown; and in 1922 in all judicial districts of the state of Virginia[6]. The next country to implement the American idea of family courts system was Japan. The main goal of Japanese family courts was to mitigate family conflicts and tensions and the protection of minors. Special courts to deal with family and youth issues were gradually established all over the world—either as separate courts[7] or separate divisions of general courts[8].

The idea of family courts was not always welcome. Initially the legal systems of France (1947), England (1956) and Germany (1961) rejected it. One of the concerns was that the work of such courts was dominated by divorce and alimony cases[9]. Also, one could not talk about their uniformity either at the international level or within national legal systems. For instance, family courts in New Brunswick (Canada) dealt only with cases of adoption, parental authority and care, while courts in Ontario dealt only with alimony and adoption cases. Unlike Canada, the competences of family courts in Japan were very broad and encompassed all family conflicts and problems with judicial consequences. In the Philippines family courts dealt with issues of adoption, divorce, separation, parental authority and care. German family courts were typically civil courts that dealt with marriage and family related issues. However, in spite of such variety, in all countries one could notice changes in the attitude of those supporting the establishment of family courts. Initially, the adherents of such courts wanted to give them the broadest range of competence. Gradually, however, due to organizational and financial difficulties (creation and maintaining of teams of specialists) there was a tendency to limit their powers[10].

Eventually, the development and transformation in general judicial systems led to the crystallising out of family courts systems, and, in consequence, the establishment of the institution of the family judge that was to deal with cases related to law concerning the family. Although in ancient times some judges had an impact on family relations, family judges did not constitute a separate professional group. Neither were they required to have special knowledge or qualifications.

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6 Crucial to the promotion of family courts were the National Probation and Parole Association, the National Council on Crime and Delinquency, the National Council of Juvenile Court Judges and the U.S. Children`s Bureau.

7 Austria, Japan, Mexico.

8 Brazil, Germany, Greece, Austria, Spain, USA.

9 Por.: J. Bafia: *„Sądy rodzinne – pierwsze pytania i wątpliwości"* (Family courts – first questions and doubts), [in:] „Gazeta Prawnicza" (Law Review)1978, nr 4.

10 J. R. Kubiak: *Sądy rodzinne w Polsce…, op. cit.,* p. 178.

The relevant literature stresses that in the United States, the cradle of the family courts system, the involvement and personality of a judge determined the functioning of the family court.. If the judge did not take sufficient initiative, the functioning of a court would be suspended and the court closed down. This phenomenon could be observed in the United States in the first years of the family courts. But in Northern America, the profession of a family judge became very prestigious, because a judge while reaching decision based on the law, made decisions not on behalf of the state, but on the behalf of the family. The judge and the court created a unity[11].

Quite a common practice when it comes to the functioning of family judges is that one judge deals with all cases relating to one family. In this way, the risk of diversity of decisions is avoided and particular courts have deep knowledge about the issues of one family. This, in turn, is especially important in carrying out preventive and protective measures. In France, the essence of connection between a judge and a family comes from the old Roman law referring to issues of minors: "this is my judge, I know him and he knows me". That is why, in the relevant literature a family judge is often compared to a family doctor. One can also find statements there that such a judge deals with particular families "from the cradle to the grave" [12].

Establishment of family courts in Poland

In Poland in the Middle Ages in, judicial power was concentrated in the monarch's hands. However, rulers sometimes handed over some of their judicial authority to so-called *castellans*. With the growth in the number of cases, the powers of the courts gradually grew. The establishment of the family courts emerged from much earlier courts set up for minors and family departments involved with minors.

Immediately after WWI the judges' community put forward the idea of courts for minors. They came into being with a decree of the Head of the State on February 7th, 1919 and in November of that year, courts for minors started functioning in Warsaw, Łódź and Lublin. In subsequent years standardization of criminal, substantive and procedural law occurred and influenced further development of such courts. By 1928 in most of the bigger judicial districts, special divisions or departments to deal with cases concerning minors had been established[13].

In 1949, in connection with changes to the law regulating the functioning of general courts, criminal divisions for the minors were established[14]. Although intended for criminal cases, in practice they tended to deal with all cases covered by family law. In consequence, criminal courts (divisions) for minors became guardianship courts. The establishment of a family courts system in Poland was, to a large extent, an evolutionary process from then onwards.

Organizational decisions made in this sphere resulted from practice and were a response to the initiative of courts' chairmen. In 1953, as an experiment, the range of competences of some courts for minors was broadened. Since then, they have dealt with guardianship cases, which previously had been dealt with by civil divisions of general courts. The first, separate family division started functioning in July 1962 in Poviat's Court in Katowice. The next divisions of this type were created in Łódź in January 1963. These divisions dealt with cases of divorce, paternity, alimony and abolition of legal co-ownership between spouses.

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[11] J. R. Kubiak, W. Kasprzycki: *Sądy rodzinne…, op. cit.,* p. 1050 – 1055.

[12] Por.: *Z pomocą rodzinie. Rozmowa z wiceministrem sprawiedliwości, dr Marią Regent Lechowicz*, (Help for families. Interview with Maria Regent Lechowicz, PhD, vice Minister of Justice), in „Prawo i Życie" 1979, nr 2, H. Zabrodzka: *Odpowiedzialność nieletnich w ustawodawstwie francuskim* (Responsibility for minors in the French legal system), in „Problemy Wymiaru Sprawiedliwości" (Problems of the system of justice) 1973, nr 2, p. 184 and H. Amend*: Organisation und Zaständigkeit der Jugendgerichte und Vormundschaftsgerichte in Westeuropa, Skandinavien und Vereinigen Saaten von Nordamerika*, Marburg-Lahn 1970, p. 100.

[13] J. Mojak: *Z problematyki sądownictwa rodzinnego* (Problems of family courts system), [in:] „Nowe Prawo" (New Law) 1881, nr 1, p. 14.

[14] Act, April 27th, 1949 on the changes of the law on general courts (Dz. U. Ne 32, poz. 237).

The concept was then quite modest as it was based upon a formal division of civil cases between two parallel civil divisions. One dealt with cases related to work relations and property claims, while the other dealt with cases resulting from family relations[15]. Positive experiences of the functioning of courts in Katowice and Łódź led to the establishment, at the beginning of the 1970s, of sixteen experimental family courts in Poland[16].

Under Regulations of the Minister of Justice of January 1st 1974, chairmen of certain regional courts created family departments—among others, in Tarnów, Kluczbork, Tarnobrzeg, Inowrocław, Świnoujście, Ostrołęka and Braniewo and in 1975 in Brtoszyce, Szczytno and Nowy Sącz.

In the same period, changes reorganizing the structure of auxiliary organs of courts for the minors and guardianship courts were introduced. Under the Regulation of the Minister of Justice of May 3rd 1973 on minors' curators, two separate institutions—social inspectors for care cases and court-appointed curators for minors were merged into one and became known as curators for minors[17]. From 1975 the amendment of the Family and Guardianship Code as well as the amendment of the Civil Procedure Code highly influenced the process of development of the family courts system. The amendments acknowledge that: "In cases related to minors, this court (for minors) acts as a guardianship court. …..it deals with cases for a defined range of issues". Such a change provided the legal framework for establishing family courts in Poland[18].

In 1978 broad system reforms were started. They were supervised by 22 judge-inspectors. On the basis of an Order of the Ministry of Justice of December 28th 1977, which changed the regulation of regional and district courts in administrative and supervision issues[19], 97 family and minors' departments were established. 48 of them dealt with issues from exactly one district, 27 from an area smaller than one district and 22 from an area larger than one district. 496 judges, 6,000 lay judges, 500 professional curators, around 7,000 social curators, and almost 900 administrative workers were sent to family courts[20].

The establishment of family courts was based on organizational changes made by the Ministry of Justice. The Reform was carried out without any obstacles because the family courts system was based on the already existing organizational structure of courts for minors. It had negative consequences, as well – family divisions were established only in district courts, without counterparts of family divisions of appeal in regional courts.

In 1978 the competences of family courts were very broad. Apart from issues relating to minors, they dealt with many other issues from family and care law to criminal cases against youth and against adults for lack of care for minors and other acts against the family[21]. They also dealt with cases of compulsory treatment of alcoholics[22].

The aims behind the regulations adopted in the family courts system were to ensure the integration of a court's activity in all family cases. The territorial division of work was also to lead to the complex way of solving problems of a given family by the same judge. "The idea behind the reform of the courts system was not to connect some institutions mechanically but to optimize legal protection of a family by the institutions of the system of justice. Since the family courts system is qualitatively different from traditional courts they should apply specific measures. Above all, however, family judges

15 J. R. Kubiak: *Sądy rodzinne w Polsce…, op. cit.,* p. 182-186.

16 Order of the Ministry of Justice July 26th, 1973 on the implementation of new methods of organization and functioning of the system of justice' organizational units (Dz. Urz. M.S. nr 5, poz. 37).

17 Dz. U. nr 18, poz. 107.

18 Art. 568 par. 2 kodeksu postępowania cywilnego (the Civil Proceedings Code).

19 Dz. Urz. M.S. nr 6/ 24.

20 W. Patulski*: Sądownictwo rodzinne* (Family courts system), [in:] „Nowe Prawo" 1978, nr 2, p. 205.

21 Sprawy karne osób dorosłych przeciwko rodzinie, opiece i młodzieży regulował rozdział XXV kodeksu karnego z 1969 r. (Criminal cases of adults against family, welfare and youth were regulated by chapter XXVof the Criminal Code from 1969.

22 Compare.: A. Strzembosz: *Polish Family Courts In the Light of Empirical Research*, [in:] J. Kurczewski, A.A. Czynczyk: *Family, gender and body in law and society today*, Sociology of Custom and Law Department – Institute of Applied Social Science WPRiPS, University of Warsaw, 1990, p. 199 – 222.

have to use and benefit from existing institutions and legal measures to a maximal degree."[23]

The natural consequence of the assumptions described above was the establishment of specific requirements concerning the experience and personality of a family judge. The opinion that the judge plays a crucial role in the realization of disposals of the family courts system can be encountered frequently in the relevant literature. "The change in the model of a family judge deserves to be underlined. The attitude of a judge, who would consider him or herself only as an arbiter deciding on, at the parties' request, disputes between them, is no longer considered modern or rational. A contemporary family judge participates in an active way in a dynamic development of social relations, and—with the aid of certain legal instruments they possess—can influence their shape[24]".

The above statements, made by the Minister of Justice during the First National Conference of Family Judges stress the fact that the establishment of family courts in Poland was connected with the identification of an exceptional social role of a family judge. Family judges have to meet special requirements. They need to have deeper and more versatile legal knowledge than other judges, but they also have to "be sensitive to family and youth issues, convinced of the need to strengthen and protect a family. They also should possess the precious, although not frequently met, ability to make contact with and gain the confidence of people in whose lives they are to intervene"[25]. Apart from a high level of professional qualification, a family judge should be sensitive to the problems of children and be willing to bring help to families in carrying out their caring and educational functions[26].

In the literature and materials from the late 1970s concerning the reform of the family courts system in Poland, the demands of one outstanding author dealing with civil law – Professor A. Wolter were often quoted. "The judge has to act as a good host and show knowledge about economic phenomena and social relations. The confidence of society towards guardianship institutions will depend on whether or not the judges will be able to perform their duties properly"[27]. Although these words come from 1947, they have not lost their relevance and importance, neither after the reform in 1978, nor nowadays.

At the time of reform, the candidates who wanted to be family judges had to meet special criteria concerning age, work experience and knowledge. They had to have deep psychological, sociological and pedagogical knowledge. Moreover, the Ministry of Justice made it compulsory to take special courses organized together with the Higher School of Special Pedagogy or other departments of a similar profile[28]. The current performance of judges in their professional posts was assessed as well. Family judges had to be at least 30 years of age with a minimum of 5 years experience as a judge.

In addition, taking into account the legal system, which was in place then in Poland, they also had to understand in a 'proper' way the politics of the communist party and the government, towards the role and function of a family, the need to strengthen it, the need to protect the role of the party, the state and the nation in education of the young people.[29].

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23 J. Mojak: *Z problematyki…, op. cit.,* p. 18-19.

24 J. Bafia: *Rola prawa i sądów w realizacji polityki partii i państwa na rzecz umacniania rodziny* (Role of law and courts in the realization of the party's and state's politics towards strenghtening the family), [in:] „Nowe Prawo" 1980, nr 1, p. 8-9.

25 Z. Wasilkowska: *Aktualny model sądów rodzinnych w Polsce* (Current model of family courts in Poland), [in:] „Problemy Rodziny" (Problems of a family)1979, nr 1, p. 41.

26 Compare.: M. Bańkowska: *XX-lecie sądownictwa rodzinnego* [in:] „Przegląd Sądowy" 1999, nr 4, p. 131-136, W. Patulski*: Sądownictwo…, op. cit.,* p. 204.

27 A. Wolter: *Władza opiekuńcza* (Guardianship authority), [in:] „Demokratyczny Przegląd Prawniczy" (Democratic law review)1947, nr 12, p. 40.

28 From the late 1970s there were calls to broaden the program of law school to include specialization in the family courts: so that at early stage persons interested in family and care issues could be selected", see: Z. Wasilkowska: *Aktualny model…,op. cit.,* p. 42.

29 Letter of the Minister of Justice, December, 28th, 1978 (N.I –1579/77).

Those who implemented the reform had to use new criteria of assessing the work of a judge. The criteria applied for regular judges focused only on adjudicating and were no longer useful.

What is crucial in the work of a family judge is their preventive, mediation, care and resocializational role. That is why there was a demand that every family judge devoted at least half their time to prevention and preparatory proceedings.

in conclusion…….

In all legal systems the function and duties of a family judge as well as the procedure through which they are appointed are shaped by special regulations. The family judge is guaranteed judicial independence. However, one can take a risk and say that these are the only similarities. "In a traditional judicial system the role of a judge, a very important one, consisted of the appropriate adjudication of cases.....in accordance with the law and principles of social cooperation. Neither enforcement of a verdict nor implementation of any preventive measures belongs to a judge's duties…

The situation in a family courts system is different. Although here the main duty of a family court judge is to make appropriate orders/sentences that take into account both legal and social implications of each case, they may also have other tasks.

In Poland therefore a family judge is obliged to oversee the execution of a sentence/disposal, track proceedings—especially in care and criminal cases involving a juvenile, and make sure the judicial decision is made quickly and is beneficial for a family. A judge does it through a court-appointed curator and assistants in diagnostic centres, but still needs to be personally involved in the educational and resocializing processes, required by his/her judicial decision[30]."

The role of family judges is really a special one. They do not only lead judicial proceedings and are responsible for proper judicial decisions, but they also supervise the execution of sentences and make sure the judicial decision is made quickly and is beneficial for a family. Their roles of prevention, mediation, protection and resocialization are also very important.

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[30] Z. Wasilkowska: *Aktualny model…, op. cit.,* p. 43.

International child custody disputes—the Indian experience

Anil Malhotra & Ranjit Malhotra

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1. Introduction

The world is a far smaller place now than it was a decade ago. Inter-country and inter-continental travel is easier and more affordable than it has ever been. The corollary is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. International mobility, opening up of borders, cross-border migration and dismantling of inter-cultural taboos all have positive traits but are fraught with a new set of risks for children caught up in cross-border situations. In a population of over a billion Indians, 30 million are non-resident who—by migrating to different jurisdictions—have generated a new crop of spousal and family disputes. Foreigners too, who venture into India for permanent abode, add to the numbers multiplying the problem

The resulting problems have no ready made solutions in the conventional legislation prevailing in the legal system of India. The net result: the innovative judicial system of India—with its dynamic jurisprudence when invoked—provides a tailor-made answer for every individual case. But then, from an international perspective, this does not provide a consistent, uniform and universal remedy. What then is the answer, in this highly sensitive area of family law involving conflict of jurisdictions in inter-parental child custody cases, when children are removed to India in violation of inter-parental rights or infringement of foreign court orders?

2. Definition of child removal

Families with connections to more than one country face unique problems if their relationship breaks down. The human reaction in this already difficult time is often to return to one's family and country of origin with the children of the relationship. If this is done without the approval of the other parent or permission from a Court, a parent taking children from one country to another may, inadvertently or not, be committing child removal or inter-parental child abduction. This concept is not clearly defined in any relevant legislation. As a matter of convention, it has come to mean the removal of a child from the care of the person with whom that child normally lives.

A broader definition encompasses the removal of a child from his or her environment, where the removal interferes with parental rights or right to contact. Removal in this context refers to removal by parents or members of the extended family. It does not include independent removal by strangers.

The *Convention on the Civil Aspects of International Child Abduction*[1] was opened for signature at The Hague on 25 October 1980. By September 2008, 80 contracting countries from all regions of the globe had signed the Convention. Article 3 defines **wrongful removal** or **retention** in the following words:

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

[1] The full text of the Convention and supporting material is available at www.hcch.net

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

3. The Indian situation

Child removal does not find any specific definition in the Indian statute books and, since India is not a signatory to the Hague Convention, there is no parallel Indian legislation to give it the force of law. Hence in India all interpretations of the concept of child removal arise from judicial innovation based on precedents of case law decided by Indian courts in disputes between litigating parents of Indian and / or foreign origin.

Questions regarding the custody of children in such cases are considered by the Indian Courts on the merits of each case, taking the welfare of the child to be of paramount importance while considering any order made by a foreign Court to be only one of the relevant factors in its decision.

The High Courts and the Supreme Court in India will entertain petitions for a writ of *habeas corpus* to secure the custody of a minor child at the request of a parent who lands on Indian soil alleging violation of a foreign Court's custody order or who seeks the return of children to the country of their parental jurisdiction. Invoking this judicial remedy may provide the quickest and most effective solution.

A review of relevant cases since the mid 1980s shows that the Courts consider the best interests of the child to be paramount and that the legal rights of the parents (whether or not supported by a foreign court order) are subordinate. In determining the child's best interests, the Courts require all relevant factors to be taken into account. The Courts will consider the grant of a writ of *habeas corpus* when satisfied that to do so would be in the child's best interest. Two recent High Court cases[2] have refused such a grant until the 'best interests' have been decided in an appropriate forum, such as a local family proceedings court or a forum prescribed by law to adjudicate it. A detailed list of the fourteen relevant cases with a summary of the judgements together with some unreported matter is available from the authors on request.

The Hague Convention came into force on 1 December 1983 and now has 80 contracting nations. The Convention secures the prompt return of children wrongfully removed to or retained in any Contracting State and ensures the rights of custody and access under the laws of such Contracting States. Unfortunately, India is not a signatory to the Hague Convention and practical experience demonstrates that the principles laid down in the Convention are not applied in India.

This situation encourages child removal to India by an offending parent and prevents custody rights being determined by the laws of the country where the child was normally resident. Moreover, the 'best interests of the child' are determined in a purely Indian context. Furthermore, foreign courts now largely disallow children from their jurisdictions to be brought to India, fearing that the children will not be returned to the country of their habitual residence. A US Court recently declined the return of children to India, despite a direction to that effect from the Indian Supreme Court.

Indeed instances abound from the US, UK and Canada where non-resident Indian parents desperately seek advice on what to do when Courts in these jurisdictions deny permission for children to be brought to India when there is a custody dispute. Situations also occur where a parent in India seeks *habeas corpus* relief, while the parent with the child abroad petitions the foreign Court and gets a restraint order.

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[2] *Mandy Jane Collins v. James Michael Collins*, 2006 (2) Hindu Law Reporter 446 in the High Court of Bombay at Goa, 3 March 2006 **and** *Ranbir Singh v. Satinder Kaur Mann* 2006 (3) Punjab Law Reporter 571 in the Punjab and Haryana High Court, 30 May 2006.

Both parents are then equipped with judicial orders and the bi-continental custody battle picks up in courts of two different nations. This conflict of jurisdictions needs immediate resolution.

4. Conclusion

It is clear that, in the absence of any Indian legislation on the subject, there is no uniform approach to resolving the issues of custody, access and contact which arise when parents are separated and live in different countries. The time has come for some international perspective in this regard.

In England & Wales, in January 2005, Lord Justice Thorpe was appointed Head of International Family Law to promote development of international instruments and conventions in the field of family law and greater international judicial collaboration. Pakistan has signed a judicial protocol between the President of the Family Division of the High Court in London and the Chief Justice of the Supreme Court of Pakistan for cooperation between judicial authorities of the two countries on such issues.

The Hague Convention guides provide a wealth of information on the subject. However, India has as yet not signed the Convention. The *Civil Aspects of International Child Abduction Bill, 2007* is being looked into before India accedes to the Convention. Till then, the jurisdiction of the High Court as an exclusive remedy for release from illegal detention through a writ of *habeas corpus* is the only expeditious remedy available.

However, for a litigating parent from a foreign jurisdiction to convince the Indian Court to exercise such an option is an uphill task. It may occasionally be successful but usually it does not succeed. What then is the remedy?

In the larger interest of children at risk, the conflict of jurisdiction between Courts must take a back seat. The Indian Parliament should give high priority to enacting the proposed legislation to protect the rights of the abducted child and to resolve the clash between the rule of domicile and the rule of nationality. Until this is done, the Supreme Court of India would do well to lay down some uniform guidelines to be consistently followed in cases of inter-parental child abduction from foreign jurisdictions. India cannot allow itself to become a haven for parents who wrongfully remove children.

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Contact Corner — Editor

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Cédric Foussard International Juvenile Justice Observatory	Annie E Casey Foundation—Detention Reform in Rural Jurisdictions by Richard A. Casey	http://www.juvenilejusticepanel.org/en/newsletter or http:/www.aecf.org
United Nations office, Geneva	UN Committee on Rights of Child—50th session 12 -30 Jan 2009 will review the situation in Malawi, Chad, Netherlands, Democratic Reublic of Congo, Democratic Republic of Korea and Republic of Moldova	tdh-childprotection.org/content/view/944/1 and www.unorg,ch/
Jean Zermatten* Institut international des Droits de l'Enfant (IDE), Vice Chair UN Committee on Rights of Child	Children in street situations. Prevention, intervention, rights-based approach Book available from web-site from spring 2009	www.childsrights.org
"The Future of the Council of Europe Youth Policy: Agenda 2020". **Kiev (Kyiv) Declaration 11/10/08** was adopted by Council of Europe Ministers	The instrument development of the Council of Europe youth policy and action plan in three directions: human rights and democracy, youth co-existence in various societies and young people's social inclusion.	http://youthministers2008.org/documents.phtml
Council of Europe: Committee of Ministers	European Rules for Juvenile Offenders subject to Sanctions and Measures	http://coe.int: follow Committee of Ministers and Search for the document CM/Rec(2008)11

You will remember the article about the new children laws in Guernsey that was reported at length in the Chronicle of July 2008. Ruth Bowen, author of the article, Solicitor and Legislative Consultant for the States of Guernsey Services for Children and Young People has kindly sent me the following update.

Dear Friends 6th January 2009

Intensive work on Guernsey and Alderney's new children laws has continued (*New Children Laws for Guernsey: Chronicle July 2008*). The autumn of last year saw a widespread publicity campaign to recruit members of the Child Youth and Community Tribunal, the new lay body that will replace court in most cases of child offending and child protection. There was considerable interest with over 70 people applying for 33 places. The high quality of applicants enabled a good cross-section of the local community to be selected, ranging in age from 26 to 67. Training of the Tribunal members begins this month.

The post of Children's Convenor, the independent lawyer who will be the gatekeeper to the Tribunal, also attracted around 70 applications, from as far afield as the United States, although most were from the UK. Karen Brady, who has extensive experience of the Scottish children's hearing system, from practice and policy perspectives, will take up the post at the beginning of February. Together with those drafting the necessary secondary legislation, policies, procedures and guidance, the new Convenor will be working towards implementation of the new legislation in summer 2009. With best wishes, **Ruth**

Treasurer's column — Avril Calder

Subscriptions 2008

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3. if under **Euros 70**, by **cheque** (either in GBP or euros) made payable to the International Association of Youth and Family Judges and Magistrates and sent to me.

If you need further guidance, please do not hesitate to e-mail me.

It is, of course, always possible to pay in cash if you should meet any member of the Executive Committee.

Without your subscription it would not be possible to produce this publication.

Council Meeting Sion, Switzerland October 2008

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Corinne Dettmeyer (Netherlands)
Petra Guder (Germany)
Hervé Hamon (France)
Joseph Moyersoen (Italy)

The immediate Past President is an ex-officio member and acts in an advisory capacity.

Chronicle Chronique Crónica — Voice of the Association

The Chronicle is the voice of the Association. It is published bi-annually in the three official languages of the Association—English, French and Spanish. The aim of the Editorial Board has been to develop the Chronicle into a forum of debate amongst those concerned with child and family issues, in the area of civil law concerning children and families, throughout the world

The Chronicle is a great source of learning, informing us of how others deal with problems which are similar to our own, and is invaluable for the dissemination of information received from contributions world wide.

With the support of all members of the Association, a network of contributors from around the world who provide us with articles on a regular basis is being built up. Members are aware of research being undertaken in their own country into issues concerning children and families. Some are involved in the preparation of new legislation while others have contacts with colleagues in Universities who are willing to contribute articles.

A resource of articles has been built up for publication in forthcoming issues. Articles are not published in chronological order or in order of receipt. Priority tends to be given to articles arising from major IAYFJM conferences or seminars; an effort is made to present articles which give insights into how systems in various countries throughout the world deal with child and family issues; some issues of the Chronicle focus on particular themes so that articles dealing with that theme get priority; finally, articles which are longer than the recommended length and/or require extensive editing may be left to one side until an appropriate slot is found for them

Contributions from all readers are welcome. Articles for publication must be submitted in English, French or Spanish. The Editorial Board undertakes to have articles translated into all three languages—it would obviously be a great help if contributors could supply translations. Articles should, preferably, be 1500 - 2000 words in length. 'Items of Interest', including news items, should be up to 500 words in length. Comments on those articles already published are also welcome. Articles and comments should be sent directly to the Editor-in-Chief. However, if this is not convenient, articles may be sent to any member of the editorial board at the addresses listed below.

Articles for the Chronicle should be sent directly to:

Avril Calder, Editor-in-Chief,

e-mail : acchronicleiayfjm@btinternet.com

Copies in our three working languages (English, French and Spanish) would be appreciated.

Alternatively, articles may be directed to any member of the Editorial Panel. Names and email addresses are given below

Dr Atilio J. Alvarez	infanciayjuventud@yahoo.com.ar
Judge Oscar d'Amours	odamours@sympatico.ca
Cynthia Floud	cynthia.floud@btinternet.com
Prof. Jean Trépanier	jean.trepanier.2@umontreal.ce
Mónica Vazquez Larsson	Monimar50@yahoo.com
Dra Gabriela Ureta	gureta@vtr.net

THE VEILLARD-CYBULSKI AWARD 2010

The Veillard-Cybulski Fund Association aims to reward deserving works, particularly those which make a new contribution towards perfecting methods of treatment for children and adolescents in difficulties and their families.

To achieve this objective the Association has established a Veillard-Cybulski Award.

Rules (summary)

- The award is made every four years, on the occasion of the quadrennial Congress of the International Association of Youth and Family Judges and Magistrates (IAYFJM).
- Candidates must submit four copies of their work in English, French or Spanish, together with a summary of not more than ten pages, to the address of the Association. Papers will not be returned.
- The next award will be made in 2010. The deadline for submission of works will be 30 June 2010.
- The prize winner receives an award of 10,000 (ten thousand) Swiss Francs. The amount of the second prize, where appropriate, will be decided by the VCFA Committee. Where two winners are classed ex aequo, they share the award. There will be no addition to the total amount of the prize.

Applications must reach the Veillard-Cybulski Fund Association

at the address below no later than

30 JUNE 2010

Enquiries should be directed to the following address

Association Fonds Veillard-Cybulski
c/o Institut International des Droits de 1'Enfant (IDE)
Case postale 4176, CH-1950 Sion 4 - Switzerland.
Tel: +41-27-205.73.00; Fax: +41-27-205.73.02 Email: ide@childsrights.org