INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES

CHRONICLE CHRONIQUE CRÓNICA

Contents

		Page
Letter from the President	Justice Renate Winter	3
Restorative Juvenile Justice—		
International view on Restorative Juvenile Justice	Dra. Veronica Polverini	5
Restorative Juvenile Justice—the way forward	Justice Renate Winter	7
Lima Declaration on Restorative Juvenile Justice		12
Support from the CRC—an example from Samoa	Justice Clarence Nelson	16
Rights of the Young—Justice for the next generation	Justice M Imman Ali	20
A global response to child protection	Maurine Lewin	24
Training judges in Kabul	Judge Sonja de Pauw Gerlings-Dohrn	28
A day in the life of a Family Judge	Judge Sophie Ballestrem	30
The Belgian Juvenile Justice System	Eef Goedseels	32
Juvenile Justice in the United States	Judge Leonard Edwards	37
Protectionist justice in Chile	Judge Gabriela Ureta Roiron	41
Juvenile and Child Justice in Quebec	The Honourable Lucie Rondeau	46
Very young offenders in New Zealand	Linda McIver	48
Evaluation of the Swiss and South African Juvenile Justice Systems	Ursina Weidkuhn	50
Law for non-resident Indian families–a dilemma	Anil Malhotra*	55
Treasurer	Avril Calder	57
Executive and Council & Chronicle		59

Editorial — Avril Calder

Restorative Justice

The world's first Juvenile Restorative Justice Congress took place in November 2009 in Lima, Peru, an important Congress in which our Association was much involved—including Jean Schmitz, a member of terre des Hommes and a principal organiser of the Congress and our President who gave a key-note speech. Dra Veronica Pulverini has kindly provided an overview of the event. I am also pleased to bring you an edited form of our President's speech, which does much to clarify the meaning and import of restorative justice for juveniles, and the full text of the Lima Declaration.

Convention on the Rights of the Child

Following the twentieth birthday of the CRC in November 2009, I am pleased to publish a judgement by Justice Clarence Nelson of **Samoa**, South Pacific. Even though the CRC has not been incorporated into domestic legislation in Samoa, his judgement relied on infringement of articles 37 and 40 of the CRC when deciding on the admissibility of evidence in a murder case involving a 16 year old.

Similarly, Mr Justice Imman Ali, **Bangladesh**, argues forcefully for children to be the beneficiaries of international conventions, particularly the CRC and hopes that amendments to the Children Act 1974 and a Children's Code will be adopted in his country to ensure the incorporation of the CRC into domestic legislation in Bangladesh.

Child Protection

Maurine Lewin, a Barrister and Head of the Legal Department at the Child Exploitation and Online Protection (CEOP) Centre in London, **England** clearly and informatively sets out the stark realities of the work carried out by CEOP in protecting children from sexual exploitation both in the UK and internationally. It is a vivid account and reminds us that the work of such a Centre is crucial for children and never stops.

Two **vignettes** follow. The first by Judge Sonja de Pauw Gerlings-Dohrn of the Netherlands who describes a recent training visit she paid to Kabul, **Afghanistan**, where the judges were mainly unaware of the CRC; the second from Judge Sophie Ballestrem of **Germany** relates a day in her life as a family court judge which I am sure will strike a chord with you.

Youth Justice Systems

In each Chronicle I have published at least one article about the system of youth justice in the author's country. In this edition I am very proud to publish no fewer than seven:

- from **Belgium**, by Eef Goedseels a researcher at the Department of Criminology in the Belgian National Institute of Forensic Science and Criminology (NICC);
- from the **USA** by Judge Len Edwards who succinctly sets out the principles applying in the 50 states;
- from **Chile** by Judge Gabriela Ureta Roiron whose article draws on the presentation she made at the recent Congress in Mendoza, Argentina—see the President's article on page 4;
- from **Quebec**, Canada by the Honourable Lucie Rondeau, showing the interaction between federal and provincial laws;
- from **New Zealand**, an updating article from Linda McIver, Research Counsel to the Principal Youth Court Judge, explaining that there is a move to treat the most serious offences by 12- and 13 year-olds in the Youth Court instead of the Family Court; and
- from **Switzerland** by Judge Ursina Weidkuhn, who asks whether international law can serve as a new model for juvenile justice and provide States with useful guidance and how far Swiss and South African justice systems comply with international law.

This 'collection' confirms me in the view that the Chronicle should try, at least to some extent, to theme each edition. Perhaps, for example, more judgements such as that of Justice Nelson would be a good basis on which to build a Chronicle.

The final article, like Judge Weidkuhn's, is also based on a book and is by Anil Malhotra, a barrister in **India** who, you will remember, is much involved in the issue of non-resident Indians who go to law to solve family matters.

The **Council and General Assembly** will take place in Tunis at our next **World Congress** in April. The Congress website www.aimjf-tunis2010.org.tn is now accepting Congress registration and hotel bookings for what will be an exciting and informative series of presentations and discussions on the different approaches to the problems of young people and families under civil law, common law and the Sharia.

This is the last edition of the Chronicle before our Tunis Congress. When I edited my first edition, three years ago, I knew few of you. Today I am in e-mail contact with a host of you. This I love and I should like to say a sincere thank you for making my task enjoyable and showing the range of expertise of our members, thus making the Chronicle the **'Voice of the Association'**. Please forgive me for naming names, but our President has been a constant source of support and Judges Gabriela Ureta Roiron of Chile and Ginette Durand Brault of Quebec have proofread hundreds of thousands of words in Spanish and French respectively—a task quite beyond me, a monoglot English woman.

I look forward to seeing a great many of you in April in Tunis.

Avril acchronicleiayfjm@btinternet.com

Letter from the President — Renate Winter

Dear Friends and Colleagues,

First and foremost: HAPPY 2010! I hope that for all of us and for the IAYFJM this year will be a most successful one!

Since the last Chronicle a few very interesting and rather important events have taken place about which I would like to inform you.

The first one was the highly successful first international congress on restorative juvenile justice in Lima, Peru. You will find more details about it in this issue of the Chronicle, so I will refrain from describing it as well, but I would really like to stress, how important this congress was. When you discuss juvenile restorative justice with experts, practitioners and academics, as I have to do quite often in a lot of countries, almost everyone is enthusiastic.

When you look a bit closer, as the scientific committee had to do to decide whom to choose to speak about relevant experiences, good or bad, you will rather quickly find out that there is a lot of confusion about the subject. Some people think that restorative justice means programmes to prevent delinquency, others think that it means never punishing offenders, again others are of the view that social services could do the job of juvenile justice instead of the judiciary completely on their own. Getting the definitions right and to knowing exactly what restorative justice means was one of the big achievements of this congress.

But there was another one: Quite a lot of experts know a lot about restorative justice. But not very many of them have thought about JUVENILE restorative justice. Many experts know a lot about juvenile justice but not many of them have thought about RESTORATIVE juvenile justice. You see what I mean! The aim of this congress was to find out what would be needed for juvenile justice to have the tools to develop tailor-made restorative programmes for young people below the age of 18. That was the big issue and I think the congress made a lot of progress in this regard. It will be for the next congress—most probably in another Latin American country—to continue working on these lines to see how the tools work and how to make them better or to create new ones, if needed.

The second congress, this time in Mendoza, Argentina, was important as well. It was the first Latin American congress on juvenile justice and it brought representatives of a lot of Latin American and South American countries together.

This time the important issue was to identify the common problems in the field of juvenile justice and to find common solutions, especially concerning inter-country problems. As in many LA countries the juvenile judge is also in one way or another the family judge and has to deal with the protection of children, it was very promising to see how representatives from different jurisdictions tried to find ways of linking together efficiently to solve urgent problems and to circumvent unnecessary administrative hurdles. This very successful congress ended with the foundation of the International Association of Latin American Juvenile Judges and Related Personnel which wishes to become a member of the IAYFJM. The Executive will check the Statutes and submit the request to the General Assembly in Tunis.

By the way: The congress of Brescia in Italy in November 2008 has borne fruit as well. The European branch of the IAYFJM is being created, the Statutes have been submitted and I am very much looking forward to being able to present them to the General Assembly.

The third important event took place in Stockholm, Sweden—a congress under Sweden's EU presidency, which dealt with child victims and witnesses before, during and after a court procedure. You will certainly remember that the IAYFJM took part in the drafting of the UN model law and its commentary. Quite a lot of colleagues from different European countries were present to discuss the impact of police or court procedures on children and how to prevent their negative effects. I am very happy to see that this long neglected group of vulnerable children is now really being taken into consideration and I just hope that other continents will take over the progress made. I am also sure that our members will assist as much as they can when asked to inform their governments about the protection these kids need.

Finally I can report that our partners from Tunisia, ATUDE, invited the Executive to visit Tunis in November, first for a congress on juvenile justice

sponsored by the Tunisian Government and the International Francophone Organisation in order to explore good practices in the field of child protection in all French speaking countries and, second, for final discussions about the programme and venue of our own forthcoming congress. The discussions were very fruitful (albeit long and intensive) and you can find the outcome of them on the congress web, www.aimjf-tunis2010.org.tn.

The programme, the speakers (as far as they have been confirmed), the venue with different hotels, a package covering registration, transport and special events— everything can be found there. Please have a look, register quickly and tell us at the same time which workshops you would like to participate in (first and second choice), so that we can better organize the multitude of workshops, round tables and discussion rounds.

I am very much looking forward to seeing you there and I have a special request, which is just an idea of mine, not discussed with anyone else. I would find it a great idea, if everyone attending were to bring some small item, typical for his/her country to the organizers. We could then have a real oriental bazaar and hold an auction in honour of the now 80 year old lady, our IAYFJM! Please indicate if you find it a good idea and if you would like to participate!

Dear friends and colleagues—this idea will be the last one I shall bother you with, as this will be the last time I address you in the Chronicle as the President of our Association. The Executive will do its best to present all of you at least one month before the congress with all the material we have to consider during the General Assembly—the above mentioned requests for joining, a very important draft of a new code of ethics for juvenile judges, a candidates list for the Executive for 2010-2014 and the programme for the General Assembly. If you would like to include a subject in the programme, please don't forget to send it in in time as it has to be made known to all members. I hope I have not omitted any other important information, but if so, I am sure our Editor-in-Chief, Magistrate Avril Calder, will remind you (and me!)

So, now, coming to the end, I just hope you liked the Chronicle and the way it has been done over these four years and I am left with thanking all of you who helped make it a reality—the writers of the articles, the proof-readers, the translators, the Editor-in-Chief (with a special thank you) and those of you who were kind enough to tell us that you liked our Chronicle!

Again a successful and happy 2010!

See you all in Tunis!

Renate

International view on Restorative Juvenile Justice

Dra. Veronica Polverini

The First World Congress on Restorative Juvenile Justice took place in Lima Peru from November, 4th to 7th, 2009, attracting more than 1000 participants from 63 countries and five continents. The final document drawn up by the Congress, the Declaration of Lima, not only represents an important technical instrument with solid recommendations to States and International Organisations, but demonstrates an international consensus by specialists regarding the treatment that adolescents in conflict with the law should receive.

Distinguished professionals, academics and people who work daily with children (from the Judiciary, the Public Ministry, members of non-governmental organizations and international child protection agencies), agreed that Restorative Juvenile Justice, which respects the rights of the young offender and those of the victim, appropriately meets the needs of society and takes into account the best interests of the child.

The real challenge now is to put into practice this international specialists' agreement through concrete measures in the fields of legislation, justice and public policies. After the evident failure of earlier models, it is necessary for societies and States to move forward towards new ones, without harsh penal repression which keeps the young involved in crime (under new forms of retribution) or unfair arbitrariness (under cover of the tutelary idea or rehabilitation).

We will focus on the analysis of certain Restorative Juvenile Justice aspects tackled during the seven main sessions that were held during the Congress. The core concepts analyzed by the speakers represent intensive work carried out in 21 workshops and more than 20 specialized sessions as well as 60 international speeches split into 9 commissions that were translated in the four official languages of the conference.

The first session was held by **Renate Winter**, currently President of the International Association of Youth and Family Judges and Magistrates, who referred to the historic evolution of the penal process into the creation of specialised juvenile justice systems. In this respect, she underlined the necessity of going beyond retributive and welfare models and not falling into neo-retributive tendencies, for it would mean taking a step backward for young people as well as for society.

Speaking of the fundamental structures of the Juvenile Justice system, she said that restoration should be imposed as a goal. This means the judicial process would not aim at identifying a culprit to be punished but at having the adolescent accepting his/her responsibility to repair the damage caused (to the victim and to the offender) and to re-establish the community bond. The capacities and needs of the young person would thus come first with social expectations being considered.

Jean Zermatten, Vice-president of the United Nations Committee on the Rights of the Child, made an exhaustive analysis of the international normative framework as regards juvenile justice. He put a special emphasis on the General Observation N° 10 of the 2007 Committee concerning the concept of restoration. His analysis clearly showed that even when the Convention on the Rights of the Child and other international norms do not expressly refer to Restorative Juvenile Justice, the latter fits the established standards and requirements.

Technical instruments such as diversion, probation and mediation enable juvenile justice systems to prevent the systematic deprivation of young people's liberty, without the need to set public security against the best interests of the child as defenders of the early criminalization of adolescents wrongly hold.

The third main session highlighted the error made by the Juvenile Justice system in focusing on the idea of pure rehabilitation or pure punishment. **Lode Walgrave**, Emeritus Professor of Criminology at the Catholic University of Leuven, held that in this framework, Restorative Justice appears as "an option to dispense justice after an offence, mainly orientated to the reparation of the individual, relational and social damage caused by the offender".

Strong social pressure on systems in which rehabilitation is the sole aim of the process and yet prevents the victim from speaking, is unfortunately leading us to a return to repressive

systems favouring punishment as a form of vengeance, which does not satisfying the victim either.

Michael Corriero, Magistrate of the City of New York, based his speech on his vast experience as a juvenile judge. Through his analysis of cases, he demonstrated the need to prevent adolescents receiving the same judicial treatment as adults, since it is not a guarantee for well being of the child or society.

"Judging children as children" is the title of his book, which wonderfully summarizes the author's point of view, since this very idea represents the belief we should have in young people's liberty.

To give a second chance to a young offender is to give one to society as well. The adolescent's participation in alternative programmes opens (maybe) new horizons for his future, whereas imprisonment keeps him—for certain—in crime.

This last topic was also tackled by **Willie Mc Carney**, a Magistrate with more than 30 years of experience in Northern Ireland and former President of the International Association of Youth and Family Judges and Magistrates. His analysis was based on the reality of children living in homes or shelters, whose situation and opportunities are greatly inferior to those who live in functional families.

Usually, any offence, even minor, committed by an adolescent living in one of these centres is immediately reported to the police authority, starting a cycle that ends with the intervention of youth courts and the eventual deprivation of the young offender's liberty. This does not happen in favourable family circles where the adolescent's negative behaviour is handled by his/her parents or tutors, without any police intervention or penitentiary treatment being necessary.

In this regard, the principle of Restorative Justice tends to unify the response of society to young people, whether they live in a stable family or not. Facilitating an agreement between a young offender, especially one who is at high risk, and the victim, using specialist staff, prevents the automatic criminalisation of adolescents.

In this context, education appears as a fundamental element of crime prevention but also as a way to cope with it. Alejandro Cussianovich, lecturer, Honorary Doctor of the Federico Villareal National University and a catholic priest, has pondered the role of education. Educational models which penalize and stigmatize strengthen the social gap. Restorative Justice, however, aims at repairing the bond between the adolescent and the community.

From the moment he takes on the position of an adult who accompanies and guides the young person, an educator is not and cannot stay neutral. His role is to defend and protect the rights of the adolescent who, when committing an offence, also harms himself. Educating children to be responsible instead of punishing them is a way to generate resilience instead of resentment.

Finally, **Atilio Álvarez**, a Public defender of minors from the Republic of Argentina and President of the Scientific Committee of the Congress, gave the last session. He underlined the necessity of going beyond the prevailing model that, in Latin America, leads to the prosecution of a growing number of increasingly younger children, and of launching a change of attitude and giving up the blind trust we have in the penal process to achieve social peace.

He added that Restorative Juvenile Justice is the only way to real peace since, instead of punishing, it aims at repairing the damage undergone by the victim and his/her family and social circle through the positive behaviour of the offender and his/her own group.

Compared to the tutelary and neo-retributive models that only consider the victim to be a witness of the act, Restorative Juvenile Justice gives more value to the victim. When his/her participation is secured and strengthened, society will be ready to trust its judicial administration.

On this aspect Restorative Juvenile Justice is the only truly social justice, because it puts strong trust in liberty, calls for personal responsibility more than penal incrimination and embodies the commitment of the whole society to its youngest members.

The sessions synthesized the thoughts of experts of recognized academic achievements whose actions have also shown a true commitment to young people.

Young people were present and participated in the 21 workshops. They also gave the participants beautiful moments of artistic expression and showed amazing abilities in various activities according to their age.

All was complementary and harmonious. There were music, dancing and painting activities, theatre and acrobatics at all times, which made this high-quality scientific event very enjoyable for all.

Dra. Veronica Polverini is a lawyer and ad hoc Juvenile Public Defender, Federal Capital, Argentina

Restorative juvenile justice—the way forward

Justice Renate Winter

Bringing a child into contact with the criminal justice system is an extremely difficult issue. In my opinion it is necessary to look first at ways to prevent children coming before a justice system before thinking about solutions to dealing with them once they are already involved in it.

In most countries around the world, juvenile prisons, detention centres, closed institutions—whatever they are called—are overcrowded. Children who should not have been detained in the first place, as their crimes are petty in nature, are kept far too long in such places. The fact that so many of them are detained is an obstacle to the provision of sensitive and efficient assistance in terms of education, health care and vocational training, although, according to the terms of the law, the children are being detained in order to receive such assistance.

Clearly, there has to be an immediate reaction to inappropriate, deviant, offending behaviour, and if possible at the point when such behaviour is first observed so as to prevent the perpetuation of unsocial behaviour in the offending child. So even when the offences are minor in nature, a quick reaction is needed to prevent the commission of more serious offences.

A group of 15 year old boys have vandalized benches in a public place. If made to repair those benches, would they not quickly learn to understand how much work goes into making them and their value? Would that not be more effective than awarding formal punishment, thus stigmatising and labelling them as good for nothing criminals? (Not to mention the fact that the child could learn carpentry!)

Changing attitudes

I recall a time when children from my part of the world had no status whatsoever. They were not to be reckoned with; they were tools used by adults for income support, and old age insurance. Their births were not planned and they were not cherished family members, but extra mouths to feed and extra pairs of hands to be put to work. Their plans and dreams for their own future were not discussed with adults. When children were caught engaging in criminality, they were suddenly considered to be "mini adults" and they would be punished as adults even for minor deviancies. Sadly, there are still many such children treated in this way in today's world.

I remember reading the story of a 10 year old boy who lived in Europe in the middle ages. The boy had fought in a war, which was already horrific from my point of view, but it got worse. He was demilitarised without any assistance, and due to hunger he stole some bread. His punishment, at the age of 10, was to be hanged. Just as adults were hanged for minor crimes, so was this little boy.

Only at the beginning of the last century, when huge leaps forward in science and education were made, did it became clear that children were very different from adults. Governments started to see the value of mandatory basic education. Teachers were among the first to recognize the different stages in a child's intellectual development, and as a consequence, the different stages of a child's ability to be held responsible for his or her acts.. The issue of children's responsibility for crime came under scrutiny and it became clear that a child who had committed a crime should be examined using different standards from those used for examining adult offenders. The idea of different systems of juvenile justice was born.

Welfare model

One concept was the so-called "welfare" model. Under this model the explanation for offending was that society was at fault, that a child was influenced by negative factors resulting from a dysfunctional system, and that the child was not yet a fully developed human being, could not understand his or her crime, and therefore could not be held responsible for any wrongdoing.

Solutions arrived at under this system often involved the use of institutions where wayward children could be provided with care and education, which was obviously lacking in their home environment, because why else had they offended? The threat of being sent to such an institution, especially a closed one, for "as long as it takes" to re-educate the offending child, was very real. The State, as the guardian of children, or its representative, the judge, decided what course of action to take, albeit in the best interest of the child in question as understood. As children were not considered to be fully developed human beings, their views were not sought (and were in fact, completely ignored). The views of victims were also ignored. Responsibility remained with society that had produced the environment in which offences had occurred. The child was not given the opportunity of repairing the damage he/she had caused as he/she bore no guilt for that wrongdoing. This system continues today in tutelary systems in some Latin America countries.

Retributive model

A completely different system, and one that could be described as being almost opposite to the welfare system, was established in most European and common law countries as the

"retributive model". This model does not speak about the break down of society, but about the break down in respect for and observance of rules. This system uses punishment as a means of teaching that rule breaking is wrong. The offender's punishment should be commensurate with the suffering caused to the victim. In the not too distant past, this principle was known as "an eye for an eye" but has thankfully evolved, in most parts of the world, to a more humane attitude, as offenders are no longer necessarily meted out punishment that is as great as that which the victim had endured. Today, international law at least prohibits the use of the death penalty for crimes committed by people younger than 18. The execution of child offenders still however continues in a few countries. International law also prohibits corporal punishment, and that is also a law that is not respected in many parts of the world.

Under the retributive model victims also have no voice and are of no interest other than to measure the degree of punishment for the offender. Their role in penal procedures is solely that of a witness. The State, and its representative the Judge, decide on a course of action without engaging in discussions with either the victim or the offender as to their needs. Under this system the child is again regarded as a "mini adult", is labelled an offender and in certain cases is even dealt with under criminal systems designed for adults. However, responsibility may be less than full adult responsibility. This may result in "mitigating circumstances" for the offence but does not result in resolution of the child's problems. The consequence of this attitude is the stigmatisation of child offenders, which is certainly not helpful for their future development. Furthermore, victims are often subjected to reliving trauma through long and cumbersome judicial procedures, and receive no recompense for their suffering.

Neither the welfare nor the retributive system still exists in their pure forms in contemporary justice systems but elements of both are mixed in various degrees. Further, it has now been proved that overburdening a child with responsibility and commensurate punishment has long lasting negative impacts on the child's development.

No matter what type of justice system is in place, the impact of culture, tradition and religion, particularly on juvenile justice systems, is not negligible. In those societies where religion dictates that there must be repentance and punishment for wrongdoing, alternative measures not involving punishment have little chance of being used, to the detriment of both victims and offenders.

Restorative justice

An older system of justice reappeared at the end of the last century. The system was in use when legal bodies as we know them today did not exist, and people came together under the leadership of a chief, elder or wise man to discern solutions to daily problems. A child that had done wrong would be brought by the parents to the victim of the offence and apologies would be made and restoration achieved. This very old cultural technique was the basis of research undertaken by eminent jurists, such as Zehr and Braithwaite, and evolved into the model of "restorative justice". The restorative model gives equal consideration to the victim and the offender. Restorative justice neither speaks about a break down in society, nor about broken rules. It speaks about broken relationships and injured people. Under this system, a child is included in a procedure designed to heal and restore and the threat of punishment is largely removed. It is neither the State nor the judge that decides what measures should be put in place for the victim or the offender, but, through a participatory process, the child offender will be encouraged to take responsibility for what he or she has done and to participate fully in the process of redemption and amendment.

This approach takes into account the needs of all those affected by the wrong doing and is oriented towards restoring peace between victim and offender, and offender and society, where, after all, both must live.

It is not easy to describe restorative justice clearly. Perhaps stating what restorative justice is **not** will help.

- Peter has stolen a mobile phone from his neighbour and has been caught with the stolen property. He may be told to return the property and to offer an apology to the neighbour. Peter thinks he got away with his wrongdoing without too much hassle. While this procedure may be in the interest of the offender, and the victim has his stolen property restored and receives an apology, Peter has not understood his misdemeanour and will most likely offend again. This is not restorative justice.
- In a brawl Alex broke his class mate's nose and the police are called in by the school director. The director believes that the children's behaviour is typical for their age and simply wants a police presence as a threat. Therefore no police action is taken. Such an approach is neither in the interest of the victim nor of the offender. The victim is not compensated and the offender is not shown the error of his ways. This is not restorative justice.

- A judge suggests a family conference but the victim does not want to participate. The facilitator, in attempting to execute the order of the judge, implies that without the victim's participation, no protection or compensation will be made in the victim's interest. Whatever the outcome, it is not restorative, as the victim's participation is forced.
- Both the offender and a victim are in the courtroom where the judge has decided on the measures to be taken in the best interests of both, and the judge issues an order accordingly. The victim and the offender have to accept the order. Again, this action may be in the interest of the judge who thereby avoids having to sit through a long procedure or writing judgements. It might even be in the interest of the parties, but it certainly has nothing to do with restorative justice, as neither party has had a chance to contribute to the outcome or have their real needs addressed.
- Furthermore, in none of these cases is the relation of the offender or the victim to their community/environment addressed.

So what is restorative justice?

There are several definitions and none of them completely covers what it is all about, but it might be helpful to cite two:

- *Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.*[1].
- *Viewed through a restorative justice lens, "crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender and the community in a search for solutions which promote repair, reconciliation, and reassurance."*[2]

The primary consideration is that victims, offenders and communities and the relationships between them all have to be addressed. Let's look first at offenders.

Do offenders see justice in a welfare, tutelary or retributive justice system? The only guaranteed way to prevent re-offending – an issue of great importance in all systems – is to first ensure that the offender understands why his actions were wrong and, second, to ensure, as far as possible, that the offender is capable of taking responsibility for those actions. Only the restorative justice system will permit this to happen. Under which system do offenders have the opportunity to make reparation for damages caused? Which system will encourage them to change their behaviour in their own interest? Which system gives them the opportunity to participate in the justice process and to contribute to seeking the right solution? Which system enables them to address their own needs? Finally, which system tries to help their families by providing support and assistance? You will come to the conclusion quite quickly that restorative justice systems answer all of the above requirements and thus assist the offender.

What about the victim? Take the example, for instance, of a young offender who forcefully robs an old lady of her handbag. The handbag contained the keys to her house, a set of false teeth, her identification papers, and some money. The robber was only interested in the money and threw away the other items. Under which system can the victim explain that her biggest loss was that of her false teeth, without which she was unable to eat; that the loss of the keys for her house caused her great stress as she could not enter her own home until new keys were organized; and finally, that the loss of her identification papers and the process of obtaining new ones caused her a lot of bureaucratic difficulties? The loss of the money was not a big issue. It was however of great concern to her to be able to ask the offender why he picked her as a victim, and how she could prevent herself from becoming a victim again.

None of these issues is taken into consideration in a retributive system where a victim is treated only as a witness or in a welfare system where the victim has no part in the procedure. The restorative approach will first of all give victims a voice, so that they may articulate what kind of compensation or restitution they feel they need, what kind of injustice they have felt done to their person, what kind of protection they seek against further violations, what kind of information they want about the offence, the offender, and the judicial process. Finally, the restorative approach will address any other needs material, psychological or spiritual that the victim might have.

In order to provide the offender with the opportunity of atonement, offender and victim should meet. Would a direct confrontation be appropriate or would it be a re-victimization for the victim to confront the offender, particularly if the crime was brutal? Would it merely provide an opportunity for the victim to shame the offender if the offender is of a lower social status than the victim? A neutral third person should be present to facilitate any meeting between victim and offender (and their families if they consent).

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[1] UN working Party on Restorative Justice, derived from Tony Marshall

[2] Zehr, Howard

What about community concerns? Should the outcome of the restorative justice procedure be public in order to assist the community or has the outcome to be weighed against the needs of the victim and the offender? Is the protection of the community as such to be addressed, a consideration that is important for example when the case involves an extremely violent offender? Is there need for restitution to the community if it has been violated by the action of the offender? Is any symbolic action needed? Should the community be represented in some way?

Let me tell you the story of a child soldier whose evidence was brought before the Special Court for Sierra Leone. When this boy was 12 years old he was captured by one of the warlords during the 11 year civil war in Sierra Leone. In order to make it impossible for him ever to flee the rebel group, he was forced at gunpoint to hack off both hands of a neighbour's 12 year old daughter.

After the war, the girl's father brought her to the Special Court to give evidence and said that she was no longer worthy of being fed as she would not fetch a bride price. Without hands, she would be unable to work for a husband. Social workers tried to find a solution that would satisfy the culture of the village where the boy and girl came from. Both the family of the boy, and the villagers rejected his reintegration. Village elders believed that if the boy was allowed to remain in the village, he would continue his criminal ways and bring members of criminal gangs into the village to commit theft. A further solution they considered was killing the boy, but they did not want to commit murder.

Finally, the boy volunteered to marry the handless girl and the village and the two families consented. I was horrified as, even though it seemed that all concerns had been met, the poor victim was going to be forced to live for the rest of her life with the person who had hacked off her hands. I was therefore astonished to hear the girl say that it did not matter to her who mistreated her —her father or her husband! I was also extremely relieved when the boy said that, having been a child soldier, he knew now what cruelty really meant and that he would not beat his wife.

In this very sad case, justice was finally done in a restorative way. The needs of the victim and the offender had been addressed, the community accepted them back and a healing procedure could take place.

Future development

You might ask what sorts of cases are suitable for restorative justice and, in particular, **juvenile** restorative justice? In answer, I would maintain that it is not the types of cases that are important, but the type of people involved.

To say that restorative justice is a cost-saving enterprise, particularly in the "developed" world is incorrect. The methodology and network needed for restorative justice procedures have to be established and that is not cost neutral. For example, a paid mediator and two rooms are needed, as well as an established network of assistance providers However, restorative justice can lead to longer-term savings in costs because no stigma will be attached to the offender and therefore he or she will have the opportunity to become a law abiding citizen who is able to contribute to the well-being of his community. Fortunately, communities are generally willing to accept the reparative efforts of a child.

As the restorative justice process needs resources, I would argue that it is not appropriate for cases of petty crime. There are many less cost-intensive and non-punitive alternative measures available.

If the victim does not wish to participate in the process (which is his or her right and has to be respected) a restorative justice approach would be impossible. Such an approach may not be advisable when the possibility arises of the victim being re-traumatized, such as in a rape case. Also a restorative justice process may not be possible where one of the parties has considerably more power than the other, because such an imbalance might render agreement impossible.

It is the nature of the offender that matters most in deciding whether to use a restorative approach. The offender has to accept wholehearted responsibility for the offence. If the offender claims innocence, a trial must take place and the presumption of innocence must be respected. Furthermore, if is established that a child has committed an offence against another person but is not ready to admit having done wrong, or if a child is not capable of taking responsibility for the offence, a restorative justice procedure cannot take place.

Thus, the practical questions are the following:

Is the offender ready to apologise and right the wrong? Is the victim ready to accept an apology and the efforts of the offender to repair damage caused? Is the community ready to accept and rehabilitate the offender? Is the community ready to accept the reintegration of the victim? I say this because, in many cultures, victims, for example victims of rape, are also considered guilty and are stigmatised. If the criteria are met, then one can start the restorative justice procedures, while taking into consideration the possibilities, mental capacities, spiritual development and needs of the offender and the victim alike.

The necessary collaboration of social workers, psychologists, mediators, public administration, specialised prosecutors and juvenile judges allows rapid and flexible reactions to offences—of utmost importance in dealing with children. If after having committed an offence, a child is arrested, held in custody for some time, with the trial taking place months after the offence was committed, the child will have grown and changed in character (for better or worse); will most likely be unable to recall the event correctly, and will not understand the import of punishment after such a long passage of time. If on the other hand the reaction comes immediately and proportionately, understanding and acceptance will prevent recidivism.

No two children are the same, and no two children's problems are the same. Not every situation can be regulated by law. A widespread range of responses must be available to cope with the differing problems of offending children.

Even if a case involving a juvenile does go to court, a judge has (or should have) the power to opt for a restorative approach if conditions are met. A judge would then stop the proceedings and refer the case to the appropriate institutions or people (social workers, mediators, facilitators etc) to initiate restorative justice procedures.

Maria is one of many children who have repeatedly stolen sweets from a shop. After an evaluation of the case by a social worker which was requested by the judge, Maria makes a commitment to attend a session run by a policeman and a woman with children who works in a supermarket, at which the consequences of shoplifting are discussed with a group of children. Maria then promises to assist in cleaning the shop on four consecutive weekends. The shopkeeper agrees to this, as does the judge. Maria keeps her promise. The social worker, who stays in contact with Maria and her family as well as with the shopkeeper, submits a report to the judge which is signed by the social worker, as well as by Maria and the shopkeeper.

The judge gives Maria a warning and the case is closed. Maria has learned the lesson and will not re-offend.

Would Maria have learned this lesson better in a court trial or while in detention? Would Maria have found it easier to accept and understand why she was being punished, and be convinced that she should not re-offend when she found it difficult to face classmates at school or to find future employment as she was stigmatised as a juvenile offender? Would Maria's classmates have been happier to see her return from court or prison?

Given all the restorative tools available to the justice system, very few child offenders should have to face sentences involving deprivation of liberty.

Much progress has already been made by modern juvenile justice systems, but much remains to be done. Juvenile justice has always been at the forefront of developing humane ways of delivering justice. I am sure that the acceptance of a sound restorative justice system for children worldwide will be another "first" that juvenile justice systems will be proud to achieve.

This article is an abridged version of a speech given by our President at the First World Congress of Restorative Juvenile Justice, held at the Pontificia Universidad Catolica del Peru, Lima in November 2009. The text of the complete speech is available (in English only) from the Editor-in-Chief.

Lima Declaration on Restorative Juvenile Justice

Introduction

The First World Congress on Restorative Juvenile Justice was organised by the Foundation Terre des hommes (Lausanne), in cooperation with the Public Prosecutor of Peru, *the Pontificia Universidad Católica of Perú* and the Association *Encuentros-Casa de la Juventud* and was held in Lima from 04 to 07 of November 2009. About 1.000 participants from 63 countries on five different continents representing governments, the judiciary, civil society, in particular NGO's, and organisations of professionals working with or for children, the media, the academic world and UN agencies attended the Congress to discuss different aspects of restorative juvenile justice guided by the objectives of the Congress:

- to reflect upon the concept of Restorative Juvenile Justice and to undertake a critical viability analysis;
- to examine the methodology and instruments of Restorative Juvenile Justice;
- to evaluate the situation of the victim in Restorative Juvenile Justice and the need for her/his protection and reparation of damages;
- to exchange experiences and lessons learned and good practices of Restorative Juvenile Justice worldwide;
- to elaborate and present some recommendations for the development and implementation of Restorative Juvenile Justice.

In the discussions in panel sessions, specialised conferences and workshops the participants were guided and inspired by, amongst others, the UN Convention on the Rights of the Child (CRC) and General Comment N° 10 of the CRC Committee on "The rights of the child in juvenile justice", the African Charter on the Rights and Welfare of the Child, the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), Resolution 2002/12 of the UN Economic and Social Council (ECOSOC) on Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes (ECOSOC Resolution 2005/20), the Handbook on Restorative Justice Programmes of the UN Office against Drugs and Crimes (UNODC) and relevant regional human rights instruments.

This Declaration reflects the deliberations during the Congress and contains a set of Recommendations for further actions to promote, develop and implement the restorative approach as an integral part of Juvenile Justice.

Basic Rights of the Child and the Principles of Juvenile Justice

The participants to the Congress want to underline that (the practice of) Restorative Juvenile Justice (RJJ) has to respect the fundamental rights of children as enshrined in the CRC, more specifically elaborated for Juvenile Justice in General Comment No 10 of the CRC Committee, and has to be in full compliance with the relevant international standards such as the UN Minimum Standards on the Administration of Juvenile Justice (Beijing Rules) and the recommendations and guidelines mentioned above .

The participants in the Congress recall in particular the aims of Juvenile Justice as set out in Art. 40 (1) of the CRC:

- to treat children in conflict with the law in a manner consistent with the promotion of the child's sense of dignity and worth;
- to reinforce the child's respect for the human rights and fundamental freedoms of others;
- to promote the child's reintegration and the child's assuming a constructive role in society.

In their efforts to achieve these goals States shall take into account the relevant provisions of international instruments, such as the rule that retro-active justice is prohibited, and shall in particular ensure the implementation of the following rights of the child:

- the right to be presumed innocent until proven guilty according to the law;
- the right to be promptly informed about the charges against her or him;
- the right to legal or other appropriate assistance;
- the right to have the matter determined without delay by a competent, independent and impartial authority or legal body;
- the right not to be compelled to give testimony or to confess guilt;
- the right to examine or have examined adverse witnesses;
- the right to have the decision that the child has committed the alleged offence and the measures imposed reviewed by a higher authority or legal body;
- the right to have free assistance of an interpreter;
- the right to full respect of her or his privacy at all stages of the proceedings.

Furthermore the CRC requires States to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the law, the establishment of a minimum age of criminal responsibility and to take measures (when appropriate and desirable) for dealing with these children without resorting to judicial proceedings while ensuring that human rights and legal safeguards are fully respected. In order to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence the States shall make available a comprehensive set of measures such as supervision, counselling, probation, educational and vocational training programmes and other alternatives to institutional care. This is in line with the rule in Art.37 (b) of the CRC that deprivation of liberty shall be used only as a measure of last resort and for the shortest appropriate period of time. This article contains further specific rules for the use of this measure of last resort.

Major Concerns

During the Congress, and with references to the rights and principles mentioned earlier, participants expressed their serious concerns at the status and the quality of the rules and practices in Juvenile Justice. Many children in conflict with the law do not receive justice in accordance with the provisions of the CRC and other relevant international standards. They are (too) often deprived of their liberty either in the context of pre-trial detention (often without any information about the charges against them) or in the context of the execution of a sentence. Furthermore concerns were expressed, based on research, regarding the limited or even negative contributions of the classical sanctions, in particular of the deprivation of liberty, to achieving the aims of juvenile justice as set out in Art. 40 (1) of the CRC. Efforts to deal with children in conflict with the law without resorting to judicial proceedings, as clearly recommended in the CRC, are in many countries either very limited or even non-existent. However, available information shows that alternative measures, including restorative justice programmes, do contribute to the child's reintegration and the child's assuming a constructive role in society.

Restorative Juvenile Justice

a. The concept of Restorative Justice

Restorative juvenile justice is a way of treating children in conflict with the law with the aim of repairing the individual, relational and social harm caused by the committed offence. This aim requires a process in which the child offender, the victim and, where appropriate other individuals and members of the community participate actively together in the resolution of matters arising from the offence. There is not one single model for practicing this restorative justice approach.

Experience in different countries shows that restorative juvenile justice is practised via mediation, family group conferencing, sentencing circles and other cultural specific approaches.

Where possible policies to introduce restorative juvenile justice should build on and benefit from already existing traditional and non-harmful practices of treating children in conflict with the law.

The outcome of this process includes responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

Restorative juvenile justice should not be limited to minor offences or first offenders only. Experience shows that restorative juvenile justice can also play an important role in addressing serious crimes. For example, in many armed conflicts children are used as child soldiers and forced to commit unspeakable crimes targeting especially their own family members, their neighbours and their community. Restorative justice is very often the only way of bringing reconciliation to victims and offenders alike in a war-torn society where victims of offences suffer as do child offenders, having been forced to commit offences. Without such reconciliation the reintegration of child soldiers in their communities is not possible, much to the detriment of the then ostracised child as well as the community bereft of workforce and under threat of criminal behaviour of the excluded child.

Furthermore it is important not to limit the restorative practice to isolated cases in juvenile justice but to also develop and implement a policy of pro-active restorative practices e.g. in schools.

b. The role of the restorative approach in juvenile justice

Restorative justice is a way of treating children in conflict with the law which contributes to the child's reintegration into society and supports the child in assuming a constructive role in society. It takes the child's responsibility seriously and by doing so it can strengthen the child's respect for and understanding of the human rights and fundamental freedoms of others, in particular of the victim and other affected members of the community. Restorative justice is an approach that promotes the child's sense of dignity and worth.

Restorative justice should be applicable in all stages of the juvenile justice process, either as an alternative measure or in addition to other measures. At the police level one of the options should be a referral of the child to a process of restorative justice. Police officers should be well trained and instructed regarding the use of this option and where appropriate special attention must be given to possible abuse of this and other forms of diversion. If the case has to be reported to the prosecutor he/she should consider, before any other

action the possibility of a restorative justice process as a way to deal with the case without resorting to judicial proceedings. Before using police custody or pre-trial detention alternative measures, including the use of restorative justice, should be used to avoid this deprivation of liberty.

When the case has been brought before the court the juvenile judge should, to the maximum extent possible, explore and initiate a process of restorative justice as an alternative to other possible sanctions or measures. Finally and based on experiences in some countries: restorative justice can and should be used, when possible, as part of the treatment of children placed in juvenile justice institutions. In other words: restorative justice should be an integral part of the juvenile justice system that is in full compliance with the provisions of the CRC and related international standards; restorative justice should be offered as an option to all persons affected by the crime, including direct victims/their families and the offenders/their families. In that regard it is important to include effective prevention programmes, with special attention and support for the role of parents and the communities, in the national juvenile justice policy. States should consider establishing a national body with the mandate to coordinate and supervise the implementation of juvenile justice, including restorative justice programmes.

As part of the introduction of restorative juvenile justice programmes it is very important that the public at large, professionals working with or for children in conflict with the law and politicians receive information via awareness raising campaigns organised by the State, with the support of NGO's where appropriate, not as a one time event but should be repeated with a regular interval. This informative advocacy should, amongst others aspects, present the benefits of restorative justice as a "victim-centred" approach. The media should be involved in these campaigns with attention not only for the important role of local radio but also for the growing importance of new communication tools such as internet and mobile phones.

c. The rules for the use of restorative justice

The use of restorative justice should be governed by the basic principles on the use of restorative justice programmes in criminal matters as set out in ECOSOC Resolution 2002/12 such as:

Restorative juvenile justice should only be used when there is sufficient evidence to charge the child offender and with the free and voluntary consent of the victim and the offender. The offender and the victim should be allowed to withdraw such consent at any time during the process of restorative justice. Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations. Neither the victim nor the child offender should be coerced or induced by unfair means to participate in the restorative process or to accept the restorative outcomes.

Disparities leading to power imbalances, as well as cultural differences among the parties should be taken into consideration.

The victim and the child offender should, subject to national law, have the right to legal counselling and the child offender and the child victim should have the right to the assistance of a parent or guardian.

The victim and the child offender should be fully informed of their rights, the nature of the restorative process and the possible consequences of their decision.

The outcome of the process should have the same status as any other judicial decision or judgement and should preclude prosecution in respect to the same facts.

d. Recommendations for actions

1. We call on the UN Committee on the Rights of the Child to systematically recommend the States Parties to the CRC to undertake the necessary measures for the integration of restorative processes as a possibility for dealing with children in conflict with the law at all stages of the administration of juvenile justice.
2. We recommend the Interagency Panel on Juvenile Justice to further strengthen its technical assistance for the support of governments in their efforts to develop and implement the restorative juvenile justice approach, while referring to Resolution 2009/26 of the ECOSOC encouraging UN Member States to provide this Interagency Panel with the necessary resources and to fully cooperate with the Panel.
3. We recommend the UN Office against Drugs and Crime to increase, as a follow-up to its Handbook on Restorative Justice Programmes, its efforts to promote the use of restorative justice approaches in dealing with offences committed by children and to assist Sates in their efforts in this regard where appropriate.
4. We recommend UNICEF to continue and increase its efforts to support and provide technical assistance to States in the development and implementation of restorative juvenile justice programmes, in particular by providing training to all actors in the field of juvenile justice.
5. We recommend States parties to the CRC and States that signed the CRC to undertake, as part of their comprehensive national policy on juvenile justice, the necessary measures to include restorative justice programmes as an integral part of the administration of juvenile justice while taking into account the observations, suggestions and rules above under a – c, and to call on the Interagency Panel on

Juvenile Justice, UNICEF and UNODC for technical assistance in that regard. These measures should include awareness raising campaigns, with the involvement of national and local media, informing the public about the nature and the benefits for the victim, the offender and the society of a restorative juvenile justice policy and the promotion of the involvement of parents and the community.

6. We recommend States engaging in a process of introducing restorative juvenile justice to undertake pilot projects together with a thorough evaluation and to decide on the basis of the outcome of these projects on the country wide introduction of restorative juvenile justice and on the legislative measures to provide a solid basis for a sustainable practice of restorative juvenile justice as the main characteristic of its juvenile justice system, while ensuring that human rights and legal safeguards are fully respected in line with the basic principles adopted by ECOSOC.

7. We recommend States when developing and implementing restorative juvenile justice to pay special attention to vulnerable children such as children in street situation, taking into account their specific daily reality, their problems and needs and children and adolescents involved in gangs, armed groups and paramilitary groups.

8. We recommend States to develop and implement adequate and ongoing training for all the key actors in the administration of juvenile justice, with special attention for changing the conventional legal approach and to establish and/or support the services necessary for implementing restorative juvenile justice programmes while using existing networks as much as possible. These services should practice an interdisciplinary approach, for instance by establishing multidisciplinary teams, in conducting restorative juvenile justice among others with the view to address also the emotional needs of both the victim and the juvenile offenders.

9. We recommend States to establish or strengthen the systematic collection of data on the nature of and the responses to juvenile delinquency in order to inform its policies in that regard with a view to adjusting them as necessary and to conducting or supporting research on the nature and the impact of the various responses to juvenile delinquency.

10. We recommend States and the relevant UN agencies to initiate and/or support the development and implementation of regional projects of restorative juvenile justice in different parts of the world.

Lima, November 7, 2009

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Support from the CRC—an example from Samoa

Justice Clarence Nelson

This article—based on a recent ruling in the Supreme Court of Samoa by IAYFJM member Justice Clarence Nelson, citing a wide range of judicial authorities in the South Pacific—shows the relevance of the UN Convention on the Rights of the Child even where, although the State is a signatory to the Convention, the relevant provisions have not yet been imported into domestic law.

The facts of the case

A fatal incident occurred at the Fugalei Market bus stop on 13 September 2008. The accused, arrested in the swamp area behind Sogi village, told the police that the culprits were a boy named Oloa and others. An eye witness said that it was the accused who assaulted the deceased and he was re-interviewed, this time at police request in the presence of his mother. After being advised of his rights, he refused to make a statement. The interview [in a 3-page document] lasted 40 minutes. The accused was charged with murder and remanded in custody at Tafaigata Prison overnight.

The following day he was brought to the Apia Police Station to meet his mother and be remanded. Constable Roache, said the mother had come to "asi" or check upon her son. He was surprised when the accused, on being brought into the office, said he wanted to admit it was he not Oloa who assaulted the deceased. The constable immediately cautioned and, interviewed him and obtained the signed statement dated 30 September 2008 which the prosecution seeks to tender into evidence. In it the accused admits the fatal assault.

The statement was taken in the absence of the mother, despite the Constable's evidence that she was present at the police station. The interview is recorded at 2 hours and 22 minutes, but is of 3-pages, like the one taken the previous day which only took 40 minutes. The statement is not signed by the officer recording it, Corporal Malama Fauoo. Roache denied pressuring the accused to make the second statement or in any way forcing him to confess. He denied that Oloa was at the police station when the accused arrived.

The second prosecution witness, Detective Sergeant Ituau Ale, witnessed the 30 September 2008 interview. He said the accused was present when he arrived at the office with a witness, and on seeing the witness, the accused called out to the investigating officer that he wanted to change his statement and admit to assaulting the deceased. The accused was accordingly cautioned, interviewed and the statement obtained. But it did not take more than two hours, rather less than one hour. He cannot explain why Corporal Malama, who was not called to give evidence, did not sign that statement.

After the interview he went with the accused outside the police building to smoke a cigarette. The accused there admitted to hitting the deceased. This was an unprompted voluntary admission. This witness also denied any threatening or improper behaviour occurred towards the accused and said that if any such thing had occurred he would have stopped it.

The accused said he was brought to the police station on 30 September 2008 when Oloa was there. He was taken to the cells and assaulted by Constable Roache and Corporal Malama, who kicked him and pressed down on his restrained wrists causing injuries and bruising to his hands. He was afraid and in pain. There were other police officers present but no one stopped the assault. He denies the whole statement except that the deceased was dropped headfirst on the concrete by one of his mates. He signed both his police statements unread, as he cannot read, to obey the police officers. He knew why he was being interviewed by the police and agreed it was a serious matter involving the loss of a life.

The judgement

The accused did not impress me as truthful. I do not accept that someone who can clearly write his name is unable to read. I reject his evidence entirely. The challenge on the ground of voluntariness therefore fails, there being no evidence that the police acted improperly or beat or otherwise coerced the accused into making his 30 September 2008 statement.

The real question is whether the statement should be admitted in evidence, as it was obtained from a 16 year old accused in the absence of his parents, guardian or caregiver even though the mother was then present in the police station.. The investigating officer opted to take the statement although he acknowledged that it was important that a parent or guardian be present. He followed that procedure the day before and I cannot

understand why, after the accused's initial voluntary and spontaneous admission, the investigating officer did not summon the mother and in her presence caution and interview the accused. This is particularly important when an under-aged accused has already been charged with a serious crime, such as murder, and has been held in police custody overnight. If the cautioned statement is ruled inadmissible, should the initial admission made spontaneously by the accused on his arrival at the Apia Police Station be admissable as well as the verbal admission made to during the post statement smoking session?

At common law a voluntary statement can be excluded, if it was unfairly obtained or "obtained by improper or unfair methods" ***R v Ali*** [1]. The principles of this were recently reviewed in ***Police v Masame*** [2] and have been widely applied.[3]. The relevant issue was stated by the New Zealand Court of Appeal in ***R v Convery*** [4]

> "Whether the course of the inquiry, as proved in evidence, makes it unjust that the statement should be received. In answering this inquiry the Court may consider not only the case immediately before it, but also the necessity of maintaining effective control over police procedure and the generality of cases."

The court in ***Ali*** cited this passage and then concluded at paragraph 51:

> "It is then a matter of looking at the totality of the police conduct. What is important is the overall question of the fairness of the police methods and the issue of fairness is determined by the judge as a matter of judgement rather than by reference to the onus of proof."

The confession obtained in the absence of the mother should be rejected. The investigating officer accepted that statements from under-aged offenders should be taken only in the presence of a parent or guardian and for him to press on and break his own rule of practice renders the cautioned statement of 30 September 2008 inadmissible as being unfairly obtained. It would be dangerous for the court to sanction such conduct. Young offenders should be interviewed only in the presence of a parent, guardian, senior family member, caregiver or lawyer If such a person is not available, the interview should be postponed to give reasonable opportunity for them to attend.

The prosecution has urged that the court apply a likelihood of truth test (section 18 of the Evidence Ordinance 1961) respecting an involuntarily obtained confession. There is no evidence of involuntariness in this case, but it should also apply to cautioned statements obtained unfairly or improperly. They cited ***Police v Masame*** in support and say a balancing act was conducted as in ***R v Shaheed*** [5]

Shaheed was discussed in ***Masame*** about a breach of the New Zealand Bill of Rights Act which contains fundamental rights similar to those found in Part II of the Samoan Constitution. At issue in that case was the search and seizure right under section 21. There is no suggestion in our case that any fundamental right of the accused has been breached. The ***Shaheed*** balancing approach related to an alleged breach of a Bill of Rights provision, not to a confession possibly obtained unfairly or improperly. As the Chief Justice said in ***Masame,*** the ***Shaheed*** balancing test is in conflict with the approach adopted by our Court of Appeal in ***AG v Ueti***.[6] One cannot apply a likelihood of truth test to a confession or admission improperly or unfairly obtained as the method of it obtaining renders its truth or otherwise irrelevant. This was best expressed by Lord Hailsham in ***Wong Kamming v R*** [7]in a passage cited in ***Ali***:

> "Any civilized system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilized society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions."

UN Convention on the Rights of the Child

Counsel for the accused also argued the non-presence of a parent meant the cautioned statement infringed the Young Offenders Act 2007 but section 9 of the Act is not relevant here. However infringement of articles 37 and 40 of the United Nations Convention on the Rights of the Child ("CRC"), to which Samoa is a party, is an argument with far more merit. The prosecution say the CRC does not guarantee a right for parents to be present at a police interview and that being a signatory to the Convention does not make it part of the domestic laws of this country until Parliament legislates on the matter, as it did with the Young Offenders Act. There is accordingly no such obligation on the police.

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[1] [1999] NZCA 292

[2] [2007] WSSC 66

[3] e.g. ***Police v Taito*** (unreported) 15 December 2008

[4] [1968] NZLR 426, 438:

[5] [2002] NZLR 377 a decision of the New Zealand Court of Appeal

[6] (1994) CA 24/93, 5 May 1994

[7] [1980] AC 247, 261

Although the CRC provides good practice for the police to follow, statements obtained in the absence of a parent or equivalent should not automatically be excluded.

Young offenders and children generally require special treatment. The CRC states: *"the child by reason of his physical and mental immaturity needs special safeguards and care including appropriate legal protection before as well as after birth."* The CRC, unanimously adopted by the United Nations General Assembly on 20 November 1989, remains the most ratified international human rights convention. Samoa has been party it since 29 November 1994 but, as with most Pacific states, has not yet given full effect to our obligations that States *"shall undertake appropriate legislative administrative and other measures for the implementation of the rights recognized in the present Convention"*[8]. I emphasise the words *"other measures"*.

The relevant articles are 37(b), (c) and (d): (d) relevantly provides:

> "Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance."

Article 40 (2) (b)(ii) reads:

> "Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
>
> (ii) to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence."

CRC in South Pacific judgements

These provisions do not explicitly require a parent or similar to be present at a Police interview but at least one Pacific court has construed 40(2)(b)(ii) that way. The High Court of Tuvalu in ***Simona v The Crown*** [9]found that "any child in the custody of the police [has] the right to have a parent or guardian present unless that is impractical". Chief Justice Ward said:

"The perception that a child needs special protection arises from the immaturity and vulnerability of children. That is the foundation upon which the Convention was constructed. In the hostile and stressful situation of an accusation of a criminal offence, it is accepted a child needs the mature guidance and reassurance of someone who clearly has its interests at heart. To suggest that it should know that it has such a right and would have the courage or maturity to demand it runs counter to the fundamental philosophy of the Convention. I consider it a logical and proper conclusion that the police are obliged to advise any child of the right to have a parent, guardian or legal adviser present and to take any reasonable steps to secure such attendance before taking any step that could result in the child making a statement against its interests."

There is high authority that the courts of this country must follow the Convention. As noted in ***Police v Faiga***[10]:

"The Court of Appeal ,,, decreed in ***Attorney General v Maumasi*** [11] that all Samoan Courts should have regard to the articles of the Convention on the Rights of the Child in cases within its scope i.e. in relevant cases. No less a person than Lord Cooke of Thorndon who was for many years the president of the Samoa Court of Appeal has stated that the following of the principles of the CRC should not be mere window dressing. See further the observations of the Court of Appeal in ***Police v Kum***[12].

This is a clear mandate to the courts of this country to have regard to the provisions of the Convention in appropriate cases. More than lip service must be paid to the provisions of the Convention."

The Samoan courts have not been slow to respond. See ***Leituala v Mauga*** [13]where article 16 of the Convention (no arbitrary or unlawful interference with a child's privacy, family, home, honour and reputation) was relied on to uphold a substantial award of damages against a Village Council which banished the plaintiff and his family without due cause.

There is also ***Attorney General v Maumasi*** itself, a case of manslaughter described by Court of Appeal as "a terrible crime by any standards", where the court increased the sentence from 3½ to 5 years imprisonment with the rider that "If any truly comparable case arises in future an even longer sentence is likely to be justified."

This was reinforced by ***Police v Kum*** [op. cit.] where the Court increased the sentence from 9 months to 3 years. In ***Wagner v Radke*** [14] it even applied the policy and principles of the Hague Convention on International Child Abduction 1980 to which Samoa was not even a party

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8 Artide 4.

9 [2002] TVHC 1

10 [2008] WSSC 1996

11 [1999] WSCA

12 [2000] WSCA 6

13 [2004] WSSC 9

14 [1997] WSSC 6

These decisions show the application of the Convention's provisions and principles broadly and widely. Other jurisdictions throughout the Pacific have applied the Convention and its philosophies: ***Kosrae v Ned*** [15]applied it to community service: ***State v Noimbik*** [16] in Papua New Guinea; ***Ali v State*** [17] to corporal punishment in schools in Fiji; in ***Re Lorna Gleeson*** [18]where the Chief Justice of Nauru said: "Nauru is a signatory to the CRC. Whether it is or is not part of our domestic law, I feel able to take the Convention into account in considering the cases stated"; ***Regina v Setaga*** [19]where Chief Justice Ward said: "The CRC was ratified by Tuvalu in 1995 and whilst it is clear that Tuvalu has not yet taken the legislative steps required by article 4 to implement the rights recognized by the Convention, the terms of article 40 must be considered to give some guidance of the way the rights of a child are considered by the courts here." and ***Faaoso v Paongo*** [20] There are also the many decisions of the European Courts of Human Rights interpreting and applying the CRC

Finding

This overwhelming abundance of international authority shows how parties to the CRC, notwithstanding the lack of specific domestic legislation, have imported its underlying principles and philosophies into domestic law. They have breathed life into the CRC—quite rightly in a modern world, where children continue to be exploited in the areas of armed conflict, child pornography, child prostitution and such-like. Samoa should not be hesitant to take its place amongst the nations of the world active in this struggle.

Article 37(d) requires that a youth in custody has the right to receive promptly "access to legal and *other appropriate assistance*." In this case assistance could have come from his mother or from a lawyer. I agree with Chief Justice Ward in ***Simona*** that the words and/or the underlying philosophy of article 40(2)(b)(ii) means that a parent, guardian or equivalent must be present before a youth can be interviewed by the police in respect of potential criminal misconduct. As this was not done here, the cautioned statement of 30 September 2008 should be excluded,. if not specifically on that basis, then on the ground that a breach of the spirit and philosophy of articles 37(d) and 40(2)(b)(ii) is tantamount to obtaining a confession by the use of improper and unfair methods.

Another basis for exclusion is the unsatisfactory nature of the police evidence. The investigating officer denied Oloa's presence and said that the accused voluntarily decided on arrival to change his story, whereas the Detective Sergeant said Oloa's presence caused the accused's change of story. This is not a minor difference. Secondly there is a conflict over how long the statement took, 2 hour 22 minutes or less than 1 hour. The cautioned statement taken the day before of similar length took 40 minutes. This casts doubt on the reliability of the 30 September 2008 cautioned statement, especially as Corporal Malama, who took it, never signed it and was not called. The two police witnesses conflict, as only the Detective Sergeant referred to the post-statement going outside the police station to smoke. These inconsistencies lead me to exclude it on that basis as well.

This then leaves the so-called spontaneous admission of the accused upon first arrival at the Police Station and the admission made to the Detective Sergeant when they were smoking. If I accept the investigating officer's evidence as to the spontaneous nature of the admission, it would be admissible as it was given without prompting and before the appropriate cautions and warnings could be delivered by the Police officer. But his evidence conflicts with that of the Detective Sergeant. I am not satisfied that the prosecution has established beyond reasonable doubt that the admission was voluntary and should be accepted into evidence. These admissions should be ruled out.

Even if both admissions satisfied the applicable common law tests, they should still be excluded, as made in the absence of the accused's parent or equivalent contrary to the accused's rights under the United Nations Convention on the Rights of the Child. Therefore the cautioned statement of 30 September 2008 and admissions made by the accused that day to the police are inadmissible.

Justice Clarence Nelson is a Supreme Court Judge in Samoa, South Pacific.

[15] [2005] FM KSC 11
[16] [2007] PGDC 63
[17] [2001] FJHC 169
[18] [2006] NRSC 8
[19] [2008] TVHC 3
[20] [2006] TOSC 37

The Rights of the Young— justice for the next generation	Justice M Imman Ali Bangladesh

This is an edited version of a speech given by the author at the 15th Triennial Conference of the Commonwealth Magistrates' and Judges' Association in the Turks and Caicos Islands

The relationship between the child and the law has been recognized only relatively recently. It was not until the end of 19th century that the child was recognized as a legal entity in itself. Three generations of child rights have followed since then with the most important international instrument, the Convention on the Rights of the Child, being adopted in 1989. Having started with almost no rights, children now have one of the strongest legal positions internationally compared to other rights holders with a Convention which is the most ratified international instrument in the world with 193 State Parties.[1]

Here, I would like to focus on one specific group of children and their relationship with the law, notably children in conflict with the law. These children have a dual relationship with the law. They are alleged to have done something against the penal law in their country, while at the same time international and in most cases national law is there to provide them with rights to protect them. The CRC in articles 37 and 40 explicitly recognizes that these children require special protection and need to be treated in a manner which is consistent with the child's age and with the promotion of the child's sense of dignity and worth to reinforce the child's respect for the human rights and fundamental freedom of others. The articles also note the desirability of promoting the child's reintegration in society and the child's assuming a constructive role. In addition, other international instruments[2] provide for more specific rights for children who come into conflict with the law. However, for children across the world to be able to benefit from these provisions, it is crucial that they are incorporated into national law.

Situation in Bangladesh

Bangladesh was among the first countries to ratify the CRC in 1990 and as such to recognize the relationship between a child and the law. Nevertheless, despite being a country where almost 50% of the population comprises children, this relationship remains a precarious one in practice. Bangladesh is a common law country with a pluralist legal system comprised of statutory law, case law and religious laws applied in the area of family law. As a dualist country, the provisions of the CRC are not directly enforceable in Bangladesh and need to be incorporated into national legislation. In addition, in case of conflict, the Constitution and other national legislation takes precedence over the Convention. Unfortunately, there is no single legislation in Bangladesh that fully incorporates the CRC into national legislation. However, in a recent decision[3] of the High Court Division of the Supreme Court of Bangladesh, the applicability of international instruments was considered. Relying upon an earlier decision of the Appellate Division[4] and also taking support from a decision of the Indian Supreme Court[5], which in turn referred to an Australian decision[6], it was held that as signatories to the UNCRC, Bangladesh was under an obligation to take steps for implementing the provisions thereof.

[1] Somalia and the United States of America are the only two countries that have not ratified the Convention.

[2] Such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) of 1985, the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) of 1990, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) of 1990

[3] State vs Metropolitan Police Commissioner 60 DLR 660

[4] Hussain Muhammad Ershad Vs Bangladesh and others, 21 BLD (AD) 69, *per Bimalendu Bikash Roy Choudhury, J.*

[5] People's Union for Civil Liberties vs Union of India, 1997 SCC (Cri) 434

[6] Immigration and Ethnic Affairs vs Teoh (1995) 69 LJ 423

In addition, in the absence of the beneficial provisions in our national law, it was also held that Bangladesh should implement the aims and goals of the CRC.

The Bangladesh Constitution of 1972 provides in article 28(4), *"Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens."* Thus the legislature is empowered to engage in positive discrimination in favour of the child. The main law in Bangladesh relating to children, namely the Children Act, was enacted in 1974 and stems from the Bengal Children Act of 1922. At the time of post-independence in Bangladesh, this law was perceived as being in favour of the child and progressive for its time. However, many of the principles of the CRC are not reflected in the Act.

Although the Act deals with children in general, most of its provisions actually deal with children in conflict with the law, making it primarily a piece of 'juvenile justice' legislation. Section 2(f) of the Act defines a child as a person below the age of 16 years. Other laws when referring to children provide different definitions. This definition of a child is very much grounded in societal perception where the belief is that children in Bangladesh reach adulthood more quickly than in other parts of the world. Hence, the word "shishu" which denotes a child in Bangladesh is used only in relation to children below six years of age. This perception is also very much applied to children who come into conflict with the law. This is evident from the minimum age of criminal responsibility provided for in section 82 of the Penal Code, 1860 which until 2004 was seven years and was raised to nine years by way of amendment of the Penal Code. A child is also exempt from criminal liability under section 83 of the said Code if the child, being above nine years of age and under twelve, has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct at the time of commission of the offence. But this is open to the subjective assessment and vagaries of the trial Judge. (This is similar to doli incapax which was abolished in England and Wales some years ago- regrettably Editor)

Despite the fact that the Children Act contains specific provisions affording the child special treatment different from adults—such as informal trial conditions, separate scheme of punitive sanctions by way of detention and no joint trial, in practice, by and large, the treatment they receive is the same as adults. This results from a general tendency to view deviant child behaviour in the same light as adult criminal activities. In some instances children are dealt with showing more vengeance with a view to deter others. Thus, until recently it was not uncommon to find children in jail together with adults and in certain cases joint trials still do occur, especially where proper steps are not taken to ascertain the age of the youthful offender at the initial stage of the trial. Undoubtedly, one of the main challenges in Bangladesh is to determine who is a child. In a country where the birth registration of the population still is less than 50% and other evidence of age are not readily accessible, the age of the child is not easily verifiable. As a first point of contact, the police are the first to determine the age of a child. In Bangladesh, often the police deliberately overstate the age of the child on the charge sheet in order to avoid extra formalities required in investigating an offence committed by a child offender. As a safeguard, the Children Act provides in section 66 that it is the duty of the Court to make an inquiry as to the age of the child and shall take such evidence as may be forthcoming at the hearing of the case and shall record a finding thereon. Nevertheless, often the lower courts do not make an inquiry of their own. Assessment is made on the basis of physical appearance and often overestimated, thus avoiding the complications of a juvenile trial. As a result children are tried as adults, thus denying their rights enshrined in the Children Act and the Constitution.

As juvenile justice legislation, the emphasis of the Children Act is on institutionalization of children. Modern concepts such as diversion and alternative measures are not reflected in the Act. Nevertheless, in section 53 the Act does allow the courts to release a child on probation of good conduct and to commit him to the care of his parent or guardian or other adult relative or other fit person. However, due to the numbering of this provision in the Act, courts tend to consider only section 51 which allows imprisonment in exceptional cases and 52 which provides for the committal of a child to detention in a certified institute.

Apart from children in conflict with the law the Act also deals with other children who come into contact with the law such as victims and destitute and neglected children. However, the treatment these children are being provided with under the law is similar to that of children in conflict with the law. Thus, the law provides wide discretionary powers to bring these children before the court and relies heavily on institutionalization. Alternative care and reintegration of children into society are not concepts that can be found in the law.

Impact of the CRC

By ratifying the CRC, Bangladesh obliged itself to implement the rights in the Convention including article 4 which imposes on States the obligation to undertake all appropriate legislative measures for the implementation of the rights in the Convention. The Committee on the Rights of the Child has expressed its concern that the legislation in

Bangladesh is not in conformity with the Convention and has repeatedly recommended Bangladesh to undertake legislative reform. Thus, the Committee held most recently in its Concluding Observations of 12 June 2009[7] that "some aspects of [the] domestic legislation continue to be in conflict with the principles and provisions of the Convention and regrets that there is no comprehensive law to domesticate the Convention" It recommended Bangladesh to " continue to harmonize its legislation with the principles and provisions or the Convention and incorporate the Convention into domestic legislation, ensuring the Convention can be invoked as a legal basis by individuals and judges at all levels of administrative and judicial proceedings."[8] The Committee also recommended that "the Children Act of 1974 be revised to comprehensively cover the rights of the child"[9]

No such legislative reform has yet been undertaken in spite of a recommendation in 2006 by the High Court Division in the case of *The State v. Md. Roushan Mondal also known as Hashem*[10] to enact laws in line with the views expressed in that decision. However, in 2007, the Government established an Inter-Ministerial Committee headed by the Ministry of Social Welfare to review the national legislation in Bangladesh. This Committee instituted a Sub-committee headed by the Joint-Secretary of the Ministry of Social Welfare to review the laws relating to children and prepare draft texts as recommendations. UNICEF together with Save the Children UK is a member of the sub-committee and is providing technical and financial support to the sub-committee. A technical working committee was established to carry out the review and to come up with amendments. The review established that many of the provisions of the Children Act and other legislation relating to children are not in line with the CRC, eg. there are different definitions of a child, discriminatory provisions exist in relation to legal age limits between boys and girls and many of the provisions of the CRC are not present in legislation, i.e. child participation, best interests of the child, the right to health and education etc. For these reasons the review recommended the drafting of new legislation which would focus on justice for children, and the drafting of a comprehensive children's code which would incorporate fully all the articles of the CRC into national legislation and to harmonize all other legislation relating to children conflicting with the CRC.

The sub-committee endorsed the findings of the review but decided eventually to amend the 1974 Children Act instead of drafting a completely new law. However, due to the large number of amendments, the Act in essence has the nature of a new law. The amendment of the Act has been drafted with the technical assistance of UNICEF and very importantly defines a child as a person below 18. The amendment focuses on promoting and implementing justice for children by containing provisions for children in conflict with the law, child victims and children in need of care and protection which promote access to justice through the use of child-friendly procedures. The draft amendment as much as possible tries to promote that children are dealt with outside the formal justice system through the use of diversion and alternative measures but at the same time provides for the establishment of children's courts for those cases that have to be dealt with in a formal manner. The draft amendment is about to be finalised and following translation into Bengali will be shared with all other stakeholders for their input and comments. Consultation with stakeholders is ongoing.

Although the amendment of the Children Act is an important step in ensuring conformity between the CRC and national legislation, the amendment does not fully incorporate the CRC into national legislation. In UNICEF's view inclusion of all articles of the CRC into the Act would conflict with the specialised nature of the Children Act 1974, which is essentially juvenile justice legislation and now with the proposed amendment has become a specialised justice for children legislation. Therefore, UNICEF has recommended that the sub-committee should opt for the drafting of a separate Children's Code which domesticates all provisions of the CRC and will act as framework legislation for the harmonization of other conflicting laws relating to children in Bangladesh with the CRC as well as for the adoption of new laws for children in the future. Hopefully, following adoption of the amended 1974 Act, the adoption of the Children's Code will be the next step in ensuring incorporation of the rights of the Convention into national legislation in Bangladesh.

Thus, it seems that a new chapter may be about to start for the relationship between the child and the law in Bangladesh. One of the main challenges, however, that will remain if the amendment of the 1974 Act gets adopted is ensuring that it does not become a dead letter but is actually implemented in practice.

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[7] Advance Unedited Version, of the Concluding Observations: Bangladesh of the Committee on the Rights of the child, fifty-first session, consideration of reports submitted by State Parties under article 44 of the Convention, CRC/C/BGD/CO/4, 12 June 2009

[8] Paragraph 12 of the Concluding Observations.

[9] Paragraph 13 of the Concluding Observations

[10] 59 DLR 72

One of the main challenges is that the provisions in the law that are in line with the CRC are actually not being implemented due to lack of knowledge or proper appreciation of them by the judges, lawyers, police officers and probation officers and also lack of available human and financial resources. In addition there is a generally hardened mindset of the relevant actors, reflecting what might be termed 'Victorian attitudes', resulting in harsh treatment of children. Unless these issues are addressed the new law will have the same fate. In the absence of professionals with specific knowledge of working with children and laws relating to children, and there being no ombudsman for children in Bangladesh, children have almost no avenue to obtain redress and justice for violations of their rights.

Pilot project on diversion

We need a change of mindset of those working for children which cannot just be achieved by amending the law and will take time to develop. It is for these reasons that UNICEF Bangladesh has initiated a pilot project in the district of Jessore to promote diversion and the use of alternatives to deprivation of liberty for children who are currently residing at the juvenile detention facility in Jessore, known as the youth development centre. Currently, at the first phase of the project, an operational case-management team has been formed consisting of different professionals to review the cases of the children in the detention facility. It is expected that during the second phase of the project, children who come in conflict with the law will be diverted to community alternatives which will be established as part of the project instead of going through the formal justice process. Pending the adoption of the new law which may take time, gradually new concepts such as diversion are being introduced. But before the diversionary measures can be put into effect there is need for infrastructure to be established where there are none existing, e.g. alternative placement facilities. Nevertheless, having appropriate legislation in place for children is crucial as in Bangladesh without any national law the CRC and other international instruments will not be implemented. The various agencies involved, including the Police, Judiciary and other Government officials will be reluctant to implement any provisions of international instruments unless there is clear direction to do so in black and white.

Hence, unless these provisions are translated into national legislation, the legal and cultural tradition in Bangladesh precludes their consideration, and their implementation is a far cry. It is essential, therefore, as the first step, to formulate laws in line with the provisions of the CRC. However, laws can never be sufficient to ensure the protection of children's rights until the mindset is moulded to be more child-friendly, but, in the case of Bangladesh, will be an important first step in ensuring implementation of the Convention on the Rights of the Child.

Mr Justice M. Imman Ali* sits in the High Court Division of the Supreme Court of Bangladesh. He serves on the IAYFJM's Ethics Committee

A global response to child protection—the UK's Child Exploitation and Online Protection Centre

Maurine Lewin

The Child Exploitation and Online Protection (CEOP) Centre, the UK's police agency for tackling the exploitation of children, was hailed as the most significant development in child protection to date when it was established in April 2006. This article gives an overview of the work of the Centre both in its domestic and international capacities.

Since then, the Centre has safeguarded 346 children from sexual abuse, arrested 724 suspected child sex offenders, dismantled and disrupted 166 organised paedophile rings and delivered online safety advice to 4.8 million UK children through its award-winning 'Thinkuknow' education programme.

CEOP is part of UK law enforcement and therefore applies the full range of policing powers to tackling the exploitation of children. Its structure is unique, comprising child protection, education, industry and government specialists working alongside police officers. This diverse range of skills enables the Centre to deliver an holistic approach to child exploitation, incorporating expertise on online grooming, victim identification, behavioural analysis, child trafficking, tracking missing offenders and a number of other areas.

Using intelligence to build understanding

Receiving, analysing and prioritising intelligence is at the core of CEOP's work. Intelligence comes from the public, law enforcement, industry and from non government organisations (NGOs). It is managed by CEOP's Intelligence Faculty which oversees the flow of information across the organisation and to external agencies such as local UK forces or international authorities. Intelligence is researched, developed and translated into assessment reports (in line with the Regulation of Investigatory Powers Act 2000) and disseminated as appropriate.

Between March 2008 and February 2009, almost 5500 reports were received by the Centre of which 2500 came from members of the public using the organisation's unique online 'CEOP Report' button. 1373 of those reports were from children and 89% of those related specifically to instances of grooming. On clicking the button, the user is taken to a 'one stop shop' of online safety, covering a number of threats including cyberbullying, grooming, viruses and hacking. Where relevant, CEOP signposts children to other organisations which provide advice and support, ensuring that instances of potential sexual abuse come straight into the CEOP team for action.

The majority of reports from law enforcement, both in the UK and overseas, relate to suspected offender activity either on or offline, in the UK or abroad. The reports often include communications data about suspected UK offenders either using particular websites, newsgroups or involved in peer-to-peer activity. Reports also include those indicating the first signs of a paedophile network, reports of missing offenders or information about the behaviour of a UK national living, visiting or working abroad.

Reports received from industry are more varied than those from other areas due to the diversity of sectors involved. These range from chat room providers and moderators to the banking industry and communications and internet service providers. They include reports of grooming, illegal content and child abuse images as well as information of behaviour indicative of an active paedophile network.

NGO reports sometimes arise from UK-based counselling and helpline services. This is mainly in cases where support is required from CEOP specialist teams to identify the location of a child who may be at risk of serious harm, so that an emergency response can be coordinated. Additionally, NGOs working in countries around the world submit intelligence on UK nationals who are suspected of committing sexual offences against children overseas.

Recent analysis of reports received by CEOP range from instances where offenders have infiltrated social networking and other online environments to collect pictures of young children to examples of sustained grooming and blackmail, with offenders seeking to meet a child offline for abduction and sexual abuse.

CEOP has also seen a growing trend of offenders using online networks to communicate with each other, show live-time abuse and share images—with the severity of the sexual contact captured, or the 'newness' of the offence committed, gaining the offender extra credibility with like-minded individuals.

Specialist support

Developing intelligence from reports into the Centre, particularly public reports on suspected grooming activity, sometimes requires specialist skills drawn from other CEOP teams. These include covert internet investigations, financial intelligence development, forensic support, behavioural analysis or input from specialists in victim identification.

Covert internet investigations typically involve taking on the identity of a child or an offender and, in some cases, adopting the online identity of a child who was being groomed in order to solicit more information on the suspect. One particular investigation resulted in the identification of a suspect who went on to arrange travel to another part of the UK to meet with the 'child' he had been grooming. On arrival at the pre-booked hotel he was met by local police officers and was subsequently convicted and imprisoned for grooming offences.

CEOP investigators also adopt the online identity of offenders who have already been arrested. In this way, further information about linked suspected offenders using websites may be gathered.

In October this year, Daniel Henry, 34, of Clitheroe, Lancashire appeared before Bradford Crown Court and was sentenced after pleading guilty to showing indecent photos of children, 18 counts of making indecent photos of children, making indecent pseudo photo of a child and two counts of arranging or facilitating commission of a child sex offence.

Henry had been arrested in November 2008 after West Yorkshire Police joined forces with CEOP following intelligence received by officers about activity on the internet. CEOP covert internet investigators were able to identify Henry through his live use of the internet and chat rooms.

On conviction, Detective Inspector Vicky Lawrence of West Yorkshire Police's Child and Public Protection Unit said: "Henry is a very cunning man. He made concerted efforts to hide his true identity online and seemingly left no trace, however thanks to the covert investigator we were able to reveal who he is. Working closely with CEOP we were able to deploy the covert tactics, which was a first in West Yorkshire and emphasises the efforts we will go to in order to identify those involved in child sex offences, bring them to justice and safe guard children."

Victim identification specialists at CEOP undertake painstaking investigations to identify and locate both children and offenders from child abuse images. Unfortunately there is no shortage of these, with more than a million images stored within the Centre. It is harrowing work and psychological counselling for those involved is mandatory; the satisfaction and relief experienced by the team when a child is located and safeguarded is immense.

However the emotional reward which comes with successfully protecting children after months of hard work is sometimes countered by reports of inconsistent sentencing when cases come to court.

In September 2008, a 55 year old man was granted an absolute discharge by Oxford Crown Court despite having downloaded more than 7466 images of child sexual abuse. Phillip Carmichael, a former primary school teacher, blamed his actions on his medication for Parkinson's disease which, he claimed, caused uncontrollable sexual urges.

While CEOP was not involved in the investigation into Carmichael, the outcome was seen as disappointing because it reinforced the perception that looking at images of children being abused is a legitimate outlet for adult sexual frustration. Jim Gamble, Chief Executive of CEOP said:

> "These images do not materialise out of thin air. In order for them to be created, a child has suffered an horrific crime which will stay with them forever. Those who download these images must be held properly accountable for their actions."

Jim Gamble also highlights the frequently inaccurate and misleading use of language in relation to offences of viewing child abuse images. He adds:

> "The term 'child pornography' is simply unacceptable. The material our officers deal with every day at the CEOP Centre bears no link whatsoever to anything remotely sexually evocative for most adults—we're talking about very young children being brutally raped.
>
> "But the word 'pornography' infers that offenders just have a different sexual preference to other adults. This critically confuses the issue for criminal justice professionals, the wider public and—worst of all—for the victims themselves, who are led to believe that they have been complicit. The fact that adults and newspapers label their abuse as 'pornography' just reinforces the grooming process they've often been through and makes them feel responsible."

CEOP investigators were pleased, however, with the sentencing of a 55 year old Staffordshire man. Christopher Stubbings, a paedophile who amassed more than 200,000 images and videos of child sexual abuse and was the self-proclaimed treasurer of a global child abuse network, was jailed indefinitely for public protection at Stafford Crown Court.

Stubbings admitted a string of child abuse charges, including indecent assaults on a child under 16 years of age, commissioning new child abuse videos, and possessing and distributing child abuse images.

The judge ordered that he should serve a minimum of 12-and-a-half years in jail and he will not be released automatically after this time until the parole board is satisfied that the risk of harm he poses to the public is acceptable.

The members of his group used elaborate security mechanisms to vet members in an attempt to prevent detection by law enforcement.

CEOP coordinated the UK investigations and directly rescued eight children from abuse in the UK, some of whose images were shared among this particular paedophile community.

Heath Westerman, Crown Advocate for the Crown Prosecution Service in Staffordshire, said: "The serious nature of the case, combined with the complexity of the worldwide internet usage, led to early consultation with specialist prosecutors from Staffordshire Crown Prosecution Service. They assessed the evidence that had been gathered and decided on the appropriate charges that Stubbings should face. By the time Stubbings was charged, the evidence against him was overwhelming and led to him entering early guilty pleas and therefore avoiding crown court trial."

Beyond the borders: international activity

The work of the CEOP Centre extends well beyond domestic borders and CEOP's Overseas Tracker team investigates UK nationals overseas who are suspected child sex offenders – people who may otherwise fall below the radar. The work undertaken has resulted in numerous disruptions to their activities, including successful prosecutions and children safeguarded.

In addition, this team handles information relating to UK child sex offenders who have been deported or extradited back to the UK following a conviction overseas. The team ensures that intelligence is passed to the force responsible for debriefing and managing that offender in the community. It also ensures that appropriate civil orders are considered for supporting the management process, including Notification Orders, Sexual Offences Prevention Orders, Risk of Sexual Harm Orders and Foreign Travel Orders.

CEOP also supports the Home Office in delivering the UK's strategic response to legislation, conventions and treaties that relate to child protection. This has recently included involvement in the Conference on the Protection of Children in European Justice Systems (Toledo, March 2009) relating to the Council of Europe (CoE) Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and working alongside the Foreign and Commonwealth Office (FCO) to support the development of a bilateral agreement with the French authorities to share information about the movement of child sex offenders.

Engaging regularly with the European Commission (EC) is a mainstay activity across all faculties at the Centre. CEOP continues to play an active role on the G8 Roma-Lyon subgroup on child protection issues and recently developed the G8 training directory. For the first time, this provides access to specialist training services promoting an understanding of child sex abuse to law enforcement agencies from G8 member states.

Delivering training, expertise and consultancy overseas – or 'capacity building' is critical in dealing with those UK nationals who travel overseas to abuse children and/or who seek to avoid the strict sex offender management regime in the UK. For example, CEOP last year delivered a week-long course, commissioned by UNICEF, in Cambodia. Over 100 doctors, police officers, prosecutors and judges participated in the 'Forensic Medical Examination of Children' course, which allowed them to further professionalise evidence-gathering and to better understand child welfare issues and sensitivities during this process.

Training

Training in understanding offences against children is not limited to overseas activity: sharing CEOP's knowledge with UK professionals working to protect children from sexual abuse and hold perpetrators to account remains central to the work of the Centre.

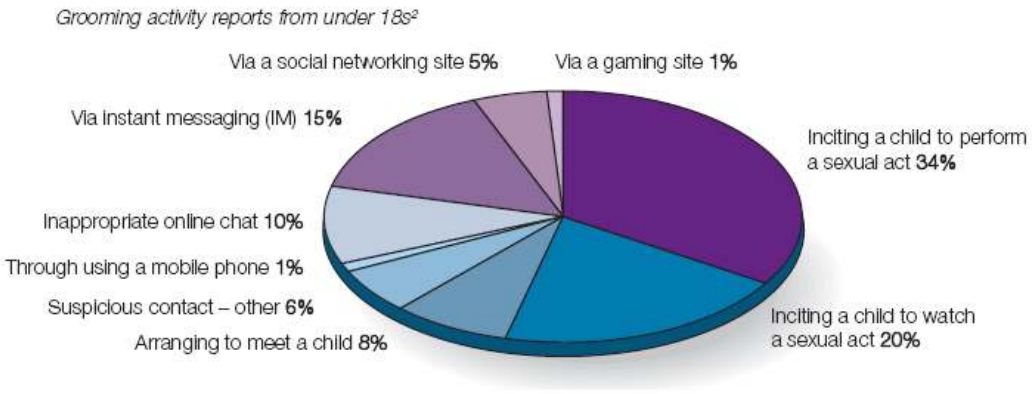
Since CEOP was set up in 2006, almost 8,000 professionals have attended specialist training courses. The majority of these come from a criminal justice or child protection background, including police officers, judges, magistrates, policy makers, social workers, prison officers and health providers. Training events remain CEOP's single most effective method of sharing an understanding of offender behaviour, managing offenders and protecting children from sexual abuse.

The training courses, which include a Foundation Course in Understanding Child Sex Offenders and Interviewing Child Sex Offenders, add value to existing services and provide greater support to professionals working in this area. The courses are regularly updated by intelligence from the analysis of reports into the Centre, academic research and qualitative input from CEOP's Behavioural Analysis Unit, meaning that information is kept current and relevant for delegates. A number of police forces in the UK are already setting CEOP training as a minimum requirement for officers joining specialist child abuse investigation units.

For more information about CEOP training courses or any aspect of CEOP's work, visit www.ceop.police.uk

Maurine Lewin, is a Barrister and Head of Legal Department at the Child Exploitation and Online Protection (CEOP) Centre. She was previously a Deputy Justices' Clerk in the Magistrates' Court Service dealing with a wide range of criminal and civil proceedings. She has always had an interest in child protection law and spent nine years in the specialist Family Proceedings Court at Wells Street London.

Jan 12, 2010—
CEOP's success leads to independent status
Comment: 'Times Online' reports that the British Home Secretary announced that the Child Exploitation and Online Protection Centre would become a non-departmental public body with more powers. It is seen as a direct result of the organisation's effective work in the recent past on pursuing child sex offenders and on educating children and parents about the dangers of online predators.Times Online full text



Training Judges in Kabul — Sonja de Pauw Gerlings-Dohrn

In September 2008 a delegation of the Afghan Women's Network (AWN) came to the Netherlands to a conference on the subject of UN resolution 1325 on Women, Peace and Security[1]. Because one of the members was a juvenile judge they were interested in the Dutch approach to juvenile delinquency. So a meeting was arranged in the Court of Rotterdam where I explained our criminal and civil system of Juvenile Justice.

Afterwards I received an invitation to give a week's training course in Kabul for judges about dealing with juvenile delinquents.

As I had to get leave from my work, it took until August 2009 before I could travel to Afghanistan. It was not easy to get the costs for my flights paid, but eventually enough money was found. Getting a visa was also difficult and because of the Afghan elections in August, I was seriously advised not to go. As it would have been almost impossible to go at any another time, I went in spite of all the warnings.

Flying above the immense country of Afghanistan, it was clear to me that communication between the different parts of the country is very hard—transportation, other than by plane is very difficult too.

After landing, it was not easy to get through the safety areas and find the car with the AWN chauffeur who would take me to the AWN office. I had a phone-number and my GSM worked (!) but this turned out to be the first difficulty caused by the language gap.

Driving from the airport to the office, I was impressed by the safety measures—guards all over the place, many concrete road blocks and kilometres of barbed wire.

The plan was that I would sleep in the home of one of the ladies from the board of the AWN, but as the Embassy considered this not safe enough, it was decided that I would sleep in the AWN office There was a small room with a good bed and in the corridor there was a bathroom as well, very nice except on one day the place was overflowing and another day there was no water at all, except for some cold water saved in a bucket.

Women were not allowed to go outside without a male companion. So I was more or less a prisoner in the office. The building was guarded night and day by one or two men, who also functioned as chauffeurs. Everyone was very kind and it was arranged for me to visit the Dutch Embassy and a House for eight cast off / abandoned women with their children (over 30 of them) where they are doing a really good job in this House. They also took me out for dinner at the house of the sister of the president of AWN and for sightseeing in Kabul.

During the rest of the week (except for Friday, the free day for everyone) I gave the training. There were 34 judges, half male half female, from district courts and high courts in Kabul. Hierarchy seemed to be more important than I was used to and it took me some time and much explanation about my position and authority before everyone was willing to listen to me.

Lunch was between 12.00 and 13.30. For the men there was a beautifully appointed table in the main hall; while the women had a very small table with too few chairs in the library. The food, however, was the same. After lunch the men went out to the mosque to pray and had not returned at 13.30. Nevertheless, I started the afternoon session on time and they entered the room a good ten minutes late. But the next day they were on time!

The participants were interested in the Dutch system but I persuaded them that it was more important for them to hear from me about the European approach in general—and that is what I did. The main subject, however, was the UNCRC. Only one of the judges (the president of the Youth Court in Kabul who was part of the delegation that had visited the Netherlands) had ever heard of the UNCRC. The UN Convention Committee's report on Afghanistan that had been published in August 2008 was completely unknown.

Before I went to Afghanistan I had downloaded this report so I was able to give it to them after having it translated from English to Dari. I had found the full text of the UNCRC in Dari on the

[1] Security Council Resolution 1325, passed unanimously on 31 October 2000, is the first resolution ever passed by the Security Council that specifically addresses the impact of war on women, and women's contributions to conflict resolution and sustainable peace.

UNICEF website so I took copies for the judges to Kabul. Of course, it was necessary to work with a translator. Most days there was a lawyer who knew the jargon well enough but nevertheless it remained difficult to communicate and especially to explain more delicate things.

The cultural gap and the difference between the work in Afghan courts and "Western" courts are tremendous! For example, crimes committed after drinking alcohol or taking drugs are treated very differently, because 'alcohol is forbidden to all' and 'there are no drugs in Afghanistan'. Views of rape are very different and, because divorce does not exist, the need for children to see both their parents is neglected.

The use of psychology is unknown; the judges did not understand what a psychologist's report meant, not to mention the meaning of IQ! The examples I normally use for explanation were meaningless to them.

I was interested to discover as much as I could about the judges' backgrounds and education, but this was not easy. There seemed to be big differences between their backgrounds and 'learning on the job' appeared to be important. I sensed too that there is a big gap between the written law and the law administered in practice—more than once someone referred to the demands of the Sharia.

It seems almost a miracle that in spite of all the misunderstandings there was a growing eagerness to make the training a success.

So, finally, with the help of Dr Zurmati Khalid Batoor Hassan, director LMO, we succeeded in making recommendations—in Dari—to implement the UNCRC on several levels in Afghanistan. Another little success that I think I achieved is stimulating the judges to feel responsible for the results of their personal work, and to take a more active, less passive approach to the tremendous problems that they face.

To have the best chance of influencing the views of Afghani judges, I believe that—in addition to travelling to Kabul to give local training—we need to support and work closely with key people like Dr Zurmati Khalid Batoor Hassan.

Judge Sonja de Pauw Gerlings-Dohrn* sits in the Juvenile Court in Rotterdam. She is a consultant for new legislation and trains Judges and Prosecutors at the Erasmus University of Rotterdam.

A day in the life of a Family Judge — Sophie Ballestrem

0800

The judge arrives at the office. The first thing she does is deal with the files submitted by the administrative office. The service of newly arrived petitions of all kinds is dealt with after checking and with comments/recommendations.

Documents requesting assistance with legal costs are examined and evaluated and if necessary the applicants will be asked to supply further details to substantiate their need for assistance; an appeal against a judgement made a few days ago is reviewed and transcripts of the files made available to the Court of Appeal.

The clerk of the court arrives with an application, which has just arrived, requesting secure accommodation for a 14 year old suicidal girl. Despite the need for urgency dealing with this must be temporarily deferred as court proceedings are now about to start.

0900

The civil partnership of two women is to be annulled. As both are agreed and as there are no further matters to be decided, the judgement can be reached within 15 minutes.

0920

Divorce proceedings which—according to the contents of the file—should be straight-forward are arranged, although it immediately becomes apparent that the parties have not yet settled all the other matters out of court. The division of several items of household equipment has not yet been done and the parties involved would now like a ruling by the court. The attempt at an amicable settlement breaks down with a bitter dispute over some pictures, a tea service, an expensive vacuum cleaner and 20 boxes of floor tiles which were left over when the house was built. What is to happen to the house, which is in joint ownership, remains unclear.

The wife's lawyer now produces a lengthy written claim with which the husband does not want to become involved and which the court can no longer deal with as there is no more time. The hearing is adjourned after 45 minutes.

1005

The litigants and others involved in the case - originally scheduled for 0940 -crowd into the court for the division of the assets. The plaintiff (female) complains about the hold up and says that she has to leave again in an hour, at the latest, to pick up her son from nursery school.

A claim regarding the balance of the increase in value of the property of a married couple of 20,000.00 euros, which has been *sub judice* for a year, is processed. The case files of the proceedings now include 3 volumes of about 600 pages as well as numerous legal documents and many enclosures, together with 2 transcripts of the proceedings and the testimonies of 5 witnesses.

At today's hearing is the expert who drafted a 150 page report on the value of the defendant's dental practice at the time of the break up of the marriage on 6 October 1997.

The defendant does not agree with the findings of the report. His lawyer puts many questions to the expert, whose answers do not always satisfy the plaintiff's lawyer. The plaintiff is a Finn and does not have a sufficient understanding of German, which means that precise explanations have to be translated into Finnish by the interpreter. At 1130 the hearing of the expert finishes, the plaintiff hurriedly leaves the courtroom. The judge discusses the outcome of the hearing with the lawyers and the defendant and makes a proposal for a settlement. The defendant agrees, the plaintiff's representative wants first to consult with his client. The proceedings finish at 1200.

1210

Phone call with H - Klinik about the request for authorisation of secure accommodation. It is arranged that the judge be at the clinic not later than 1700 to speak with the doctor in charge and to hear what the girl has to say.

1340

The administrative office applies for legal protection against violence.

A few days ago a violent husband was told by the police to leave the marital home (by a certain time). His time runs out tomorrow. The application must be scrutinised and a decision reached without delay so that the wife and children can be protected. The wife stands in the corridor awaiting the court's decision.

1415

A 6 year old boy who was taken into protective custody by the youth welfare department arrives accompanied by the person in charge (of his case) and the nurse who was assigned to him by the court. The boy must be heard, as two weeks ago the limited custody which was granted to his parents as a matter of urgency (following a court injunction) is now to be withdrawn. The child is very shy and frightened and it is only after about 15 minutes, with the aid of toy cars, that the judge succeeds in having a 20 minute conversation with him.

The boy has just left the court with the person in charge, when the parents, who were also to be heard, appear with 2 representatives from the youth welfare department. Immediately the parents—who are slightly inebriated—start grumbling that they have not once been allowed to see their son in court, claiming that the judge objected because she was prejudiced. The father's lawyer who is also present asks for a short break and leaves the court room with the parents. The parents start quarrelling loudly in the corridor. Eventually all three of them return and the objection on grounds of prejudice is withdrawn.

The actual conversation with the parents can now begin and they are persuaded that they need counselling regarding their alcohol use. At the same time contact with their son in the company of a third party is arranged.

The court orders that the parents should not be involved with the welfare and guardianship of the child and asks the youth welfare department to submit a report after 8 months with a view to these measures being reversed. The hearing finishes at 1600.

1615

The lawyer of the plaintiff from the property settlement case rings up and says that his client also agrees with the suggested judicial settlement. The judge is really pleased.

1630

The judge sets off to the H - Klinik. In the office the mountain of files is stacking up!!

Judge Sophie Ballestrem* is Head of one of the two Family Divisions of the County Court in Munich

The Belgian Juvenile Justice System	Eef Goedseels

1. Protection, yes but...

Belgium is divided into 27 judicial districts, each with their corresponding 27 youth courts. These courts hear cases of young people who are in problematic situations or have otherwise committed an offence—*acts qualified as offences*. We will focus this contribution on the judicial treatment given to young offenders.

The division of jurisdiction on matters related to juvenile crime is very complex in Belgium. Although the federal lawmakers are the ones who determine which measures the youth court judge can take with young offenders, the concrete enforcement is in the hands of the French, Flemish and German speaking communities.

Until recently, young offenders came under the application of the Youth Protection Act of 8 April 1965. Substantial amendments to this law were introduced by the laws of 15 May and 13 June 2006. It has since been referred to as the law on youth protection, treatment of minors who have committed an act qualifying as an offence, and reparation of the damage caused by such act.

The reform of the law on youth protection immediately became the subject of extensive debate. The 1965 law was based on the idea that young offenders were not responsible for their behaviour. Their criminal behaviour was in fact considered a manifestation of underlying socio-psychological problems.

Therefore, the measures had to be tailored to the characteristics of the minor, rather than being proportional to the act committed. The application of the law raised strong criticism. In addition, gaps were identified in the areas of legal safeguards, the lack of attention given to victims, a lack of clarity for young people, etc.

Although general agreement was reached on the existence of these gaps, there was no unanimous view on the most appropriate manner to reform the law. Some argued for a radical change of course, namely the abandonment of the protectionist model and favoured increasing legal guarantees and moving either towards a punitive (educational/constructive) model or a model centred on reparation. Others were in favour of maintaining the protectionist model.

The reform of the law on youth protection finally took the form of *compromise*. The decision was basically to maintain the *protectionist model,* but in addition to the personality of the minor and his/her environment, from now on the youth court judge should also take into account—pursuant to the law—the seriousness of the acts and/or the effect on public order. The victim's central role has also been recognised, and the law now provides that a *restorative offer* should always be made. The *idea of protection, reflection on the terms of reparation, the criminal components, the legal safeguards and minors' rights,* all these elements are present in the new law on youth protection …

2. Statistics

Until recently, Belgium was desperately short of reliable figures on the number of young people with police and/or judicial records for the commission of offences. However, since 2003, the National Institute of Forensic Science and Criminology (INCC is its acronym in French) has undertaken, at the request of the Minister of Justice, a research project that primarily seeks to arrive at the uniform and reliable registration of judicial data reaching the public prosecution offices and registries of the juvenile system. More specifically, this project is based on a bottom-up approach to improve the registration systems of juvenile public prosecution offices and registries so that the data entered within the framework of the administrative processing of the cases may be used equally for scientific, statistical and/or political purposes—for more information see http://www.incc.fgov.be.

After reviewing the first reliable figures for cases reported to juvenile public prosecution offices in 2005[1], the following may be outlined:

- in 2005, a total of *82,305 cases* were referred to 23 of the 27 public prosecution offices[2]; these cases involved 66,342 minors;
- a little over half of these cases (55.1%) involved an offence. The other cases (44.9%) were about problematic situations;
- considering only *offences,* in 2005 there were 45,722 cases reported;
- a very cautious comparison with the data available for the years 1968, 1975, 1981, and 1987 shows that the reported offences have *not increased,* neither in absolute figures nor in proportion of the total number of reported cases. On the other hand, there has been a rise in the number of problematic situations reported;
- 42.7% of the reported offences involved *crimes against property*, basically robberies (larceny) and extortions;
- besides, some young people are referred to the juvenile public prosecutor for *crimes against persons* (17.8%), basically for assault and battery;
- apart from the crimes against property and crimes against persons, youngsters are also referred to the juvenile public prosecutor for *traffic violations* (14.4%), *crimes in violation of the narcotics legislation* (11.3%), *crimes of public safety* (10.2%), and for a small *category of other offences* (3.6%);
- the *very serious offences,* such as homicide, murder or attempted murder, are quite rare: in 2005, they represented 0.08% of all cases reported;
- in all, *38,747 minors* were involved in the reported offences. In relation to the total population of minors, they represent 55 per 1,000 minors aged 12 to 18. In other words, for approximately 5.5% of the minors aged 12 to 18, (at least) one offence was reported in 2005 to the juvenile public prosecution service. Approximately 95% of minors aged 12 and older had no reported offences;
- as expected, close to 80% of the minors referred to the juvenile public prosecutor for offences in 2005 were *males*;
- the registered figures show a marked increase in the number of reports around the *age* of 12, with a peak among girls around the age of 15 and among boys around the age of 16, certainly in any case in regard to crimes against property and against persons.

3. Age Categories

In Belgium, anyone *aged below 18 years-old* is considered a minor. Below this age, the law considers the minor as an incapable person. There exists no (explicit) distinction between children, adolescents and young adults.

However, it is true that when a young person commits an offensive act *before the age of 12,* he/she is assumed to be in a problematic situation and in need of supplementary protection. For children below 12, only a limited number of measures can be applied. They can only be reprimanded, placed under the surveillance of social services, or be subjected to the educational accompaniment of a referent educator (see below).

If a young person commits an offence *between the age of 16 and 18,* and the youth court judge considers that the protection measure is no longer appropriate, he/she can decide to relinquish jurisdiction and entrust the person to a special chamber within the youth court. In this case, the criminal law (for adults) is applicable. For very serious crimes, the young person is referred to the juvenile felony court (*cour d'assises*). The youth court judge cannot decide to relinquish jurisdiction if the young person has committed serious offences or has already been the subject of a protection measure and then only after conducting a detailed social inquiry and a medical/psychological examination.

For *traffic violations* committed between the *ages of 16 and 18*, minors are equally referred to the ordinary criminal courts—in this case, the police court.

Youth protection measures can only be taken if the offences were committed upon the commission of offences before the age of 18. Likewise, these measures typically end when the minor reaches the age of 18. In exceptional cases, measures can be applied up to *the age of 20* or can be extended up to *the age of 23*.

4. Possible Interventions

4.1. Juvenile Public Prosecution Office

When a case arrives at the juvenile public prosecutor's office, the prosecuting magistrate can decide for *non-prosecution* or for *presentation of the case to the youth court judge*. In addition, prosecution magistrates have available a limited number of legally provided measures, such as a warning letter, a warning summons (reminder of the law), a mediation proposal orthe offer of a parenting course.

- *Warning letter or warning summons*

When an act is not serious enough to be brought before the youth court judge, but the public

[1] The registered data regarding the case files received by the juvenile public prosecution offices during the years 2006, 2007, 2008, and 2009 are presently being subject to an in-depth analysis.

[2] The records of 4 juvenile public prosecution offices were not sufficiently reliable.

prosecutor wishes to indicate clearly to the young person that his/her behaviour is not to be tolerated, the public prosecutor can send him/her a warning *letter*. He can also issue a verbal warning to the minor and his/her parents, summoning them and calling their attention to their legal obligations and the risks that they run. In this case, it may be a warning *summons* (reminder of the law). Both the warning letter and the reminder of the law mean that the case is not going to prosecution, but it has nevertheless generated a reaction.

- *Reparation mediation*

The public prosecutor can propose of mediation. He can make this proposal if (1) a victim has been identified, and (2) the participants in the mediation have expressly stated their agreement and continue agreeing to it for the duration of the mediation. A reparation mediation could be defined as a process of voluntary communication between the minor, his/her parents and the injured individual(s), which is supervised by an impartial third party, with a view to the making good the material and emotional consequences of the act committed. When a case is presented before the youth court judge without prior mediation, the grounds for the decision of such referral should be expressly stated. In other words, the public prosecutor is always required to consider mediation before referring a case to the youth court judge. If the mediation proceedings produce results, the public prosecutor is free to decide for the non-prosecution of the case or nevertheless present it to the youth court.

- *Parenting course*

The public prosecutor can propose that those parents who evidence blatant "disinterest" in their child's delinquent behaviour should take a parenting course. Its purpose is to make the parents aware of their child's criminal behaviour and stimulate their feelings of responsibility. Given the rather unfortunate wording used in the new law on youth protection when defining the conditions of this parenting course (the fact of "*evidencing blatant disinterest...*"), to date it has not been at all successful.

4.2. Youth Court

In Belgium, the proceedings before the youth court take place in two phases: the investigative phase and the definitive phase (see figure in annex).

The *investigative phase* is basically designed to allow the youth court judge to perform a social inquiry into the *minor's living conditions and personality*. If necessary, the youth court judge can, during the preparatory phase, recommend a reparation mediation or apply any of the following provisional measures:

- *leave* the young person in *his/her environment,* eventually augmenting this measure with a set of *conditions* (e.g. attend school regularly, complete a learning project, perform a community service (maximum 30 hours), perform paid work, house arrest, prohibition from associating with certain people or going to certain places, etc.);
- *place* the young person
  - with a reliable person (e.g. grandparents) or in a suitable institution,
  - in a public institution (open/closed),
  - in a hospital, a treatment centre specialising in addictions or paedo-psychiatric services,
  - int the federal closed centre of Everberg (preventive custody)[3].

During the investigative phase, only *measures of custody or investigation* can be applied. In other words, the sole aim of the youth court judge's intervention in the investigative phase is for the protection of the young person and/or society and/or the proper development of the social inquiry.

Upon the closing of the investigative phase—which can last for a maximum of six months—the youth court judge sends the case file to the public prosecutor, who can then decide either not to prosecute or to bring the case to court to obtain a final judgment. This decision should be made within two months.

During the definitive phase, the youth court judge pronounces on the issue of guilt. If there is no acquittal, he can choose any or several of the following possibilities:

1. a *restorative offer* (reparation, mediation or family group conference),
2. a *written project* directly produced by the young person,
3. a *parenting course,*
4. a community measure (eventually matched with conditions),
   - a reprimand,
   - social service surveillance,
   - intensive educational support,
   - educational and community service (maximum 150 hours),
   - community treatment,
5. a *placement measure:*
   - placement with a legal person in order to perform a positive service,
   - placement with a reliable person or in a suitable institution,

[3] The federal closed centre can only receive young boys aged at least 14 who have committed serious offences, and in case of lack of space in public community institutions. They can only stay there for a maximum period of 2 months and 5 days.

- placement at a public institution (open/closed),
- placement in a hospital, a treatment centre specialising in addictions or paedo-psychiatric service,
- placement under probation in conjunction with the performance of community service,

6. *transfer to the special chamber (waiver) (*see above).

The "subsidiarity principle" is expressly included in the law. In concrete terms, this means that a restorative offer is always preferable, and that before the application of any measure, it is appropriate to address the feasibility of a written project. Community measures prevail over residential measures, and placement in an open unit should be preferred to the placement in a closed unit.

However, it is of considerable concern that lawmakers have expressly stated that the judge, when making his decision, should also assess to what extent resources are available for the measures that he is considering. This may hinder the "subsidiarity principle", and might mena that the youth court judge might not always be in a position to apply the most appropriate measure.

5. Legal situation of the minor

The reform of the law also aimed to improve the protection of young people's rights.

It also attempted to curb the *extensive discretion* previously allowed to the youth court judge. In addition to a *hierarchy of measures*—"subsidiarity principle"—the law lists *a series of decision criteria* (such as the juvenile's personality and degree of maturity, his/her environment, the seriousness of the acts, previous measures, public safety and security, etc.), which the youth court judge must take into account in his decision. The youth court judge is also subject to a *(special) motivation obligation*. In concrete terms, this means that he/she should always choose the least severe measure, and justify the choice in detail following a series of established criteria. In principle, this should result in greater transparency and therefore a greater legal security for the young person.

The law also subjects the *placement* in a public institution or in a federal detention centre to a series of supplementary conditions that are mostly related to the age and the seriousness of the offence. When adopting a placement measure, the youth court judge must also indicate explicitly if it is to be in an open or closed unit.

In addition, the youth court judge is also required to determine the maximum duration of each measure, and lastly, he is responsible for reviewing the measures more frequently (within one year).

Within the context of the reform, lawmakers have also chosen to limit and define thoroughly the competencies of the public prosecution service with a view to bringing back the *presumption of innocence* to the centre of the public prosecutor's matters of concern. On the other hand, the presumption of innocence at the level of the youth court is not guaranteed, because community service remains a possible investigative measure before the juvenile's culpability has been established.

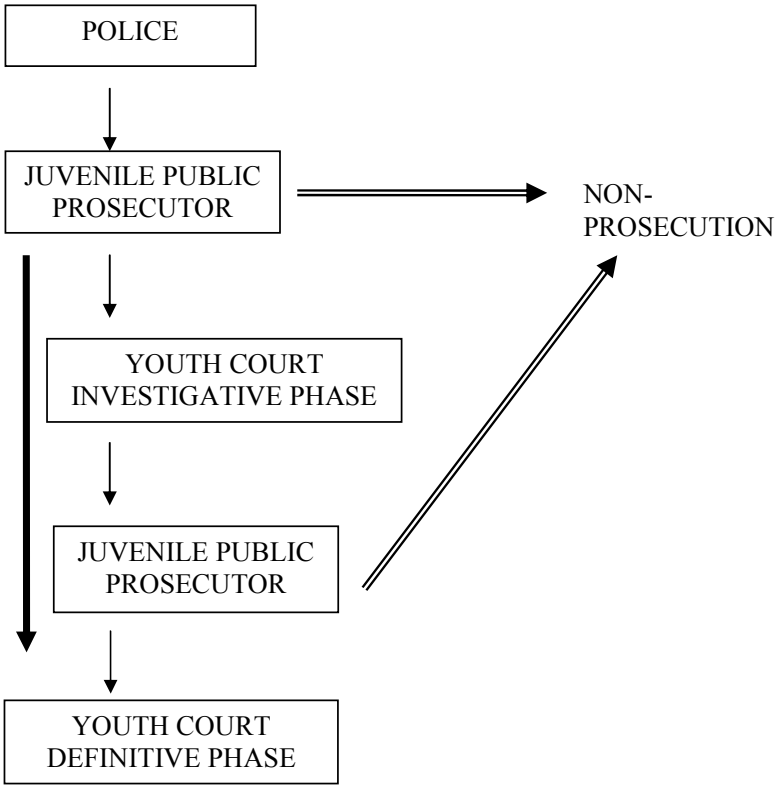
6. Future development

The outcome of the reform is a highly hybrid model, associated with diversified objectives. Despite various provisions in the law seeking to curb the high freedom extensive discretion enjoyed by youth court judges, they retain a significant margin of freedom. Thus, even though the law lists a series of criteria that the youth court judge should take into account when issuing his decision (such as the young person's personality and degree of maturity, his/her environment, the seriousness of the facts, previous measures, public safety and security, etc.), it does not establish any hierarchy for the application of these criteria. For one youth court justice, public safety will prevail, for another the seriousness of facts, for a third one the young person's personality. One youth court judge may continue prioritising the youth protection model, while another will be rather guided in his decision by the punishment model or the approach centred on reparation. Consequently, it is not the lawmaker but the youth court judge who determines the purpose of the judicial action. From now on, a lot will depend not only on the youth court judge's point of view, but also on the available resources and political choices, both at the federal level and at the level of the communities.

The future will tell how the new law on youth protection will be applied in practice, and what its priority objectives will be.

Eef Goedseels is a researcher at the Department of Criminology in the Belgian National Institute of Forensic Science and Criminology (NICC). NICC is a national research institute that works under the authority of the Minister of Justice (www.INCC.fgov.be). She is also an affiliated junior researcher at the Catholic University of Leuven.

ANNEX 1


POLICE
JUVENILE PUBLIC PROSECUTOR
NON-PROSECUTION
YOUTH COURT INVESTIGATIVE PHASE
JUVENILE PUBLIC PROSECUTOR
YOUTH COURT DEFINITIVE PHASE

Juvenile Justice in the United States: —an Overview

Judge Leonard Edwards (retired)

1 The beginnings

The first juvenile court was created in Chicago, Illinois, in 1899. The juvenile court was established to rehabilitate youthful offenders and to protect children. Its establishment was an acknowledgment that children are different from adults, that they are developing beings needing different treatment and care from adults. For many its creation was a reaction to the treatment of children as adults in the criminal justice system.

The theory underlying state intervention on behalf of children is *parens patriae*, the state as parent. Under this doctrine, when the parent fails, the state has the legal power to substitute for that parent and act on behalf of the child and on behalf of the community. The original Illinois statute identified two strategies for children who fell within the jurisdiction of the juvenile court: assist the parent to rear the child in the parent's home or remove the child to a better environment. The goal remains the same in either case: ensure that the child is properly reared.

The legislation creating juvenile courts sets out a philosophy different from the philosophy underlying the criminal courts. The latter focuses on punishment while the juvenile court focuses on rehabilitation of the youth, restitution to crime victims, and providing the youth with a healthy environment so that he can be given an opportunity to lead a productive life. Thus the juvenile court philosophy acknowledges that a child is a developing being, one who has not matured and who can be re-directed towards a socially productive lifestyle.

At its inception the juvenile court was informal. Juvenile judges would meet with children and families in an informal setting. Attorneys rarely appeared. Instead, the judge would fashion interventions based on the reports from probation officers and social workers. No one discussed legal rights as one idea behind the juvenile court was that it should focus on the needs of the youth, not legalities.

The juvenile court was a popular idea. After its creation in 1899, the juvenile court spread rapidly throughout the United States. Today all 50 states and the District of Columbia have juvenile courts as a part of their judiciary.

2 The Juvenile Court

The juvenile court is a small part of the judiciary in each state. The judiciary handles many types of cases including civil, criminal, probate, family, and traffic as well as juvenile cases. Approximately 5% of the work of each court system involves juvenile matters. In a rural court where a single judge may hear all legal matters, juvenile cases might take an hour or two each week. In an urban court there may be a team of judicial officers hearing juvenile cases. In Los Angeles, for example, over 50 judicial officers hear juvenile cases exclusively.

The juvenile court in the United States addresses several types of cases: juvenile delinquency, status offenses, and juvenile dependency or child protection. Juvenile delinquency cases involve children who have violated the criminal law. Status offenses are law violations, but not criminal law violations. They include truancy, being beyond control of a parent, running away from home, and curfew violations—in other words, law violations for children that would not be criminal law violations for adults. The third category is juvenile dependency or child protection cases. These cases involve state intervention on behalf of children who have been abused or neglected. This paper will address juvenile delinquency cases only.

Juvenile law comes primarily from state legislatures. Each state has its own juvenile code, and while they are all different in their details, they share common attributes. The federal government has not passed significant laws affecting juvenile court operations. Congress has appropriated money for juvenile corrections and general juvenile justice administration, but this money typically does not benefit the juvenile courts. Congress has made conditions on the receipt of these monies—juvenile courts may not incarcerate children with adults and juvenile courts may not incarcerate status offenders.

On the other hand, the United States Supreme Court has issued several important decisions affecting juvenile justice. The most important of these cases is *In re Gault (1967) 387 U.S. 1*. In the Gault case the Supreme Court ruled that before a state could take jurisdiction over a child

and remove him from parental care, the child was entitled to certain constitutional rights including:

1. the right to notice of the charges for the child and the parents;
2. the right to appointed counsel;
3. the right to see and hear the witnesses accusing him; and
4. the right to remain silent (privilege against self-incrimination).

One result of the Gault case has been to make the juvenile court appear more like the adult criminal court. Gault ended the informality of juvenile proceedings and brought the adversarial process into the juvenile court.

3 Criminalisation of the Juvenile Court.

A significant trend in juvenile court law over the past 25 years has been to criminalize the juvenile court. This is reflected in a number of areas. First, the prosecutor has become a fixture in all juvenile court proceedings. Before the Gault case prosecutors rarely appeared in juvenile court.

Second, many states make it easier for children accused of crimes to be transferred or waived to the adult criminal courts. Transfers occur in several ways. The state legislature may pass a law that all persons who commit a crime when they are 16 or older will be prosecuted in adult criminal court. This is called legislative waiver. Or the legislature may pass a law that the prosecutor has the discretion to file charges against a child of 15 or 16 directly in the adult criminal court. Usually the legislature restricts this "direct filing" to cases in which the youth is accused of a serious felony. The juvenile court judge can also transfer a youth to the adult court after a transfer or waiver hearing. In some states a significant number of 15, 16, and 17 year-olds are tried in the adult criminal court.

Third, in many states juvenile court cases and records are open to the public. In the original juvenile court juvenile cases were confidential as the legislators believed that confidentiality enhanced the child's chances for rehabilitation. In the past 25 years some legislatures and juvenile courts have opened up hearings and made records available to the public in the belief that this will increase a youth's accountability for his actions. One advantage to opening up the courts has been to dispel public and media sentiment that the juvenile court was a secret tribunal that was violating the rights of children or, in the alternative, was secretly "soft on juvenile crime." By opening the juvenile court and making records available those claims can no longer be made.

Fourth, in some states a charge proven in juvenile court can be used as an enhancement for punishment if the youth is later convicted of a crime as an adult.

It should be noted, however, that youth crime is different today in the 21st Century from when the juvenile court was created over 100 years ago. Children are committing crimes at younger and younger ages, weapons are more available to youths, and street gangs have become more sophisticated than ever before.

In one instance juvenile law has moved in the opposite direction. With the case of *Roper v Simmons (2005)* 543 U.S. 551 the Supreme Court declared that a state may not execute a minor (17 or under) for any crime. Most states had already prohibited the death penalty for children under 18, but several had statutes permitting this penalty for minors. The Supreme Court opinion noted that children were developing beings, not fully mature, and not fully aware of the consequences of their conduct.

4 The Juvenile Court Judge

In some states the juvenile court judge has equal status with other judges on the court, while in other states the juvenile court is a separate, lower court in the judicial hierarchy. In most states subordinate judicial officers perform some or all of the juvenile court work. These subordinate judicial officers are called Magistrates, Commissioners, Referees, and similar titles reflecting the fact that they are employees of the court, hired by the court to perform specific judicial duties. Many experts in juvenile court law recommend that juvenile cases be heard by juvenile court judges exclusively, and that juvenile court judges be given the same status as all judges on the court.

The juvenile court judge has a different role from that of other judges in the judiciary. The juvenile court judge not only hears cases, but often has administrative responsibilities such as management of the juvenile probation department, the juvenile detention center, and juvenile rehabilitation facilities. Moreover, the juvenile court judge is highly visible in the community, reporting on the needs of the community's most vulnerable and at-risk youth and asking for community participation in rehabilitative programs. The juvenile court judge often is the champion for these youth – asking for resources to provide improved programs and community involvement in their lives.

The role of the juvenile court judge is particularly important in the United States because the judiciary is a separate branch of government. The judiciary does not answer to the Executive or Legislative Branches, but is co-equal with them. Thus the juvenile court judge has greater power to convene members of the community to discuss issues related to the rehabilitation of delinquent youth, to initiate changes in the court structure, and to speak out on behalf of the youth who come before the court. This power makes the juvenile court judge potentially the most important official in the community regarding delinquent and at-risk youth.

5 A typical case

A typical case study may show how the juvenile justice system works in the United States. Three boys break into a building to steal some food and liquor. They are caught while in the store by a night watchman who calls the police. When the police officers arrive, they have several choices. They can arrest the youths and take them to a juvenile detention facility, they can give them a citation to appear before a probation officer (usually within a few weeks or months) or they can warn them and let them go home. Most cases where youths encounter the police result in a warning or are released with a citation to appear before the probation officer.

But in this case the charges are serious so the youths are arrested and taken to the detention center and placed in the custody of the probation department. The role of the probation officer at this point is to investigate the individual circumstances of each youth and decide whether each should be detained or released to a parent awaiting further action by the probation department or by the prosecutor. Depending on the age of the youth, his prior contacts with the juvenile justice system, his attitude, the cooperation from his parents and other family members, as well as other factors, he will be released or detained in the detention center. If he is released, there may be conditions attached. He may be required to be under adult supervision 24 hours a day; he may be required to stay away from the co-participants; he may be required to check in with the probation officer every day or week, and he may be placed on an electronic monitoring device that will inform the probation officer where he is at all times.

The probation officer has another option—resolution without the filing of charges. This option permits the probation officer to offer the youth the opportunity to perform community service, follow the law, and attend school, for example, over a six month or one year period of time. If the youth successfully completes the terms of the agreement, charges will not be filed.

This resolution is referred to as diversion.

If a youth is detained the law requires that charges be filed quickly (usually within 24 or 48 hours) and that there be a court hearing (a detention hearing) usually within 24 additional hours excluding holidays. Before any court hearing, however, the prosecutor must decide whether to file charges. In most cases if there is sufficient evidence, the prosecutor will file charges consistent with the facts of the case. However, some state laws permit the prosecutor to delay or defer prosecution on condition that the youth complete some program. This is similar to the probation officer's power to resolve the case informally through a diversion program.

If the prosecutor files charges, a youth arrested on Monday would be in court later the same week, likely on Tuesday, Wednesday, or Thursday. At the hearing the youth would be appointed an attorney (often a Public Defender), his parents would be present as would the probation officer and the prosecutor. The judicial officer would consider the evidence presented and decide whether it is necessary for the youth to be detained until the fact finding or jurisdictional hearing is held, usually within 30 days of the detention hearing. Again the judicial officer can release the youth with conditions, similar to the conditions available to the probation officer.

Most cases resolve with an admission by the minor so that a trial is not necessary. However, the youth has the right to a trial and at that trial to have all of the rights guaranteed by the Constitution (as enumerated in the Gault case). The judicial officer will decide whether the charges have been proven beyond a reasonable doubt—the adult criminal court standard of proof.

If they have been proven, the next stage is the dispositional hearing, the hearing at which the judicial officer will decide where the youth will live and under what conditions. This is a critical hearing as it focuses on the individual needs of the youth and hopefully will result in programs that will enable the youth to end his criminal behavior and become a productive member of the community. The probation officer will prepare a report for the judicial officer and others to read and will include a series of recommendations regarding the placement and programs that the youth should participate in. All participants will be able to comment on the recommendations including any victim who chooses to appear at court. Then the judicial officer will make a decision and decide on the placement and programs for the youth. If there has been property damage or hospital expenses, the youth may be required to provide restitution to the crime victim. There may also be orders concerning parental participation in programs to assist the rehabilitative process, although some parents may resist involvement, believing that their child is the problem and not them.

6 Some facts and figures

The United States incarcerates more juveniles than any other country in the world. More than 500,000 youth are brought into detention every year, and on any given day over 125,000 youth are locked up in jails, prisons and detention centers.

The United States also incarcerates more minority youth proportionally than Caucasian youth. For example, African Americans make up approximately 12% of the nation's population yet they are incarcerated at over twice that percentage.

There is similar over-representation of Native American youths in youth jails and prisons.

While boys have more involvement with the juvenile justice system, more and more girls are also involved with the juvenile court. Delinquency among girls has risen 83% over the past 10 years. Girls in the juvenile justice system bring a special set of issues including health care and the need for gender-specific services.

7 Recent trends

The juvenile court in the United States has been changing rapidly. New developments include the emergence of specialty or problem-solving courts. These are courts that address the substance abusing youth (Juvenile Drug Courts), youth with mental health problems (Juvenile Mental Health Courts), youth with domestic and family violence issues (Juvenile and Family Violence Courts), youth who possess weapons (Juvenile Gun Courts) and similar courts focusing on a specific problem that brought the youth to the attention of the authorities. These courts were developed by trial judges across the country and have grown rapidly over the past 10 years. Most of them have been evaluated and have proven effective.

Another new court procedure is the deferred entry of judgment[1]. In this legislative scheme the youth admits his delinquent conduct to the court, but is then given a year to demonstrate that he can remain free from crime and compliant with court orders. If he is able to do this, the court dismisses all charges and the case is erased from his record. Again this procedure has been evaluated and has proven effective.

One of them most positive developments has been the writing and implementation of the *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases*, published by the National Council of Juvenile and Family Court Judges in 2005. This book was the result of several years of research and included numerous contributors from all parts of the juvenile justice system. It outlines a best practices approach to juvenile justice.

The Guidelines are more than a policy book. They have become the blueprint for juvenile courts around the country, so-called Model Courts. These courts are implementing the Guideline recommendations and transforming their courts into models for other courts across the nation. A copy of the book can be obtained from the National Council of Juvenile and Family Court Judges in Reno, Nevada.

8 Conclusion

The United States is proud that it developed the first juvenile court in the world and that the juvenile court has become an integral part of each state's judicial system. Tens of thousands of professionals work in the juvenile justice system including judges, subordinate judicial officers, probation officers, attorneys, social workers and service providers. Additionally, thousands of community members volunteer their time and energy to work with delinquent and at-risk youth.

Yet we realize that there is much work to be done. Incarceration rates must be reduced. Disproportionate minority representation in the juvenile justice system must be addressed. Creative approaches to the very young law violator, girls, and gangs, to name a few, must be developed. Fortunately, there are many professionals and citizens ready and willing to devote their lives to the needs of our most at risk children, and there are policy and practice guidelines in place to help lead the way to positive changes.

Judge Leonard Edwards is a retired Judge from San Jose, California.

[1] California Welfare and Institutions Code, section 790. Evaluations are local and not published. In Santa Clara County more than 90% of the youth entering the program successfully complete it.

Protectionist justice in Chile

Judge Gabriela Ureta Roiron

The opinions given in this paper are of a personal and academic nature and do not involve any institutional stand. The text is a summary of a presentation at the congress held in Mendoza, Argentina, in November 2009.

Origin of Juvenile Justice in Chile—the protection model

The situation of minors was approached in Chile from the viewpoint of an irregular situation or protection model by Juvenile Act N° 4,447, sanctioned in 1928, which constituted a clear social advancement at the time and was accompanied by the Decree-Law on Special Facilities for Juvenile Delinquency Prevention. This Act gave rise to the Child Judicature and established specific juvenile legislation. Such legislation lasted throughout several amendments and was subsequently incorporated into Act 16,618 of 1967, updated in turn by Act 19,711 of 2001, a few sections of which are still in force.

The effect of the Convention has started to noticeably alter the legislative scene in many countries. In Chile this process began with the ratification of the Convention and its incorporation into law in 1990.

Since 1990, and in line with the return to democracy, numerous acts have been enforced in Chile, such as the ones regulating stopping putting children in prison, concerning filiation, and improving the system for the adoption of deserted minors, in order to adjust the legislation to the provisions of the Convention on the Rights of the Child. Such laws co-existed however with Act 16,618 which empowered the Judge to hear on all matters involving persons accused of committing felonies, simple offences or misdemeanours, ranging from under 16 up to 18 years old, who had acted without discernment, and apply the corresponding protection measures. It should be noted that the same laws were indiscriminately applied to both criminal law transgressors and those requiring assistance and protection.

Within an extensive criminal procedure reform that instituted an investigation and adversarial public trial system, amendments to the Juvenile Act were made trying to harmonize its provisions with this new criminal procedure system and thus correct certain contents of Act 16,618. An interesting achievement consisted in the separation between protection and contravention matters but only in respect of transgressors above 16 and below 18 years old. However, adolescents below 16 and the child whose rights had been infringed, could hypothetically be subject to a restriction of their freedom because it was allowed in our legislation. These were anachronistic legislative remains of a former protectionist model which reflected a distorting feature of the Juvenile Act tutelage system. In practice, these minors could be subject in the name of "protection" to measures implying a breach of essential rights such as freedom.

Act 19,968 on protection measures in Chile

A new stage in the development of Chilean legislation took place with the promulgation of Act 19,968, which created the Family Courts as from October 1, 2005, and introduced a special procedure for the judicial application of measures to protect the rights of the child and adolescent.

Principles of the Proceedings

The act states a series of principles governing the application of the legislation to guide the judge in case of doubt. The principles are generally applicable in all Family Justice matters, fully applicable in the case of protective measures enunciated in paragraph 1, Chapter III of the Act and are as follows:

1. **Orality** principle, according to which all legal proceedings shall be oral, except as expressly provided in the present Act.
2. **Concentration** principle, according to which the proceeding takes place either in one single hearing or in continuous successive hearings.
3. **Immediacy** principle by virtue of which the judge shall be present in every hearing, under penalty of being its being invalid.
4. **Sua sponte p**rinciple by which, once the action is brought and at any stage thereof, the Judge shall make, at his own instance, any decisions required to complete it as soon as possible. It is expressly stated in the Act that "this principle shall be specially observed in respect of measures intended to grant protection to children and adolescents and the victims of family violence", thus guaranteeing a stronger application of the inquisitive

principle in this matter. In connection with the inquisitive principle, this section introduces the principle of **speed**, since this is the aim established by the act for the application of the inquisitive principle.

5. **Collaboration** principle which establishes that during the proceeding and in the conflict resolution, alternatives tending to mitigate confrontation between the parties shall be sought, favouring the solutions agreed on by the same.
6. **Publicity** principle, according to which all jurisdictional and administrative court proceedings are public and only exceptionally and at the request of a party, when there is serious danger of affecting the right of privacy of the parties, particularly of children and adolescents, the judge may order one or more restraining measures to that effect, such as prohibiting the entry of certain persons to or ordering their exit from the court where the hearing is being held, and denying the entry or ordering the exit of the public in general for carrying out specific proceedings.
7. Principle of the **best interests of the child or adolescent** stated as follows: "It is the purpose of this act to guarantee all children and adolescents residing in the national territory the full and effective enjoyment of their constitutional rights and guarantees". This is doubtless the most important principle and the one that pervades the whole legal body.
8. Principle of the **right to be heard**. It compels the Judge to hear the child or adolescent for the purpose of solving the matter submitted to his/her consideration.
9. **De-formalization** principle**.** This principle is specially applied in respect of the requirement for adopting protection measures concerning children or adolescents, the mere request for protection being sufficient to bring the action.

Principle of the child's best interests

As stated in section 3 of the Convention, it is considered as a general legislation principle. It is particularly applicable in connection with interim authority when so required by the child's or adolescent's interests. This principle is also essential in connection with the evidentiary conventions [1] where the Judge is permitted to approve them taking particularly into account the interests of the children or adolescents involved in the conflict.

Without prejudice to the foregoing, it is unquestionable that the above mentioned principle permeates across the national legislation. Thus, Act 19,585 on Filiation refers to the best interest of the child as a principle to be included among the Civil Code provisions. This resulted in an amendment to Section 222 of the Civil Code, which begins Title IX concerning the rights and obligations existing between parents and children. The same states in its new second paragraph that

> "the parents' main concern is the child best interest, and to this end they shall endeavour to secure his/her highest possible spiritual and material fulfilment and guide him/her in the exercise of the essential rights that originate in the human nature as his/her capabilities develop."

Although there is no clear definition of what is meant by the child best interest or the "highest spiritual and material fulfilment" concept, the above mentioned stipulation certainly constitutes a conceptual advance as the definitions stem from the Convention. Likewise, it is not possible to disregard certain subjectivity on the part of the Judge when having to define in each specific case the child best interest, which implies a requirement for discretion and wisdom in this respect in order to give more significance to the principle. As Grosman states [2] "some may believe that his best interest is to obtain strong emotional ties, and others suppose that it is to have an adequate spiritual or religious formation, or to prepare him to be a productive man in his adult age", "for some individuals it will be important to stimulate affection, love for fellow human beings, solidarity, responsibility; for others, discipline, efficiency, or order". As remarked by the same author when citing a work by Parker [3], a survey carried out in Kentucky disclosed that for solving custody cases, the factors considered by the judges at the time of deciding on the children custody did not respond to the requirements of the latter but to the characteristics of their parents.

On the other hand, old provisions survive, such as Section.234 of the Civil Code which still contains a paternalist aftertaste in the following statement: "whenever necessary for the child's welfare, parents may request the Court to decide on the future life of the child for the period of time it deems convenient, which shall in no case exceed the date of the child's 18th birthday". This provision has not become obsolete; on the contrary, Judges many from time to time come face to face with parents who, overburdened with children who are out of their control due to drugs, alcohol, vagrancy, prostitution or misconduct, declare they are incapable of fulfilling their parental duties and

[1] Evidentiary conventions are such facts as the parties decide to deem proven.

[2] Grosman, Cecilia, "El interés superior del niño" in "Los derechos del niño en la familia", Editorial Universidad, 1998, Buenos Aires. Pág36

[3] Grossman op. cited, pág.36.

keep appealing to "Justice" to take charge of such minors and this leads to the Judge reconsidering the child's best interest concept in each case.

With regard to the contents of the child's best interest principle, jurisprudence has been laid down in Court that incorporates the Convention as a binding source of law. Thus, the Supreme Court decided on November 2, 2006, in accordance with the Convention, to make an exception in respect of the Convention on Civil Aspects of Child International Abduction, on the grounds that if a minor showing a high degree of maturity and being endorsed by his mother, expresses his wish to remain within national territory, the denial to the request for removal to another country submitted by the guardian is valid, according to Section 13 of the The Hague Convention. [4]

Special procedure to protect the rights of the child and adolescent

- **Basic aspects**

A preparatory hearing is stipulated (to be held within five days), where the parties shall be informed of the reason for appearance. Subsequently, a summons is issued for appearance at a trial hearing for receipt of evidence on the complaint submitted to the Judge for consideration. In the course of same, there may be objections to the expert reports provided and the judge may request the advice of the Technical Council. In exceptional cases separation from the family may be ordered when strictly necessary to safeguard the rights of the child or adolescent. The procedure provides for a proactive conciliation by the Judge and should this not be possible, a judgement shall be pronounced indicating the nature and object of the measures adopted, explaining the reasons for its need and convenience and fixing the term of its duration.

The Head of the establishment where the adopted measure is to be complied with or the person in charge of the respective programme shall have the obligation to report on the progress of same, the situation of the child or adolescent and the advancement made towards the attainment of the objectives set in the judgement. Such report shall be submitted every three months unless a longer term is indicated by the judge, with a maximum of six months, by means of a well-founded verdict. When pondering said reports, the judge shall be advised by one or more members of the technical council.

In case of non-compliance with the adopted measures, the court shall either determine the substitution of the measure or issue the relevant court order for forced compliance. Obligatory visits to the residential establishments are also scheduled. After each visit, the judge shall produce a report containing the conclusions thereof, which shall be forwarded to the National Minority Service and the Ministry of Justice.

The individuals affected by a court protection measure are entitled to be personally received by the judge when requested, either by themselves or through the persons mentioned in the following section. The judge may at any time, when justified by the circumstances, suspend, modify or annul the measure adopted *sua sponte*, at the request of the child or adolescent, one or both parents, the persons who are looking after him/her, the Head of the establishment where the measure is being applied or the person in charge of the respective programme. However, the measure will cease once the child or adolescent reaches his/her adulthood, is adopted or the term for which the measure was ordered lapses without it having been either renewed or modified.

- **Precautionary measures**.

It is also interesting to remark on an important innovation consisting of the possibility of the Judge adopting essentially temporary (not exceeding a 90-day period), special precautionary conservative or innovative measures, which clearly shows the need for excellent cooperation between the different social system organizations and the Judiciary to adopt longer term measures when necessary. These measures may be adopted by the Judge in urgent cases, when there is imminent damage and danger of an overdue course of litigation, at any time during the proceedings and even before starting the same, either *sua sponte*, at the request of the public authorities or any person, when so required to protect the rights of the child or adolescent, and to this end, the following are mentioned:

a. His/her immediate handing over to the parents or persons who are legally responsible for his/her care.
b. Trusting him/her to the care of a person or family in urgent cases. The judge shall preferably appoint his/her blood relations or other persons he/she is acquainted with or trusts, so that they may temporarily look after him/her.
c. Admission into a sheltering family programme or diagnosis centre or residence for such period of time as is strictly indispensable. If this is the case, and the measure is adopted without the child or adolescent appearing before the judge, steps shall be taken to ensure his/her appearance at the start of the next hearing.
d. Arranging for the attendance of children or adolescents, their parents or the persons looking after them to support, recovery or orientation programmes or actions to be able to face and overcome the crises they might be

[4] For considerable jurisprudence on this principle see *Familia Legislación y Jurisprudencia,* page 365. Punto Lex, Santiago, 2007. See in such work the multiple applications of this principle in Chilean Jurisprudence.

going through and give the corresponding instructions.

e. Suspending the right of one or more persons to maintain direct regular relationships with the child or adolescent, whether the same had been established by means of a judicial verdict or not.

f. Either prohibiting or limiting the presence of the offender in the family home.

g. Either prohibiting or limiting the attendance of the offender at the child or adolescent educational institution, as well as at any other place the latter attends, visits or stays at usually. In the case the offender attends the same institution, the judge shall adopt specific measures tending to safeguard the child or adolescent rights.

h. Hospitalization, consignment to a mental health or specialized treatment institution, as the case may require and it is indispensable in view of a threat to the subject's life or health.

i. Prohibiting the exit from the country of the child or adolescent subject to a protection request.

In no case may the admission of the child or adolescent to an adult penitentiary be ordered as a protection measure. The verdict ruling the application of a precautionary measure shall be based on such records as may be deemed sufficient to justify the adoption of the measure, and contain an express detail thereof. For the purpose of complying with the adopted measures, the judge may require the help of Chilean Armed Guards (Carabineros de Chile).

When the adoption of any precautionary measure takes place before the start of proceedings, the judge shall set the date for the preparatory hearing within five days following the adoption of the measure. The precautionary measure adopted in accordance with this section shall under no circumstances last more than ninety days.

However, the Act kept the provision contained in section 30 of old Act 16,618 according to which

> "the judge may order such measures as may be necessary to protect minors whose rights have been seriously damaged or threatened".

The judge may in particular arrange for the attendance of children or adolescents, their parents or the persons looking after them to support, recovery or orientation programmes or actions to be able to face and overcome the crises they might be going through and give the corresponding instructions. It is interesting to mention that the law establishes as an alternative measure the admission of a minor to a transit or distribution centre, a foster home or a residence, a measure that the court may order for a one-year term. It can therefore be inferred that the general protection measure that the judge can order is not subject to the mentioned term or to the terms that apply to precautionary measures.

Challenges encountered in the implementation of the new legislation

With the above mentioned changes, the Judge faces the limitations typically imposed by the scanty resources available in his sphere of activity. Accordingly, it would be desirable to specify more accurately which rights are expected to be protected by the Court.

One may wonder, for example, if in the cases when extremely expensive, long and doubtfully effective alcohol or drug addiction treatments are needed, it would be appropriate for a Judge to "order such treatments", to whom?, to which authority?, under which penalty? Or if it were a case of damaged education rights would this proceeding be comparable to a sort of *sui generis* protection recourse under the Juvenile Law?

It is convenient to analyze here whether the objectives aimed at by the new legislation have been attained by the new regulations and their implementation.

- With regard to the **judicialization** of problems connected with children at risk, there have been advances since the differentiation of the treatment given to minors at risk or in danger or having health, education or other social problems from that given to juvenile transgressors. However, transgressors under 14 years old continue receiving protection measures since it is considered that they are minors whose rights have been damaged.
- Regarding **impunity** for the treatment of criminal conflicts, this matter was the object of Adolescent Criminal Responsibility Act N° 20,084, dated December 7, 2005;
- Regarding the **criminalization of poverty**, it must be pointed out that those who more frequently visit the Courts, both in search of protections measures and as transgressing minors, belong to the lower income sectors of society.
- With regard to the **lack of the due process of law**. Under the new legislation, it is mandatory to appoint a defence counsel for the offending minors so that they may have an appropriate defence and, in the case of minors whose rights have been damaged, when there is an opposition between their rights and those of responsible adults, the court shall assign them a guardian *ad-litem.* In both cases they have the right to be heard, however, they may also exercise the right to remain silent if it is preferable for protecting their rights.

- As regards the **hospitalization** or **consignment judgement** in the case of children whose rights have been damaged, when measures have to be taken involving separation from one or both parents or from the persons who act as their guardians, there shall necessarily be a well-founded court verdict.

As the country has gradually progressed, clear advances have been noticed in the way of approaching social problems, particularly those affecting minors living in extreme poverty conditions. There exist public Government programmes focusing on this social segment: *Chile Solidario*, for people living in extreme poverty and *Chile Crece Contigo*, for children. The outcome of the public policies undertaken since 1990 to date is a remarkable reduction in the poverty level, from 38.6% down to 13.7%, and from 13.0% in 1990 to 3.2% in 2006, in the extreme poverty level. Nevertheless, it is evident that there still exist problems coming up before the Courts due to a lack of early detection and action. Yet, it is worthwhile mentioning that there is an ever increasing participation of social agents from education, health and social services (social workers and municipal psychologists) in the investigation of the causes of the problems and in the actions taken in this respect.

We must however point out that many a time children and adolescents continue to be left in the hands of the Family Courts merely because they are in poverty, extreme poverty or abandoned, lacking the basic support, which leads them to show maladjusted behaviours, when they should by no means be taken "before the justice".

It is still a fairly common occurrence that their own parents request the police or the court to deprive their children of their freedom because they feel their parental authority has been overridden and find themselves impotent before certain behaviours they are not capable of either preventing or correcting.

The passivity we have been mentioning is reflected not only in the police authorities but also in the executive and functionary levels of hospitals, schools, information bureaus, institutions collaborating with the National Minority Service (SENAME) and other administrative organizations, all of which continue reporting these types of events directly to the courts.

To these requirements must be added a certain protest from the media which claim for Family Court responses to the situations afflicting children, thus increasing the notion in the collective unconscious that it is the responsibility of the Judicature to solve and face the problems arising from the breach of juvenile rights.

With these problems in sight, the Family Justice system has had to adjust only with the currently available legal instruments.

By way of conclusion

The numerous problems that push a minor to vagrancy exceed the scope of influence of a Judge, even of a specialized one, and clearly pertain to the social welfare area of the different Government organizations, whether national or municipal. Undoubtedly, a joint action of all government powers is needed to undertake structural solutions.

The Chilean Supreme Court has expressed its concern because it can be noticed that in spite of the above mentioned legislative advances, there still prevails a repressive rather than a preventive criterion; deficiencies in the infrastructure for prevention and rehabilitation treatments can be seen; the coordination of the National Minority Service should be improved; there is overpopulation in the temporary confinement centres and unhealthy conditions in several of them, posing challenges certainly related to the scanty Government resources, and there is, in addition, lack of judges.

Nevertheless, based on the series of amendments referred to above, there is no doubt that in recent years and subsequently to the enactment of the Convention, the country has undergone a positive evolution in line with the said convention. Although some anachronisms still persist, these are just a few. Judges face challenges that many a time exceed their sphere of influence but in the application of the fundamental principles and rights contained in the Convention there is increasing evidence of the quest of such principles and rights tending to give them, and particularly the child's best interest principle, greater significance.

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Bibliography

- *García Méndez, Emilio (2004) "Infancia. De los Derechos y la justicia", Buenos Aires, Editorial del Puerto.*
- Grosman, Cecilia, "El interés superior del niño" en "Los derechos del niño en la familia", Buenos Aires, 1998, Editorial Universidad.
- Punto Lex, Familia, Legislación y Jurisprudencia, (2007), Santiago.

Juvenile and Child Justice in Quebec

The Honourable Lucie Rondeau

The Youth Criminal Justice Act (YCJA)[1] is a federal law that applies across Canada. However, in practice it operates differently from one region to the next because each province has jurisdiction over the organisation of the courts, the administration of justice and the services offered to children and families. This article aims to present the main characteristics of the judicial system for children and young people in Quebec.

The Youth Protection Act (YPA)[2] is a Quebec provincial law, designed for the protection of children and young people from birth to the age of 18 whenever their safety or development might be considered to be at risk[3].

The grouping of social services for the administration of these two laws is as follows:

- The authority responsible for applying the YPA is the Director of youth protection who also has, in Quebec, the responsibility of the Provincial director in charge, under the YCJA, of the social evaluation, at certain steps of the criminal judicial process, of a youth charged of an offence and for the execution of some of the sentences imposed.
- All the resources needed to implement measures under the YPA[4] and execute sentence imposed under the YCJA are under the responsibility of the Ministry of Health and Social Services.

In practice adolescents subject to a placement under the YPA and those sentenced to custody under the YCJA are kept in the same establishments, even though, most of the time, within different living areas. The resources used for young people sentenced following a criminal offence offer a higher degree of supervision.

However, the philosophy of these residential establishments and services is to offer adolescents individually designed rehabilitation programs in order to reintegrate them as quickly as possible into society. This philosophy does not look upon custody as solely intended to deprive the young person of their liberty. It might however end in that result in a situation where the young person refuses to be involved in any program or services.

The YPA and the YCJA are dealt with by a single tribunal, the Youth Division of the Court of Quebec. The judges are specialists in juvenile justice and, in the main urban centres, exercise this sole jurisdiction.[5]

Another aspect is the handling of certain criminal offences outside the judicial system under a wide-ranging extrajudicial program that has been running since 1979. In practice, some 50% of the offences committed by young people are subject to a non-judicial measure and are not subject to proceedings in courts.

The prior authorisation by a prosecuting attorney of all the criminal proceedings stemming from a police inquiry is necessary before the laying of a charge[6]. This requirement allows the exercise of discretion by the prosecutor from the start of the proceedings. From then on, if a prosecution is to be taken to court, the hearing is rapidly fixed and the crown decides, at this first step of the

[1] S.C., 2002, c. 1. The YCJA applies in every situation where a person is charged of a crime alleged to be committed at the age of 12 years old and over but under 18.

[2] R.S.Q*.,chapter P-34.1 (*Revised Statutes of Quebec)

[3] The headings set out in the law indicating the need for protection are: abandonment, neglect (lack of care, lack of health services or education), mental cruelty, physical or sexual abuse or the risk that one of these situations might arise. Another heading—often found in the case of adolescents—is the demonstration of serious behavioural problems, such as to cause concern for the adolescent's own physical or mental well-being or that of others.

[4] Under this law, in the most serious cases the Youth Court can order the child or adolescent to be placed in a foster family or rehabilitation centre against his will.

[5] The judge has no jurisdiction to decide which law applies to a specific case. He applies the YCJA when the public prosecutor has decided to charge the youth of an offence and applies the YPA when the Director of youth protection has filed a procedure under this law to the court.

[6] However, this requirement is not solely an aspect of juvenile justice, since in Quebec it also applies when an adult is subject to criminal proceedings.

Deleted: La Loi sur le système de justice pénale pour adolescents (LSJPA).

proceedings, when this discretion is allowed, if the youth will be charged of a summary conviction (for minor offences) or an indictable offence. The main consequence of that decision is the length of custody that might be imposed.

Young people are eligible for legal representation with the costs met by the judicial service without consideration of the income or wealth of their parents. Only the income of the young person is taken into account.

Lawyers specialising in juvenile justice are available to represent children and young people both in situations arising under the YPA and in criminal prosecutions brought under the YCJA.

All professionals involved take constant care to avoid bringing within scope of the YCJA a case that should be better dealt with under the YPA. This concern arises at various stages of the juvenile justice system. The main ones are as follows:

- The application in Quebec of section 30(8) of the YCJA which requires a police officer who has arrested a young person to obtain authorisation from the Provincial director to keep the young person in custody. This provision allows the Provincial director who, as already explained, is also responsible for the YPA, to take charge of the situation of the youth under this law if it is more appropriate to do so. It does not mean that the YCJA will not apply later in regard of the offence because the situation of the youth is dealt under the YPA. It only prevents that a youth is kept in custody for a reason that should rather be taken care of under the YPA.
- The courts avoid imposing conditions (for the interim release during the proceedings or at the sentence level) that do not have a rational link with the circumstances of the offence or the personal situation of the youth in relation with the crime committed. This aims to prevent repeated criminal charges against a youth who breaks a condition because he is in a situation that puts him in need of protection under the YPA.

These characteristics allow us to follow one of the many principles set out in the YCJA, namely that custody (during the proceeding or as a sentence) should not be used in place of services of protection for young people. The application of provincial law up to the age of 18 in this area is certainly of considerable help compared to the situation that prevails in some other Canadian provinces.

But it would be wrong to think that the application of the YCJA in Quebec does not lead to other problems. On the contrary, the limits on custody that section 39 of the YCJA[7] imposes present a challenge often difficult to overcome. Actually, it sometimes seems contradictory not to be able to impose a custodial penalty when it is the only way of achieving the sentencing purpose and principles under sections 3 and 38 of the YCJA. It is not uncommon to find that the penalty proportionate to the seriousness of the offence and the level of responsibility of the young offender would be custody in an establishment offering rehabilitation programs only to discover that section 39 of the YCJA does not authorise it.

Quebec is very successful in not treating cases relevant to the YPA under the YCJA. On the other hand however, it is sometimes inconsistent to find that the YPA will have to compensate the gap of the YCJA. It is the case when a youth needs rehabilitation through a program offered only in custody that the court can not order under the YCJA even if it would be the most appropriate sentence.

It is understood that the aim being sought is a reduction in the use of custody. However, the small number of custodial sentences in Quebec before the YCJA came into force leads one to think that that aim was not an urgent one in our province. We can then conclude that Quebec is experiencing, like several other provinces and despite aspects of our judicial system which distinguish it from others, both successes and problems in applying the YCJA.

The Honourable Lucie Rondeau* is the Associate co-ordinating Judge for the Youth Division of the Québec—Chaudière-Appalaches Region of the Court of Québec.

[7] Section 39 of the YCJA (which has to be strictly interpreted) authorizes the court to order a custodial sentence only in cases where the youth

- has committed a violent offence, or
- has failed at least two times to comply with non-custodial sentences, or
- has committed an indictable offence punishable by more than two years of imprisonment and has a history of convictions, or
- if the aggravating circumstances of the commission of the offence are such that it is an exceptional case such that a non-custodial sentence would be inconsistent with the purpose and principle of the law.

Very young offenders in New Zealand

Linda McIver

Following the November 2008 General Election, New Zealand's new centre-right government introduced a number of legislative initiatives within its first 100 days. Of interest to the youth justice sector was a Bill which would allow 12- and 13-year-olds to be prosecuted for serious criminal offences, and would strengthen the Youth Court's sentencing options.

The Children, Young Persons and Their Families Act 1989 is the cornerstone of New Zealand's innovative youth justice system. That system is characterised by the following features—

- Offenders aged 14 to 16 years old are dealt with by the specialised Youth Court[1];
- Offenders aged less than 14 cannot be charged (unless the offence is murder or manslaughter), but their offending is dealt with by the Family Court under the philosophy that their offending is the result of care and protection issues in their home environment;
- Priority is given to diversion—Court proceedings must not be brought if there is an alternative means of dealing with the matter;
- Family Group Conferences—whereby control over, and responsibility for youth offending is given back to families and the community; and
- A statutory requirement for the Youth Court to use the least restrictive sanction possible.

This system is now twenty years old and has resulted in significantly decreased rates of Police apprehensions, imprisonment and institutionalisation. Of course, it is not perfect and the government has become concerned at the number of very young, serious and persistent offenders causing significant harm to their victims, themselves, their families and communities.

In response to this concern, the government has introduced a range of initiatives collectively called 'Fresh Start'. They include legislative amendments in the Children, Young Persons and Their Families (Youth Court Jurisdiction and Orders) Bill. The Bill proposes changes in two main areas –

- Jurisdiction—lowers the jurisdiction of the Youth Court to include some 12 and 13 year olds;
- Sentencing—provides specifically for new and longer sentencing options for the Youth Court.

Jurisdiction

Under the proposed legislation, the jurisdiction of the Youth Court would be lowered to include 12 or 13 year olds if the alleged offence carries a maximum penalty of 14 years imprisonment (examples of those offences are arson, aggravated burglary, and attempted murder). Twelve and 13 year-olds may also be charged in the Youth Court if the offence carries a maximum penalty of 10 years imprisonment and they have previously been dealt with by the Family Court for serious offending which it found to be proved (examples of those offences are attempted arson, intentional damage, and burglary).

The government believes that there is a small but significant group of 12 and 13 year-olds for whom the current system is failing. They are not benefiting from the current approach which examines care and protection issues in their home environment as the cause of their offending. They need to be held more accountable for the harm they are causing.

A 12 or 13 year-old charged in the Youth Court would be subject to the same process as 14 to 16 year-olds, except that they cannot be transferred to a higher Court. They could still be transferred to the Family Court if the Youth Court believes that the public interest would not be served by Youth Court proceedings.

[1] The exception is the offences of murder and manslaughter which are dealt with by the High Court, after preliminary proceedings in the Youth Court.

Sentencing

In addition to expanding the jurisdiction of the Youth Court, the Bill strengthens its sentencing options. The proposed legislation doubles the length of the high-end residential orders—from 3 months to 6 months in residence. It also increases the length of the *Supervision with Activity Order*—under which the offender is required to attend a therapeutic programme in the community—from 3 months to 6 months.

The government says that the increased length of these sentences sends a strong message about how seriously society views their offending. Just as importantly, it provides more time for young offenders to receive the help and support they need to turn their lives around.

The Bill provides specifically for the following new sentencing options—

- Parenting education programmes for young offenders who are parents, or the parents of young offenders;
- Mentoring programmes;
- Alcohol or drug rehabilitation programmes.

These orders can all be made now, but their inclusion in the legislation strengthens the message about how society wants young offenders dealt with.

For young offenders who are serious repeat offenders or who ignore their community-based orders, the legislation provides for judicial monitoring and intensive supervision orders. Under those orders the young person's compliance with their community-based sentence is monitored on a regular basis by the Youth Court. If necessary, their compliance with a curfew order can be monitored by electronic bracelet for a period of up to 6 months.

In addition to this Bill, the *Fresh Start* initiatives include the development of new community-based programmes and the strengthening of existing programmes. The government wishes to see the development of military-style activity camps where young people are supported to develop life skills, personal discipline and self-confidence under the training and control of army or ex-army personnel. It has also promised to develop residential and day programmes for drug and alcohol rehabilitation to address the shortage of these programmes for young people.

The Youth Court's submissions

The legislation has been examined by a Select Committee of Parliament. It received many submissions, almost all of which were against the proposed changes. Many in the youth justice sector have pointed out that increasing the offences for which 12 and 13 year-olds can be prosecuted is taking us further away from compliance with our commitments under the United Nations Charter on the Rights of the Child.

Principal Youth Court Judge Andrew Becroft made submissions on the Bill on behalf of the New Zealand Youth Court. In particular he said—

> "Youth Court Judges regard the proposal to include some 12 and 13 year-olds within the youth justice system, albeit on a very limited basis, as constituting the most fundamental change to the system since its inception in 1989. While this profound change is properly a decision for Parliament, it is appropriate for the Youth Court to raise with the Select Committee what are the perceived inadequacies with the current response to dealing with "child offenders" which might justify this response. 'Is it a result of operational failings or, more fundamentally, is it a deficiency in the present legislative philosophy?' If the real problem is with the mechanics of the current response, might not the first step be to streamline and simplify the law dealing with child offenders (long overdue) and to better resource the current misunderstood and underused process?"

The Select Committee has recommended that the Bill be passed with only minor changes. The Bill is yet to have its third reading, but it is expected that this legislation will come into force, largely unchanged, in October 2010. If there are any major changes, we will inform members in future editions of the Chronicle.

Where to from here?

If passed, these proposed amendments constitute the most fundamental change in the twenty year history of the Children, Young Persons and Their Families Act 1989. They reflect, perhaps, the difficult balance in democratic societies between upholding our international obligations, meeting the criminogenic needs of young offenders, and satisfying the public thirst for greater accountability and a more punitive approach.

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An Evaluation of the Swiss and South African Juvenile Justice Systems in the Light of International Law

Ursina Weidkuhn

A Journey Starts

Following my passion for the African continent I decided in 2002 to enrol for a master's programme in International Law at the University of Cape Town. I felt that after a decade of practising as Juvenile Judge (Jugendanwalt) in Switzerland, some time for reflection might be useful and fruitful.

I happened to arrive in South Africa at the time when the Child Justice Bill was introduced to Parliament. This Bill promised new and progressive ways of how to deal with children in conflict with the law, symbolizing the efforts of the country to overcome the repressive Apartheid years. I was soon impressed by the strong children's rights-orientation of the Bill, its refreshing approaches, and by the highly committed children's rights lobby which stood behind it. During the parliamentary deliberations in 2003, however, it looked as if the Bill – probably influenced by public fears – was going to become much more punitive. But before a new version was published, the Bill disappeared for some years. Not so my fascination for the original version and its extraordinary drafting history; inspired by the thesis of Prof. Julia Sloth-Nielsen about the influence of international law in the South African reform process[1] I decided to undertake a similar study about the Swiss law and reform process, and to compare the results with South Africa. This idea made me return to South Africa some years later—by chance at the time when the revised (indeed more punitive) Child Justice Bill, Version 2007, was finally published and later deliberated in Parliament. The fruit of this debate (which I was allowed to attend) was a moderate compromise of the two rather diverging earlier versions of the Bill, Version 2008[2]—the fruit of my return is the book I write about here.

Overview

The study consists of five main parts. An introductory chapter briefly describes the time of the 'birth' of juvenile justice systems around 1900, as well as the models and trends that prevailed in the following decades. The chapter also contains a definition of a 'Children's Rights Model', which is considered – based on the work of Sloth-Nielsen - as a new model of Juvenile Justice. In a second chapter, the developments of international (and selected regional) juvenile justice instruments are presented, followed by a detailed analysis of these instruments. Mainly based on the above mentioned definition of a 'Children's Rights Model', the following areas are elaborated: *Penal Objectives; Age Issues; Separation and Specialization; Diversion; Organization and Procedure (incl. Pre-Trial Detention, Legal Representation, Protection of Personality and Review); Sanctions*. Here, the increasingly detailed comments of the Committee on the Rights of the Child[3] (found in particular in its Concluding Observations and in the General Comment No. 10) provided a most welcome source of guidance. Chapter three and four present the Swiss and South African way of dealing with juveniles in conflict with the law in the past, '*de lege lata* and *de lege ferenda*—including practice and implementation issues. In the last and main Chapter, these national systems and their developments are evaluated in the light of the international framework, area by area as presented in the earlier Chapters. The Chapter concludes with an overview of the results of that evaluation. A summary in German and English rounds off the book.

Some Tricky Issues on the Way…

In the course of writing, I was sometimes confronted with questions for which I could not easily find (unambiguous) answers in the materials available. Some of them concerned the interpretation of the international instruments themselves, like the question of the precise scope of the principle that arrest, detention or imprisonment should only be used as a measure of last resort and for the shortest appropriate period of time (Art. 37(b) CRC[4]). Does welfare-

1 Sloth-Nielsen Julia, The Role of International Law in Juvenile Justice Reform in South Africa, unpublished LLD Thesis, University of the Western Cape 2001.

2 Meanwhile Child Justice Act No 75 of 2008.

3 Hereafter referred to as CROC.

4 Convention of the Rights of the Child.

orientated deprivation of liberty in the juvenile justice context fall under that provision, too?[5] Similarly I stumbled when realizing that with regard to the provision of assistance (representation) of the juvenile in case of deprivation of liberty (Art. 37(d) CRC), the German version of the CRC differs from the English one. While the first (*nota bene* supported by an official version, the French) holds that ‚every child deprived of his or her liberty shall have the right to prompt access to legal *or* other appropriate assistance', the English (supported by the Spanish) version talks about 'legal *and* other appropriate assistance'. In such moments of uncertainty about the interpretation of the instruments, discussions with juvenile justice experts proved to be helpful.

However, more headaches were caused by those issues that raised doubts about the compatibility of the Swiss juvenile justice system with the international instruments. Switzerland can look back on a longstanding expertise and specialization in the area of juvenile justice, is well known for having a satisfying and child-friendly system, and as a practitioner I often had praised our exceptionally straightforward system myself – thus could it be fair to look for loop-holes, to point a finger on possible deviations from international standards? Of course it was, as long as it was well founded, but it remained an unpleasant task. Issues of concern came up, in particular, with regard to the following questions: under which circumstances, precisely, shall the investigating judge be allowed to act as a sentencing judge in the same case, thus touching the thorny issue of the widely spread practice of such 'Personalunion' in Switzerland? Another point of discussion and concern was the question whether or not proof of guilt is a *conditio sine qua non* for any penal verdict and sentencing order. Swiss law does not require such proof of guilt in juvenile penal procedures when the expected sentence is an educative or therapeutic measure addressing the needs of the juvenile (a kind of reaction that is in many other countries ordered by civil, not penal, authorities). Furthermore and based on the same needs-orientated reasoning, the duration of such measures is not to be determined in advance under Swiss law, but depending on the juvenile's progress in the reintegration process. All these elements of Swiss juvenile justice law point at its (still) strong welfare orientation. Is this approach to be welcomed, as it aims at helping the juvenile concerned, or must it be regarded as outdated in the light of the recent developments on the level of international law,[6] which 'is beginning to reject the unfettered discretion of authorities to rehabilitate children in their best interest'[7]?

Maybe surprisingly, the analyses of the South African juvenile justice seemed much less tricky. Things were easier and clearer; in the past, there was simply no (or hardly any) specialized juvenile justice system, thus the lack of compatibility with international standards was quite obvious. For the future, on the other hand, there is the brand new Child Justice Act – an Act that has consciously been drafted under the guidance of international standards, with the result that it is compatible with the latter with regard to almost all areas elaborated in this study.

Some Comparative Findings

The evaluation of the Swiss and South African juvenile justice systems in the light of the international standards conducted in this thesis highlights similarities and differences, strengths and weaknesses of the two systems compared. Some of them shall briefly be presented here.

With regard to the *penal objective*, the recent reform processes brought the formerly highly diverging approaches of the two countries much closer to one another. Today, both countries focus on the reintegration of the child, in line with the international instruments. However, concerning the means of how this aim can be reached, the two countries put the main emphasis on different means: Switzerland (today as in the past) focuses on protection and education, South Africa mainly on 'ubuntu'[8] or restoration. Thus while Switzerland held on to what has been tried and tested in the past, South Africa followed simultaneously African tradition and international trends.

Many points of congruence are found with regard to *age-related issues.* Both countries stand out by having a very low minimum age of criminal capacity: in the past, this limit was set at age 7, while the reform process brought an increase to age 10 in both countries.[9] A difference, though, can be observed with regard to the way the two countries reacted to the recommendation of the

5 The question arises as the second sentence of Art. 37(b) CRC – unlike the first - does not use the wide term of 'deprivation of liberty'.

6 In particular with regard to the principle of last resort, the principle of proportionality and the procedural rights in Art. 40 CRC.

7 See Van Bueren Geraldine, Child-Orientated Justice – An International Challenge for Europe, International Journal of Law and the Family 6 (1992), 381.

8 A traditional African philosophy which 'seeks unity and reconciliation rather than revenge punishment' (Boraine Alex, A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission, Cape Town 2000, 425), familiar from traditional conflict solution and the Truth and Reconciliation Commission (see Skelton Ann, Brit.J.Criminol (2002) 42, 496ff), and which is explicitly referred to in the new Constitution and the Child Justice Act.

9 More precisely, South Africa retained the *doli-incapax* approach, using age 10 as the new lower age limit (the upper being set at age 14).

CROC (which prefers a minimum age of 12 or higher) to reconsider and increase the planned new age limit. While South Africa discussed the recommendation intensively and tried to justify non-compliance with it, the Swiss parliament seems simply to have ignored it. However, both countries can defend the low minimum age by referring to certain other age-related differentiations in juvenile justice procedures that aim at protecting the youngest, like a provision that sets a higher minimum age for prison sentences.[10] On the other side and as further common ground, there are in both countries calls for or tendencies to introduce harsher rules for older juveniles – a trend that raises some concerns, as it can lead to excluding (certain) juveniles from juvenile justice jurisdiction, which is not tolerated by international law.

Procedural rights

Another area where similar developments can be observed is the way the two countries deal with *procedural rights*. Both have strengthened the position of the accused and delinquents in the last reform process. This is without doubt a direct impact of attempts to comply with international (and regional) standards.

Of course there are also many points where the two countries are at a very different level of development, or where they reacted very differently to new trends. Such divergence can first of all be found with regard to the issue of *specialization* in the area of juvenile justice. While Switzerland—as many other states—started to promote separate laws, procedures and institutions for juveniles many decades ago and has thus reached a high degree of specialization today, South Africa is only at the beginning of such a development. Anyhow, the young democracy presents some innovative and progressive ideas to further specialization. Examples of the former can be found in the establishment of so called 'One-Stop Child Justice Centres,' which provide various child justice services under one roof, or in the creation of special 'Children's Units' in Legal Aid Justice Centres. An example for progressiveness is found in the trainings with juvenile justice professionals that have been conducted in recent years and partly included international standards. In comparison, Swiss juvenile justice judges still mainly 'learn by doing', as no systematic and specific training for these professionals exists. This lack also includes training in international standards, for which Switzerland has been criticized by the CROC. Thus in certain respects it seems that the history of South Africa is opposed to a certain need for adjustment and review on the side of Switzerland.

Diversion

With regard to *diversion,* two very different developments can be observed in the two countries. In the South African reform process, the concepts of diversion and restoration soon became the cornerstone of the new law (which, luckily, in the end survived the 'repressive flashback' caused by the 2003 deliberations). The provisions on diversion in the Child Justice Act stand out in three ways: firstly by the very wide – or better almost unrestricted - field of applicability; secondly, by its restorative orientation,[11] and finally by the codification of carefully formulated diversion standards. This new focus reflects the strong will of the country to break with the repressive approach of the Apartheid years; simultaneously, it connects African tradition with modern children's rights in a remarkable way. In Switzerland, on the other hand, the term 'diversion' was mentioned not even once in the recent reform process, and the introduction of a provision for victim-offender-mediation was confronted with quite some scepticism. Such reluctance seems surprising in the light of the well known Swiss mediation-tradition. However, it has to be mentioned that traditionally, the Swiss juvenile justice system implies some characteristics that strongly remind of the concept of diversion – like informality of procedure, few stigmatizing registration provisions, the possibility to react to juvenile delinquency with non-intervention or various social programmes, a restrictive approach towards imprisonment – thus compared with (the formerly repressive) South Africa, there was much less pressure to look for alternatives to traditional ways in dealing with juvenile offenders in order to create a more human approach.

The issue of *deprivation of liberty* is probably the area where the approaches of the two countries differ most. In particular (and concerning the principle of last resort) it can be observed that Switzerland is very restrictive with regard to imprisonment as a sentence, but rather generous with regard to welfare-orientated institutional treatment as a sentence, while in South Africa, it is the other way round. This is true for the time before and after the recent reform processes and might be a reflection of the very different approaches of the two countries to deal with juveniles in conflict with the law in the past (welfare against repression).

[10] However, a special minimum age for *all* forms of deprivation of liberty is not provided for in both countries.

[11] An approach that can be found again in the (alternative) sentencing rules. See also n 8.

Most welcome in the light of international law is, obviously, the restrictive Swiss approach concerning imprisonment.[12] Most concerns are raised by the South African way of dealing with and implementing prison sentences; conditions in prisons seem still too often inadequate, prison sentences still far away from being a measure of last resort, life imprisonment remained a possible sentence under the new Act, and the applicability of minimum sentences for juveniles was not outlawed by the latter.

…….and some conclusions in the end:

As mentioned at the beginning of this article, the analyses carried out in the book aim to find, in the end, answers to the following questions: Can international law serve as a new model for juvenile justice and provide States with useful guidance? How far do the Swiss and South African justice systems comply with international law (past and present/future), and how far has the latter influenced the recent reform processes in the two countries? The book suggests, in sum, the following answers:

- Yes, the framework of international children's rights law provides a new model of juvenile justice *('Children's Rights Model')*.[13] The study shows that in the past years, international law has increasingly been used as a guideline for juvenile justice law reform and as a basis for considering or evaluating juvenile justice systems and developments, South Africa being just one example.[14]
- The *old Swiss Juvenile Justice Code of 1937* already contained some important elements of the more recent Children's Rights Model. This is regarded as a consequence of the fact that the international framework incorporated some elements of the welfare model, which also had (strongly) influenced the drafters of the old Swiss Code – namely the concepts of protection, separation, specialisation and individual sanctioning, aiming at resocialization.
- The recent *Swiss juvenile justice law reform* brought additional convergence with the international standards. Indications for such a trend are found in the continued efforts towards securing special treatment of juveniles in conflict with the law (separate laws, procedures, authorities and institutions), in the expansion of procedural rights and in the introduction of (although rather modest) forms of diversion. However—and maybe surprisingly—only limited explicit references to international law have shaped this process.
- In *South Africa*, the recent juvenile justice reform process has been profoundly influenced by international law.[15] This brought about a shift from a crime control model towards a Children's Rights Model since the advent of democracy in 1994. International law was an important factor in shaping the new Constitution, legislation and judicial decisions in the field of juvenile justice, and in the making of the Child Justice Act. But only time will tell whether this progressive approach will be able to prevail against the re-emerged calls for repression, and how successful the (further)[16] implementation of the new Act will be.

At this point, the question arises why the two countries reacted so differently to the recent developments on the international level. The last Chapter of the book looks for possible answers:

- In Switzerland, there was no need for major changes in the recent reform process, as already the old law was quite compatible with the international standards. However, some deviations remained—in particular as a result of the strong welfare orientation of the Swiss Code—thus one can ask why those divergences were not resolved. Maybe negligence played a role, fed by the presumption sometimes found in ‚Western' states to be generally in line with international human rights standards.[17] Another explanation might be that Switzerland consciously wanted to hold on to already established procedures and ways of dealing with juvenile accused or delinquents, and placed these above all other considerations.
- The strong orientation on international law in the South African reform process, on the other hand, has basically been explained with the policy void that prevailed at the beginning of the transition (and juvenile justice reform) period, accompanied by a search for guidance, and the aspiration to adopt internationally accepted principles and standards after some decades of exclusion

12 This sentence is limited to juveniles above 15 years of age, with a maximum term of one year (exceptionally four years for juveniles older than 16 years), and the number of juveniles imprisoned is comparatively low.

13 See also Sloth-Nielsen op cit (n 1), 98ff.

14 A welcome side-effect of such a role model function of the 'Children's Rights Model' is that it provides a useful instrument for comparing different national juvenile justice systems, as it has been done in study presented here.

15 See also the detailed study of Sloth-Nielsen op cit (n 1).

16 It was noted in this paper that one of the strengths of the reform process lies in the fact that some (key) elements of the Act are already implemented today.

17 See Neubacher Frank, Schüler-Springorum Horst, Einführung, in: Internationale Menschenrechtsstandards und das Jugendkriminalrecht – Dokumente der Vereinten Nationen und des Europarats, Bundesministerium der Justiz in Zusammenarbeit mit der Deutschen Vereinigung für Jugendgerichte und Jugendgerichtshilfen (Hrsg.), Mönchengladbach 2001, 1.

from the international community.[18] This move seems to have been further promoted by some additional elements (probably also attributable to the transition process) – like highest government level patronage at the beginning of the reform process, ongoing support by a strongly committed children's rights lobby, and completion by a dedicated Portfolio Committee. Beyond that, the South African reform process generally shines out by the intensity of how different role players have reflected about juvenile justice issues, while using the experiences of others.

Final Remark

In the end, I brought back especially two insights from this journey: Firstly, that it is important to acknowledge and valuate national particularities, proven qualities and achievements of the past, as far as there are such (like in Swiss juvenile justice law); secondly, that it is (even then) as much important to allow now and then to question what is regarded as given – as well as to stay open for new approaches, and to be willing to learn from each other (as South Africa did). One of the values of the international instruments might be that they serve as a good basis to further such reflection.

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[18] See Sloth-Nielsen op cit (n 1) 8f.

Law for non-resident Indian families–a dilemma

Anil Malhotra*

The problems in brief

There are many legal issues affecting a sizeable section of the non-Resident Indian (NRI) Community living abroad[1]. Examples arising daily are:

- brides abandoned by non-resident Indians;
- NRI parents frantically searching for their spouse who has taken their child to India in violation of a foreign court order;
- desperate spouses seeking child support and maintenance;
- NR spouses seeking enforcement of foreign divorce decrees in India;
- children of a deceased NRI seeking transfer abroad of property in India;
- anxious foreign adoptive parents desperately trying to resolve Indian legal formalities for adopting a child in India;
- bewildered foreign High Commission officials trying to understand the customary practices of marriage and divorce preserved by Indian legislation; and
- foreign police officials trying to understand intricacies of Indian law in apprehending offenders on foreign soil.

Likewise, there is a plethora of problems for NRIs concerning succession and transfer of property, banking, taxation, writing and implementation of wills and other commercial questions.

Although remedies partly exist in Indian law, the NRI may attempt to import a judgement from a foreign court. There is not yet a developed jurisprudence in India to deal with this clash of jurisdictions[2]. New legislation is urgently needed. Conventional Indian legislation has not moved with the times.

Marriage and children

Irretrievable breakdown of marriage is not a ground for divorce under Indian law and Indian Courts do not recognise foreign divorces based on this. A deserted Indian spouse on Indian shores, confronted with matrimonial litigation of a foreign court, which he or she has neither the means nor the ability to engage with or invoke, may fall into helpless despair.

Likewise, an NRI parent may come to India desperately seeking enforcement of a foreign court order, the intention of which was to prevent the child being removed from the jurisdiction of the court that made the order.

India is not a party to the Hague Convention[3] on child abduction. Neither was Pakistan. But the UK-Pakistan Judicial Protocol was signed[4] on 17 January 2003. It incorporated the provisions of the Hague Convention for the return of abducted child(ren) to their country of habitual residence. There is a crying need for India to follow suit[5].

Suggested solutions

The Indian legislature seriously needs to review these issues and enact legislation to avoid NRIs importing judgments from foreign courts to implement their rights. Such legislation should provide law applicable to them as Indians. Until this is done, courts in India will continue attempting to interpret foreign court judgments in harmony with Indian law, while doing justice to the parties. The Indian judiciary has made one thing very clear—in family matters Indian courts will not mechanically enforce judgments and decrees of foreign courts. Indian courts look into the merits of cases and decide them in the best interest of the parties after consideration of Indian law.

The following proposals are mooted to mitigate family law problems met daily by NRIs.

i. registration of marriages

Current legislation[6] makes it optional for Indian State Governments to provide for registration of marriages. States with significant NRI migration must make marriage registration (and related matters) compulsory, particularly when one of the spouses is an NRI. This would establish:

[1] 30 million NRIs have settled in 130 countries.

[2] Commonly called "Conflict of Laws in the realm of Private International Law".

[3] The Hague Convention on the Civil Aspects of International Child Abduction, 1980.

[4] By the President of the Family Division of the High Court of England and Wales and the Chief Justice of the Supreme Court of Pakistan.

[5] The British and Indian Governments have recently signed a treaty allowing extradition of offenders against the criminal law.

[6] Section 8 of the Hindu Marriage Act, 1956.

- proof of marriage;
- conditions for a valid marriage; and
- a deterrent against bigamy.

It should also be obligatory for the NRI spouse to record his/her marriage at the relevant Embassy/High Commission in India—normally that of the overseas country of residence.

ii. dissolution of marriage

Subject to safeguards, an additional ground for divorce—irretrievable breakdown of marriage—should be introduced when at least one of the spouses is an NRI. This would require amendment to two Acts[7]. This would allow NRI spouses to seek a remedy on Indian soil and allow the resident Indian spouse to defend the action on convenient and equitable terms in the Indian courts.

iii. child custody and maintenance

Where one of the spouses is an NRI, additions must be made to those two Acts[8] to address:

- child custody;
- maintenance of spouses and children in line with the income of the NRI spouse; and
- the settlement of matrimonial property.

iv. child abduction

India must sign the 1980 Hague Convention on child abduction to provide for recognition and implementation of foreign court orders. Until then, State Governments with high NRI populations should permit liaison with foreign missions and embassies in New Delhi. Courts would then be assisted to ensure the return of children to their country of residence. The administrative and police authorities in these Indian States should set out guidelines to help distressed parents, who often do not know where to go for help.

v. adoption

Inter-country child adoption procedures must be simplified, uniform legislation enacted and a single agency provided to deal with the adoption of Indian children by NRIs. Indian States with high NRI populations should lay down uniform policy guidelines—to be observed by State agencies, administrative authorities and adoption homes—so that proper help is available in adoption matters.

vi. family courts

Where Family Courts have not been established[9], the respective State Governments should be directed to do so as a matter of urgency. Family Courts should give priority to the settlement of cases involving an NRI.

vii. property and fast track courts

State Governments must simplify and streamline procedures in matters of:

- succession;
- transfer of property;
- writing, execution and implementation of wills; and
- repatriation of NRI funds.

Fast track Courts must be set up to deal with cases according to a strict timetable. The Punjab Government has introduced[10] summary trial for disputes regarding agricultural, commercial and residential property. However, in most States with a high NRI population no special Fast Track Courts exist.

Conclusion—Committee for change

It is my view that the above changes can be made either by enacting new legislation specifically for NRIs or by making suitable amendments to existing legislation to streamline laws and procedures. The Law Commission of India has already submitted reports suggesting reform in this area. A Core Committee of specialists in the field of Private International Law should be constituted as soon as possible to prepare a comprehensive draft of these much-needed changes. It is important to see what India can do for the NRI and not what the NRI can do for India.

The above is a synopsis of Anil Malhotra's book "India, NRIs and the Law", published by Universal Law Publishing Company Private Limited.

Anil Malhotra*, a Fellow of the International Academy of Matrimonial Lawyers and practises at the Punjab and Haryana High Court, Chandigarh, India.

7 The Hindu Marriage Act, 1955 and Special Marriage Act, 1954.

8 The Hindu Marriage Act, 1955 and Special Marriage Act, 1954

9 Under section 3 of The Family Courts Act, 1984

10 By amending The East Punjab Rent Restrictions Act and The Punjab Security of Land Tenures Act.

Contact Corner — Editor

We receive many interesting e-mails with links to sites that you may like to visit and so we are including them in the Chronicle for you to follow through as you choose. Please feel free to let me have similar links for future editions. **Editor**

From	Topic	Link
Bernard Boeton* Fondation Terre des Hommes (TdH)	The European Court of Human Rights Detention of children unlawful 19/01 2010	http://tdh-childprotection.org/content/view/1836/1/
Fondation Terre des Hommes (TdH)	Children in care—what role for the EU?	tdh-childprotection.org/content/view/1830/1/
Jean Zermatten* Institut international des Droits de l'Enfant **(IDE),** Vice Chair UN Committee on Rights of Child	"Les mutilations génitales féminines" Didactic handbook on MGF for Professionalsin Switzerland One hundred and thirty million women involved! (Fr) Book available from IDE website	www.childsrights.org
IDE	Publications on Nepal and China Seminars are now available	www.childsrights.org
The Child Rights Information Network **(CRIN)**	CRIN's website offers 18, 519 child rights resources which include information in four languages (Arabic, English,French and Spanish).	Email: info@crin.org www.crin.org
Council of Europe Presentation by **Sabrina Cajoly** (only in French)	The work of the Council of Europe on child-friendly justice: recent developments	http://www.google.co.uk/search?hl=en&rlz=1W1GGIH_en&q=Council+of+Europe+Sabrina+Cajoly&btnG=Search&meta=
Council of Europe	Draft Council of Europe Guidelines on child-friendly justice—2nd meeting report	http://www.google.co.uk/search?hl=en&rlz=1W1GGIH_en&q=Council+of+Europe+2nd+draft+guidelines+on+child+friendly+justice&btnG=Search&meta=lr%3D

Treasurer	Avril Calder

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In the early months of 2009 I sent out e-mail requests for subscriptions to individual members (GBP 20; Euros 30; CHF 45) and national associations.

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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 Tunis, Tunisia November 2009

Petra Guder, Avril Calder, Hervé Hamon, Ridha Khemakhem, Oscar d'Amours, Joseph Moyersoen, Shakid Daoudi (ATUDE)

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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 2000 - 3000 words in length. 'Items of Interest', including news items, should be up to 800 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

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