CHRONICLE CHRONIQUE CRÓNICA

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Editorial — Avril Calder

Children's rights

You will recall that I emphasise a theme in each edition of the Chronicle while still leaving space for issues that need to be aired and for your contributions. The theme for this edition is children's rights.

To begin with there is a short article written by **Judge Eduardo Rezende Melo** and colleagues in Brazil. It marks a sea change in the approach to giving effect to children's rights in that country. In short there was a Supreme Court judgement which ruled that the authorities cannot use lack of finance as a justification not to provide effective implementation of children's rights. Readers will remember the 'cri de coeur' from Belgium on the effects of shortage of resources on juvenile justice that was published in the Chronicle in January 2008.

Influenced by the Convention on the Rights of the Child(CRC), there has been a complete change in the administration of juvenile justice in the Buenos Aires Province of Argentina. **Magistrate Patricia Gutiérrez** explains how and why the change came about and that the Court now follows due process with legal safeguards modelled on the CRC.

The Institute for the Rights of the Child (IDE, Sion, Switzerland) devoted its autumn 2010 conference to harmful traditional practices such as early marriage, female genital mutilation and violence in the family. I am pleased to publish two articles from it.

The first is an in depth review of cases that have come before the European Court of Human Rights. **Juriste Mme Christiane Brisson** describes the developing philosophy of the Court and, by reference to a large number of cases, shows how the Court interprets the articles of the European Convention in a range of situations.

The second is by **Dra Marta Maurás Pérez** of Chile, a member of the UN Committee on the Rights of the Child, who explains how the Committee goes about its work and the Convention Rights that are violated by harmful traditional practices.

Ms Justice Belinda van Heerden of South Africa and **Mr Justice Imman Ali of Bangladesh**, Appeal Court Judges both, have contributed cases of theirs which relied on the CRC and or other international instruments. These cases demonstrate the support that International Conventions give to Judges in their analysis of the facts of a case and their deliberations in forming a judgement.

The question of children giving evidence is an ongoing question in the Family Courts and so I have included the **Times** Law Report of 2010 where the Supreme Court of the United Kingdom concluded that under Articles 6 and 8 of the European Convention on Human Rights, a presumption that a child should not be heard in the Family Courts could not be sustained.

This brings me neatly to the question of child friendly justice. What is it? The Council of Europe has been much engaged with this subject. **Edo Korljan** of the Council outlines the approach for us and describes the development of Guidelines for Member States to implement.

A South American project to develop child friendly justice systems across **Mercosur** countries is set out in an article submitted by judges from their Association. I welcome this link and very much hope its authors will be contributing to this publication in the future.

The recent fourth International Juvenile Justice Observatory Conference in Rome addressed an integrative approach to mental health and drug abuse in juvenile courts. **Dra Cristina Calle** kindly reports on the Conference and the next Chronicle will carry some of the presentations.

Many imprisoned children have mental health problems and many have abused drugs. **Judge Benoit van Keirsbilck** of Belgium has contributed an article which reminds us that taking away a child's liberty is a severe measure with potentially longer term damage to the individual and society. The article also summarises research into the effects of prison on young people. Working with Benoit, the January 2012 edition will look in depth at the research, especially longitudinal studies. Please would you think about research that you know of and that you find valuable in your work and let us know the reference. Additionally, if you have a view that you would like to bring to the attention of members, please let me know.

As you know, the Parliament of New Zealand has passed an Act extending both the age range and powers of the Youth Court. **Linda McIver**, Counsel to the Principal Youth Court Judge for New Zealand, tells us what is involved. A recent talk I gave to a seminar in Brussels organised by Defence for Children International on my view of some of the strengths and weaknesses of the youth justice system in England and Wales follows Linda's article.

Also from New Zealand, **Judge Sir David Carruthers**, who is recognised world wide as an authority on restorative justice, shows us that restorative justice practices are applicable in other areas and tells us about their use in schools.

Effective case management is a challenge for all courts, After testing. various caseflow systems, the New Zealand Family Court has developed an Early Intervention Process. From the outset, a case which has indicators for complexity or intractability is earmarked for prompt judicial oversight. The Principal Family Court Judge for New Zealand, **Peter Boshier**, explains how it works.

From India, **Anil Malhotra** describes proposals to introduce legislation on surrogacy which is a major business there and, from the USA, **Judge Leonard Edwards** (retired) gives us food for thought on engaging fathers in child protection cases, a subject which he believes needs urgent and purposeful thinking.

Over my years as a magistrate I have from time to time been involved with the National Council for Youth and Family Judges and Magistrates in Reno, Nevada, USA and have been fortunate to enjoy the friendship of **Mary Mentaberry**, who has recently retired from her post as Executive Director of that Institution. I am very pleased, therefore, to be able to publish the warm tribute made to Mary in the USA press. She will, I know, be continuing to work for the interests of children and young people and I sincerely hope that she will find time to help the Chronicle!

Finally, there is a report of the successful inauguration of the European Section. **Judge Daniel Pical** of France was elected President.

Thank you, as ever for your continuing support. Please keep the articles coming!

Avril acchronicleiayfjm@btinternet.com

Letter from the President— a difficult year ends, a new year begins

Joseph Moyersoen

Dear IAYFJM Members,

2010 has just finished. The year was characterized by the effects of the economic crisis that unfortunately affected many of our countries. The effects have also touched directly or indirectly juvenile justice systems of some countries where there have been cuts of significant human and economic resources. In the field of children and young people in conflict with the law reforms of a repressive rather than a restorative or rehabilitative nature have been introduced or promoted. We hope that the year 2011 will lead to a reversal of these trends. It is a topic to which our Association must pay special attention.

The new IAYFJM Executive and Council have begun their work. The Executive Skypes monthly (as allowed by amendment of our Statutes at the General Assembly in Tunisia April 24, 2010). The Council met in Sion in October at the Swiss headquarters of the International Institute on the Rights of the Child (IDE). This is also the new headquarters of IAYFJM. We very much appreciate the kindness of the President of IDE, Jean Zermatten, in allowing IDE to be our 'home'.

Many actions are underway including the Action Plan 2011-2014 and the identification of country and theme for the next IAYFJM World Congress in 2014. I am also able to report three new tools that are being established by the Executive for all of you from early 2011—the website, the on-line Forum and Association e-mail addresses for the Executive.

From February 2011 IAYFJM will finally have its own website at www.aimjf.org . So far, IAYFJM has enjoyed the hospitality of the website at www.judgesandmagistrates.org and for that I am very grateful.

The new website has seven public web pages, classified by topic: "Who are we," "Membership," "The Chronicle", "Documentation", "Events," "Laws," "Jurisprudence".

We are planning to develop a section visible only to IAYFJM members.

In a society increasingly computerized, in which young people are immersed from an early age in the use of computerized tools, we consider it essential to have a website, for the Executive to meet monthly by Skype and for there to be an on-line Forum.

As many of you have already learned from the Secretary General's e-mail message, the on-line Forum is similar to that already successfully tested by the Italian Association of Magistrates for Youth and Families and by other organizations.

What is it? It's very simple.

Your e-mail address is integrated into a system that allows IAYFJM, in particular its Secretary General, to send you through the e-mail address info@aimjf.org, and in our three languages, useful information such as IAYFJM initiatives, documents, studies and also information from other organizations that may interest you.

Through info@aimjf.org it also allows you to write directly to other colleagues for information—for example information on juvenile and family justice systems of other countries relating to law, case law, studies, research and best practice

The Forum registration is virtually automatic with registration and payment of annual IAYFJM fees.

I hope you will use this instrument, so do not be shy, write your questions, queries and suggestions.

Finally, we thought it would be useful for Executive members, in addition to their specific e-mail addresses to have e-mail addresses for IAYFJM.. You can contact individual Executive Committee members on any matter concerning IAYFJM:

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Eduardo Rezende Mello:	secretarygeneral@aimjf.org
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I send this message to wish you all, including from the Executive, my best wishes for the New Year 2011 which I hope will bring you what you want and that it will also be a better year for juvenile and family justice.

Joseph Moyersoen*

Judicial review of rights in Brazil

Judge Eduardo Rezende Melo and colleagues

The introduction in Brazil of class actions (called public civil actions) in 1985 and the provision in the Statute for Children and Adolescents, 1990, of their applicability to the guarantee of general, collective and individual[1] rights of children and adolescents proved to be a turning point in judicial interpretation in the field of social rights.

There were three important bases in this process. First, the obligation under Article 4 of the UN Convention on the Rights of the Child, to give effect to Convention Rights to the maximum of the resources available, was incorporated into the country's Constitution (art.227), giving absolute priority to the rights of children and adolescents. This article came to be interpreted as a guideline to the administrative activities of government and a limit on the discretionary power of the Executive Branch.

Second there was progress in giving effect to constitutional rules, which were no longer considered to need interpretation when they involved fundamental rights. Instead, they have immediate effectiveness, ensuring citizens the right to pursue these rights through the courts.

As the control of the constitutionality of laws in Brazil is diffuse—that is all judges have jurisdiction to review constitutional issues raised in the trial court—there was growing judicial discussion about the effectiveness of social rights in the country.

Third, a deeper consideration of budgetary constraints on the effective implementation of social rights. The Executive Branch often based its refusal to guarantee social rights on the shortage of budgetary resources, leading to the concept of "subject to finance." Yet, national jurisprudence has come to the understanding that the authorities cannot refuse to meet constitutional promises of social rights if they have allocated budgetary resources to lower priority matters of less relevance to the basic values of society. Thus, neither the citizen nor the public prosecutor should have to demonstrate the financial capacity of the State. Instead, because of the priority of fundamental rights and the right of citizens to their implementation, the burden of proving a lack of resources lies with the authorities. This maximizes the State's responsibility under Article 4 of the Convention on the Rights of the Child and other rules.

In the context of law and jurisprudence, the search for effective social rights for children and adolescents developed through legal and social strategies, because the Attorney General has the power to alter the conduct of a public authority by means of an agreement that can be enforced in the courts. The enforceability of the decisions is achieved by preventing government from using budgetary resources until the right in question has been promoted effectively. With regard to the rights of adolescents in conflict with the law, the case under discussion highlights these advances in ensuring the fundamental right to adequate care for adolescents deprived of their liberty.

The Public Ministry of Ribeirão Preto, a city of the State of São Paulo (the most densely populated and richest in Brazil), brought a class action against the State Government seeking the creation of an institution of semi-liberty for adolescents—that is, a regime that allows the adolescents to have outside activities during the day, but with the obligation to return at night and stay at weekends.

In his preliminary decision, the local judge ruled in favour of the creation of this institution for adolescents, setting a deadline for compliance and a fine if it was not met. The State government appealed to the State Court questioning the power of judges to make such a ruling and to set budgetary penalties for non-compliance with the deadline set by the judge.

The Court upheld the judge's ruling and, in another appeal, this time to the Supreme Court of Justice of Brazil[2], there was further confirmation with a reaffirmation of the obligation to implement social rights to family life, education and dignity for adolescents who need this kind of attention and have a legal right to its realization through the Attorney General, who represents them.

- **Eduardo Rezende Melo*** – judge in Brazil and Secretary General of IAYFJM
- **Andrea Santos Souza*** – district attorney in Brazil and Representative at IAYFJM
- **Brigitte Remor de Souza May*** – judge in Brazil and Representative at IAYFJM
- **Helen Sanches** – district attorney in Brazil, President of the Brazilian Association of Child Protection & Juvenile Justice Magistrates, District Attorneys & Public Defenders

[1] According to Brazilian law, general rights are those of groups of people who cannot be classified by certain criteria (eg pollution that affects a certain region and the health of its population); collective rights are those of a specific group of people in relation to other groups (eg the rights of disabled people to have the pavement adapted for wheel chairs); homogeneous individual rights are those available to everybody in a certain category (eg the right to education for children) The law specifies that the effective provision of education at all levels, health services, family support services et cetera can be pursued in Court.

[2] Reference: Brazilian Supreme Court of Justice (REsp 630765 / SP SPECIAL APPEAL –Recurso Especial - 2004/0008887-0)

Helen Sanches, District Attorney

Judge Eduardo Rezende Melo

Andrea Santos Souza, District Attorney

The new Criminal Juvenile Justice system in Buenos Aires Province

Magistrate Patricia A Gutiérrez
Argentina

Introduction

Since 1990, and more particularly since 1994—when the UN Convention on the Rights of the Child (CRC) was incorporated into the National Constitution[1]—the Doctrine of the Comprehensive Protection of the Rights of the Child (DCPRC) and its regime of juvenile criminal liability has governed the Argentine Juvenile Criminal Justice System. The DCPRC provides for a minimum sentencing system, based on safeguards, accountability, redress and social cohesion. It comprises two basic, major guidelines—a body of criminal legislation concerned with the criminal act; and the principle of minimum intervention within adversarial criminal proceedings.

Amendment of the legislation: Adversarial criminal proceedings:

There are a lot of overlaps in juvenile criminal law. National Law 26.061[2], just like Provincial Law 13.298, contains the basic guidelines set out in the CRC. These three legal instruments establish the governing principle as the *best interests of the child*, and promote the active participation of children, giving their opinions priority.

The family has a privileged position and a central role in the emotional support, development and integration of the child into society. The State must do whatever is necessary to ensure the implementation of the rights of the child. The idea is to take social conflicts involving children out of the legal process, moving the focus of care to welfare management. The role of the courts is to determine the legality of administrative action—either civil (Family Court) or criminal (Juvenile Accountability Charter). Child-oriented policies are decentralized[3]

Juvenile criminal proceedings are governed by Law 13.634[4], which complements Law 13.298. The idea is to implement the DCPRC in criminal judicial proceedings, moving away from the protectionist doctrine established under Decree Law 10.067, which preceded it. To do this requires the juvenile criminal law to incorporate the principles of rights and safeguards that had hitherto been excluded on the grounds that the system already provided protection to young people. The Argentine Constitution, the CRC, the Provincial Constitution, Article 8 of the American Convention of Human Rights (ACHR), the ICCPR and related provisions are clearly opposed to that view[5].

The principles of legality, due process and guilt for the offence cannot coexist with the logic of the protectionist approach, which is based on the child's alleged need for protection, whether or not he/she has committed an offence, and without the safeguard of due process—a system built on an offender-centred criminal law and an inquisitorial, mentoring procedure.

Provincial Law 13.634 follows the path of Articles 12, 37 and 40 of the CRC. These provide for an adversarial criminal procedure that ensures the implementation of safeguards of due process for any child in conflict with the criminal law.

[1] Article 75(22) of the Argentine National Constitution amended in 1994.

[2] Law 26.061 applies in the Province of Buenos Aires to any cases that are not exclusively provincial in jurisdiction, according to the provisions of Articles 5 and 31 of the Argentine Constitution.

[3] Law 13.298, Sections 3, 4, 5, 6, 7, 14, 34; Law 13.634, Sections 3, 16, 18, 65; Law 26.061, Sections 1 to 7, 10, 24, 27, 32; CRC, Articles 3, 4, 5, 9, 12, 16 and 18; and related provisions.

[4] It complements Law 13.298, Title II, Chapter IV, which dealt with Criminal Proceedings. Sections 53 to 63 of Law 13.298 were repealed by Law 13.634.

[5] Articles 18, 19, 75 (22) of the Argentine Constitution, Article 40 of the CRC, Article 10 of the Provincial Constitution, Article 8 of the ACHR, Article 14(3) of the ICCPR,

Law 13.634 acknowledges the jurisprudential and judicial criticisms of the old system and aims to create a new system based on the constitutional guidelines. It establishes an adversarial criminal procedure. It introduces into the juvenile justice system the roles of Prosecutor and Defence Attorney (independent of the Juvenile Counsel). It clearly separates the initial stage from the trial stage as well as making clear the different duties and roles within each stage. The magistrate presiding over the initial investigation stage of the case is not the same judge who will preside over the trial. The Prosecutor is in charge of the collection of evidence and the indictment. The defence is conducted by an official or a barrister in private practice. In section 36, the law reiterates that children subject to criminal proceedings enjoy all the rights and safeguards awarded to adults, plus some special safeguards available to children due to their age.

Pre-trial detention

One of the most significant amendments to the old juvenile system is the regulation of pre-trial detention. The new law gets rid of some former euphemisms and sets the specific boundaries of pre-trial detention, basing its application on the constitutional requirements[6].

In criminal proceedings governed by the earlier Decree Law 10.067, pre-trial detention, under the philanthropic cover of a protective measure, was exempt from the restrictions imposed by the criminal law. Both its application and duration were left to the discretion of the magistrate, who could decide on temporary or permanent measures for the child concerned.

The most common justification of protective custody in the previous system was the protection of the child—related to his reintegration into society, rehabilitation or re-education—and the protection of society—related to public order and the prevention of crime.

This power of protective custody over children in conflict with the criminal law that the magistrate enjoyed under the repealed Decree Law 10.067 and now has under Sections 2 and 3 of Law 22.278 is not valid under the constitution. It should be understood as giving the judge authority to adopt a preventive measure for procedural purposes for the administration of justice and not as a protective (welfare) measure.

The principles of presumed innocence and respect for individual freedom mean that pre-trial detention is an exceptional measure to be applied for the shortest possible period of time when there is no other, less burdensome measure available; and with the sole aim of ensuring the enforcement of the law. In accordance with this, Sections 43 and 44 of Law 13.634 permit pre-trial detention as an extraordinary, subsidiary and temporary measure that may be applied only in “serious cases”. It must be requested by the Prosecutor. The Supervising Judge (the judge responsible for procedural safeguards) may adopt the measure “as an exception” in an oral hearing, provided that the accused, the Prosecutor and the Defence Attorney are all present and that the gravity of the case warrants it.

The regulation of pre-trial detention starts in Section 43 with the statement “In serious cases…,” thus excluding other possibilities. We may wonder exactly what “serious case” means. A first reading might indicate that the “gravity” is proportional to the legal valuation of the items affected by the alleged offence. Subsection 4 adds another element to clarify the concept of “seriousness”, as it excludes from pre-trial detention those cases where the offence can be dealt with by a suspended sentence under Section 26 of the Procedural Code.[7]

In cases where a young person is found guilty of an offence and is sentenced to prison, the law requires a careful assessment and a reduction of the custodial penalties to the shortest appropriate period of time[8]. This assessment must be even more thorough and restrictive when the accused child has pleaded not guilty.

[6] in accordance with Article 75 (22) of the Argentine Constitution; Articles 37(b), 40, 40(b)(i), 7(5), 8(2) of the ACHR; Article 9(3) of the ICCPR; Rule 13 of the Beijing Rules; Rule 6 of the Tokyo Rulesccording to the legislation mentioned above and the national and international legal precedents set in the cases *Suarez Rosero* on the matter of extension of temporary measures in Ecuador. Resolution issued on April 24th, 1996, reissued in the 1996 Annual Report of the Interamerican Court of Human Rights [147], OAS/Ser.L/V/III.35, doc. 4 (1997);. and *Velázquez Rodríguez,* judgment delivered on July 29th, 1988, Interamerican Court of Human Rights (Ser. C) No. 4 (1988).” of the Interamerican Court of Human Rights, and *Nápol*’ *Erika Elizabeth y otros s/infracción art. 139 bis del C.P.*”, Argentine Supreme Court of Justice, No. 284.XXXII, 12/22/98.and “*M., D. E. y otro* Case “*M., D. E. y otro*” Argentine Supreme Court of Justice, 12/07/2005” and "*Famoso, Elizabeth*" of the abovementioned Criminal Court, among others.

[7] Section 26 of the Procedural Code: In cases of first sentencing to prison for a period of no more than three years, the courts have the power to order the suspension of the sentence within the same judgment. To be valid, this decision must be based on the moral character of the convicted person, his/her behaviour after the commission of the offence, the reasons that drew him/her into crime, the nature of the act and the other circumstances that prove that actually enforcing the prison sentence would not be appropriate. The court will request the relevant reports in order to make a judgment, and the parties will be allowed to offer relevant evidence for this purpose. The courts will have the same power in cases of concurrent offences provided that the sentence imposed does not exceed three years´ imprisonment. Suspended sentencing will not apply in cases where the sentence imposed is a fine or professional disqualification.

[8] Law 13.634, Section 58(2).

Given the text of this provision, I infer that there is a legal loophole in the interpretation of the term "serious case." According to *Roxin*, if the judge is limited by the legal text, the text needs to be interpreted. In case 16921 of the Supervising Tribunal where I presided, the Criminal Court of Appeal pointed out that, to be clear, this concept requires an assessment of the context in which the criminal behaviour took place. Both the Beijing Rules and the Riyadh Guidelines provide interpretive standards. According to Rule 17 of the Beijing Rules an offence is considered serious when it involves violence; and according to Rules 1, 3, 9, 12, 32 and 68 of the Riyadh Guidelines, the family background must be taken into account.

Thus, I believe that to determine whether the accused child can be released from prison, the concept of gravity[9] must be considered in conjunction with the length of sentence applicable to the offence committed. This does not apply when the offence gives rise to a minimum sentence of more than three years in prison[10] and a maximum sentence of more than 8 years[11] .In addition to the length of the sentence, the judge must consider indications that might be taken as a signs of danger, along with other elements like the attitude or behaviour of the accused during the proceedings, his criminal record and family background, etc.

The maximum period of pre-trial detention is 180 days. At the request of the Prosecutor, the judge may exceptionally extend this period for a further 180 days where that is required by the complexity of the investigation or by the existence of more than one alleged offender. This period may be extended further only when the case has been submitted to court and there is a trial pending. Otherwise, when people have been detained for a crime, the criminal investigation may not exceed a maximum period of 120 days, which under Section 48 may exceptionally be extended for a further period of 60 days. Once this investigation period has elapsed, there are no grounds for the continuation of the preventive measure and the accused must be released under Section 43.

The Defence Attorney may request a review of the measure imposed by the Supervising Judge every three months. In turn, the Supervising Judge may order the release of the Defendant—even when this decision is challenged by the Prosecutor—when he considers there are no grounds to sustain detention. This decision must be supported by a written order giving reasons—Section 50.

The extension and ending of pre-trial detention, as well as its imposition, must be ordered by the Supervising Judge in an oral hearing. The Defendant, Prosecutor and Defence Barrister must all be present for the proceedings to be valid.

Diversion measures

The different treatment of children and adolescents within the criminal justice system is warranted by their specific characteristics. . Adolescence is the first experience anyone has of the societal aspects of life. It is the moment when people emerge and start defining themselves through meaningful personal experiences. During this process, some form of violation of rules is not infrequent.

The Argentine Supreme Court of Justice has ruled that children and adolescents "…do not have the same level of emotional maturity that is to be expected and required of adults, and this can be verified through ordinary experience and in the regular course of family and school life, where some attitudes that are common among children but would be pathological in adults are corrected. Developmental psychology confirms this fact…"[12]

In this regard, Judge Sergio García Ramírez has said that: "the adult system is not transferable or applicable to children. However, there are principles and rules—human rights, constitutional guarantees—that may, by their very nature be applied to both children and adults, irrespective of the modalities that may be reasonably or necessarily implemented in each case." [13]

The European Financial and Social Committee has said that the current juvenile criminal liability system aims to combine educational and judicial aspects, implementing a rights-based model with safeguards together with some measures of an educational nature. Thus, juvenile criminal law is made up of criminal law plus the body of comprehensive legal protection, which must be interpreted as a system that acknowledges children's rights—always broader than adult's rights—and is never directed against children or goes beyond the limits of the specific legal safeguards.

This is why it is so important to have different alternatives in juvenile criminal proceedings. These alternatives, known as "diversion measures", include those that imply the termination of criminal proceedings and the referral of the case to other methods of conflict resolution, and those measures adopted as an alternative to pre-trial detention or custodial sentences.

[9] Law 13.634, Section 43, with supplementary reference to the Criminal Procedural Code, as stated in Section 169.

[10] Section 169 (3) and related provisions

[11] Sections 169 (1) and 169(2)

[12] Argentine Supreme Court of Justice ~ 2005/12/07 ~ "*M., D. E. y otro*"

[13] Advisory Opinion No. 17 of the ICHR on the CRC

These alternative measures may be adopted in an oral hearing, provided that the accused child, the Defence Lawyer and the Prosecutor are all present. It should be noted that the adoption of "diversion measures that put an end to the initial stage or to the whole judicial procedure" is covered in Section 43, which deals with pre-trial detention.

Regarding Article 19 of the ACHR (rights of the child), the Interamerican Commission on Human Rights has stated that: "...judicial safeguards are binding on every process in which the individual liberty of a person is at stake"... "The rules of due process are included, mainly but not exclusively, in the Convention on the Rights of the Child, the Beijing Rules, the Tokyo Rules and the Riyadh Guidelines." [14]

Therefore, the possibility of care must be supported by a framework of comprehensive protection[15] Juvenile matters must be decided in accordance with the responsibilities assumed by the Argentine State in, for example, the Pact of San José de Costa Rica, which establishes[16] that—"Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." This is why, in order to achieve the comprehensive protection of the child, new strategies must be adopted for each particular case (Art. 3 of the CRC); and judges must interpret the law and apply it in each particular case in the light of the needs and best interests of the child.

Conclusion

Law 13.634 finally establishes a criminal procedure for juvenile offenders in Argentina that acknowledges the ordinary rights and safeguards of due process plus the rights and safeguards required by the young person's stage of development. The law provides for a criminal procedure framed within an adversarial system, where due process excludes the discretion of the benign, father-figure judge; for a system that introduces adversarial procedures and where coercive measures may be applied only as an exception and for the shortest possible period of time. However, Law 13.364 has not completely removed every trace of the protective legacy regarding delinquent children[17]

The transition from the protective paradigm to the doctrine of the comprehensive protection of rights requires the rethinking of childhood, the abolition of some deeply rooted practices and concepts, and a restoration of democratic forms of social relations in every area, especially in the cultural, legal and institutional fields.

In order to bring about a change of paradigm, the implementation of the DCPCR requires protection also in the criminal arena, bearing in mind that the governing principle of this doctrine is the *best interest of the child*, and it is not only a principle that governs the interpretation of rules and procedural standards, but also as a safeguarding principle in juvenile criminal law, interpreted even in criminal decisions and in any other legal interpretation as the *fulfilment and non-restriction of rights*. This implies that legal professionals have to provide legal solutions with a real orientation towards the best interests of the child both in form and in content, bearing in mind that when an offence is committed, the State has a duty to provide diversionary measures (as an alternative to coercive measures) within juvenile criminal procedures, ranging from a judicial warning to an admonition or to the release of the accused person under supervision.

Full implementation of the Comprehensive Protection System established in Law 26.061 and the corresponding procedural provisions included in Law 13.634 goes far beyond the mere enforcement of these provisions. They must be implemented together with a series of actions by the State to give effect to the rights and safeguards in criminal proceedings where young people are in conflict with the law. The purpose is to reduce the vulnerability produced in juvenile offenders by the criminal procedure itself, due to the fact that criminal law is the harshest branch of law which affects not only the personal life of the offender but also family life. Despite traditional principles of protection, we must not forget that the juvenile criminal procedure has to be reinterpreted and fleshed out. For example, the Beijing Rules state that, within special prevention procedures, the case does not end in the process itself but, on the contrary, the system should provide "comprehensive protection" in each specific case, adopting every possible protective measure necessary to prevent young people in conflict with the criminal law from re-offending.

Patricia A. Gutiérrez* is a Presiding Magistrate in the Juvenile Court (*Juzgado de Garantías del joven)* No. 1 of Mar del Plata, Argentina.

[14] Advisory Opinion 17/2002 (on case No. 10.506, Argentina, 10/15/96)

[15] Article 3 of the CRC and other international instruments on human rights

[16] in Article 19 (interpreted by the Interamerican Court in the light of the CRC in Advisory Opinion No. 17)

[17] Sections 63 and 68

The European Court of Human Rights—harmful practices and the legal process

Juriste Christiane Brisson

Female mutilation, early marriage…these practices might be thought to belong to another era, but they persist to a significant extent in a number of places. Given their drastic consequences, this should be of concern to everyone.

The European Convention upholding human rights and basic freedoms has been ratified by the 47 Member States of the Council of Europe. They have undertaken to respect its provisions and to ensure that effective remedies exist for any alleged breaches. The Convention is a significant tool for the protection of rights and freedoms because it guarantees the rights set out in its text. The European Court of Human Rights (ECHR) has a role in giving effect to these rights through its international jurisdiction. The Court takes a pragmatic approach, focusing on outcomes, in a way that treats the Convention as a living document, to be interpreted in the light of life as it is actually experienced[1]. The Court considers complaints brought before it under the rules of the Convention and with reference to existing case-law. A judgement by the Court not only decides that particular case, but may also clarify, uphold and develop the principles of the Convention.

A **harmful traditional practice** (HTP) may be defined as:

- an action (not a social norm or custom)
- that occurs with some frequency (so that it assumes the appearance of a tradition)
- with the aim or effect of producing physical or psychological violence
- and which causes harm to the recipient.

The concept of harmful treatment—which is not recognised as such by the ECHR—has a wider ambit than article 3 of the Convention, which prohibits torture and inhuman or degrading treatment. Several articles of the Convention can be brought to bear against HTPs—article 2 (right to life), article 3 (above), article 4 (banning slavery and forced labour), article 6.1 (right to a fair trial), article 8 (right to privacy and family life), article 9 (freedom of religion), article 12 (right to marry), article 2 of the first protocol (right to education) and article 14 (against discrimination)[2].

HTPs can result from psychological as well as physical acts (and irrespective of whether they have actually been carried out).

First, let us consider various kinds of act.

Cases involving corporal punishment illustrate the Court's pragmatic approach. In the first case—*Tyrer v United Kingdom, 25 April 1979*—a young person was severely told off in front of several people and received blows to his bare body. The punishment treated the young person as an object, contrary to the dignity and integrity of the individual, and the severity of the punishment meant that it was degrading, violating article 3. On the other hand—in *Costello Roberts v United Kingdom, 25 March 1993*—a young pupil had received some blows of a slipper on his shorts in private three days after his transgression. Although the automatic nature of the punishment and the delay in administering it were held to be of concern, the Court did not find that the punishment had gone beyond acceptable disciplinary action—not violating articles 3 or 8.

[1] *Tyrer v United Kingdom 25 April 1978* series A no. 26 pp15-16, § 31;
Vo v France (GC) no 53924/00 8 July 2004 § 84;
Ocalan v Turkey (GC) no 46221/99 12 May 2005 §4-5.

[2] All the judgements and decisions of the ECHR are available on its website www.echr.coe.int within the HUDOC database.

Violence within a marriage or family, linked to the failure of the authorities to take appropriate steps to stop it, can constitute a harmful practice. For example, the failure of social services to take four abandoned children showing signs of physical mistreatment into care breached article 3—*Z v United Kingdom, 10 May 2001.*

It has also been found that failure to take steps to protect a child exposed to domestic violence brought about by the parents' divorce involved a breach of article 8—*Bevacqua v Bulgaria, 12 June 2008.* In *Opuz v Turkey, 9 June 2009*, a mother and daughter were being physically abused by the husband. Despite the vulnerable position of the applicant in the part of the country where she lived, inadequate steps had been taken to deter the husband from fresh acts of violence. The State's failure was held to violate article 3.

The failure to terminate the placement of children—one of whom had been the victim of a paedophile—in an institution where those in charge had been convicted of sexual abuse was held to contravene article 8—*Scozzari and Giutta v Italy, 13 July 2000*.

In the case of a child who had been beaten by the police during an interrogation for which the police had immunity, it was found that the penal system had not provided an effective means of preventing illegal acts and had not given the protection deemed necessary—*Okkali v Turkey, 17 October 2006*.

Someone held in police custody is in a delicate situation demanding special vigilance. Cruel treatment of young detainees is in violation of article 3—*Bati and others v Turkey, 3 June 2004*. When allegations of torture are made by a young person exhibiting unexplained injuries, the State has a duty to give satisfactory explanations for the causes of the wounds and to undertake an inquiry. Because the young person had not received the protection that his age required, there had been a breach of article 3—*Alkes v Turkey, 16 February 2010*.

Imprisonment can often lead to maltreatment. A breach of rights may occur if someone is held for long periods in strict solitary confinement with rigorous body-searches and frequent moves. These conditions do not respect the provisions of article 3—*Khider v France, 9 July 2009*. This also applies to a person, condemned to death by the tribunal of a body not recognised under international law, who is held in strict solitary confinement with detrimental effects on their health, comparable to an act of torture—*Ilascu v Moldova and Russia, 8 July 2004*. On the other hand, no breach occurs if the person concerned is in partial solitary confinement with no impact on his or her health—*Ramirez Sanchez v France, 4 July 2006*.

Poor sanitary conditions can constitute harmful treatment. Article 3 was breached by putting four prisoners into a 10 square metre cell without even minimal facilities—*Mordarca v Moldova, 10 May 2007*—or when for many months a prisoner suffering from several serious illnesses had to share a cell containing only 34 beds with 110 to 120 other prisoners—*Florea v Romania, 14 September 2010*.

The State must adapt prison conditions to the health of prisoners. Failure to take account of all facts known to the authorities in the case of a prisoner serving a life-sentence and known to have serious health issues breached article 3—*Xiros v Greece, 9 September 2010*. A delay of five months in providing spectacles to a prisoner with extremely poor eye-sight was also in breach of article 3—*Slyusarev v Russia, 20 April 2010*. On the other hand, no breach occurred when treatment for tuberculosis (TB) was not provided in the two-week period between diagnosis and release from prison—*Gavrilita v Romania, 22 June 2010*.

Two claims relating to **female genital mutilation** have been dismissed. The first case concerned an Ethiopian national who sought asylum in Romania. She claimed that she had suffered mutilation during childhood and pointed to the risk of harmful treatment were she to be sent back to Ethiopia. However, in order to deport a foreigner, Romanian law requires the authorities to issue a deportation order which can be challenged in the courts. The applicant was not found to be the victim of removal because she had not been the subject of an executive order—*Negusse Mekonen v Romania, 25 November 1998*. In the second case, the Nigerian applicants had sought asylum in Sweden. They said they would not be able to protect themselves from genital mutilation and pointed to the stigmatisation and rejection of women who refused to submit to this practice as well as the problems in settling in another area. The Court held that there was no evidence that the applicant would be unable to protect her daughter—*Collins and Akaziebe v Sweden, 8 March 2007*.

The case of *KH and others v Slovakia, 25 April 2009* concerned physical assaults on the person. A group of Roma women suspected that medical staff had sterilised them during pregnancy or child-birth. The refusal to give them access to their medical records on the grounds that they contained personal information was an infringement of their rights and created an obstacle to the submission of their case. Accordingly, the Court found that articles 8 and 6.1 had been breached.

Harmful treatment can arise when there is a risk that such an action may occur.

Even though the pupils at a school that employs corporal punishment may not experience significant humiliation from the possibility that they may be subjected to it, article 3 may be breached if the threat is sufficiently real and immediate. But though a pupil may feel fear when he is about to be caned, that does not in itself amount to degrading treatment—*Campbell and Cosans v United Kingdom, 25 February 1982*.

The Court found that article 3 would be breached if an Iranian national who feared being stoned to death were to be expelled—*Jabari v Turkey, 11 July 2000*. The risk of being subjected to inhuman punishment was recognised as real in the case of a person who had been condemned by an Islamic court to one hundred lashes for fornication. Whenever an individual facing deportation has serious grounds for believing that they are at risk of inhuman or degrading treatment, the State has a responsibility—*D and others v Turkey, 22 June 2006*. In the case *N v Sweden, 20 July 2010*[3], the Afghan applicant had sought political asylum. During the consideration of her request she divorced and began living with a Swedish national. Accordingly, she put forward a fresh request for asylum, pointing to the risk of family violence and reprisals if she were sent home. According to the applicant, the fact that her way of life did not conform to tradition would lay her open to domestic violence. These risks were recognised by the Court and constituted a breach of article 3.

A member of the political opposition who had already shown that he had suffered harm established that return would expose him to persecution, despite international agreements on the situation in Belarus—*YP and LP v France, 2 September 2010*.

Harm can result from the psychological impact of an action.

The ancient practices of domestic slavery or servitude still exist. In *Siliadin v France, 26 July 2005*, a young person was subjected to forced labour. Even though the situation did not amount to slavery—her 'employers' had not treated her as their property—the constraints obliging her to work amounted to a state of servitude. The criminal law in force in France had not afforded the victim firm and effective protection against this, leading to a violation of article 4.

In *Rantsev v Cyprus and Russia, 7 January 2010*, a young Russian woman landed in Cyprus with an entertainer's visa and worked for a few days before leaving her job. Several hours later she was found dead in strange, unexplained circumstances. On a complaint that article 2 had been breached, the Court found that the Cypriot authorities had failed to carry out a proper investigation into the circumstances surrounding her death.

Referring to article 4, the Court found that the trafficking of human beings uses powers comparable to rights over property; that traffickers look upon human beings as assets that can be forced to work, subjecting the victim to continual surveillance, threats and violence. Cyprus had not met its obligations under article 4 because it had not put in place legal and administrative provisions to counter this traffic and the police had taken no steps to protect the woman concerned.

Marriage, particularly if it is early or forced, can amount to a harmful practice for those involved. The Court has had occasion to make it clear that the obligation placed on marriage partners to respect the legal age of consent—even if the individual's religion allows marriage at an earlier age—cannot be taken as a denial of the right to marry in the sense of article 12. The right to marry is subject to the national laws that regulate marriage—*Khan v United Kingdom, 7 July 1986*.

Even though **administrative procedures in systems of detention** may not be 'traditional', the Court has been led to consider some of them. The case of a five-year-old child held alone for two months separately from his parents in conditions identical to those for an adult and with no-one specifically responsible for him was a violation of article 3 on the grounds of a lack of humanity amounting to inhuman treatment—*Mubinanzila Mayeka v Belgium, 12 October 2006*. States have a responsibility to protect children and put adequate arrangements in place for them. Detention for over a month in a closed centre where the surroundings are not suitable for children can lead to psychological damage, even if the children are not separated from their parents. As far as the children are concerned, this is a violation of article 3—*Muskhadzhiyeva v Belgium, 19 January 2010*[4].

Harmful treatment can occur when the education provided for children runs counter to their interests or the beliefs of their parents. In *DH v Czech Republic, 13 November 2007*, the applicants maintained that they were victims of unfair treatment because, without any justification, their children had been put into classes for children of low intelligence. The law had discriminated unfairly against the Roma community.

[3] At the time of writing this judgement has not yet become definitive. Under article 44 of the Convention, a decision of the Court assumes definitive status three months after the date of its delivery unless there is a request for review or rejection by the full Court.

[4] It is worth noting that the Court incorporated in its reflections aspects of the Convention on the Rights of the Child of 20 November 1989.

To rebut the presumption of indirect discrimination, it would have been necessary for the government defence counsel to show that this difference in treatment arose from objective facts not connected to ethnic origin.

As this was not forthcoming, the Court concluded that a breach of article 2 of the first protocol (right to education) and of article 14 (prohibiting all discrimination) had been committed. In the second case—*Orsus v Croatia, 16 March 2010*—Roma children had been put into classes reserved for them and given a limited education. A justification must be given for any provision that covers all the members of a particular ethnic group. Since the State had not demonstrated that these children had special needs, article 2 of the first protocol and article 14 had been ignored.

The authorities must give special attention to religious beliefs that have a traditional nature.

The ban against wearing Islamic headscarves at university has the legitimate aim of preserving the secular nature of those institutions. No breach of article 9 in combination with article 2 of the first protocol had been demonstrated—*Leyla Sahin v Turkey, 10 November 2005*. As far as religious symbols in classrooms are concerned, the State must avoid imposing beliefs in places where people are dependent or vulnerable. The compulsory exhibiting of religious symbols is contrary to the secular principle, because it may run counter to the beliefs and education that parents wish to give—*Lautsi v Italy, 3 November 2009*[5]. When religious education is given, it must meet standards of objectivity and tolerance. The pupil must not face conflicts between the education he/she receives at school and his/her parents' beliefs. When the latter are required to declare their adherence to a particular religion, their freedom of belief has not been respected—so that a breach of article 2 of the first protocol occurs—*Hasan Zengin v Turkey, 9 October 2007*. The fact that parents had to request exemption from religious education required them to reveal their beliefs. The Court found that the State had failed to broadcast objective, critical and broadly-based information and knowledge—*Folgero v Norway, 29 June 2007*—a violation of article 2 of the first protocol. Whenever a child is unable to take a course of ethics instead of a course of religion, discrimination occurs. Article 9 protects not only religious beliefs but the convictions of atheists and agnostics. This kind of unjustified discrimination against non-believing pupils constituted a violation of articles 9 and 14—*Grzelak v Poland, 15 June 2010*.

Some issues are irrelevant in considering whether a practice is harmful—for example, the public's view on the measure's appropriateness, its effectiveness or the fact that any failure to abide by the Convention was unintentional.

In *Opuz v Turkey, 9 September 2009*, the Court found that the failure of States to protect women from domestic violence came down to a failure to afford them equal protection under the law—ignoring articles 2, 3 and 14. A punishment does not lose its degrading nature by virtue of the public's belief in its effectiveness. The use of punishment that contravenes article 3 is not allowed. Never mind that the beating took the place of a detention—*Tyrer v United Kingdom, 25 April 1978*—or that a punishment had been reduced to the point where it was merely symbolic, it has not lost its inhuman characteristics—*DH v Turkey, 22 June 2006*.

The ban on torture and cruelty is absolute, whatever the person concerned may have done. If someone, sentenced to a term of imprisonment for involvement in terrorist activity, would run a serious risk of execution if he were to be sent back to his country of origin, his deportation would be in breach of article 3—*Daoudi v France, 3 December 2009*.

In *Gafgen v Germany, 1 June 2010*, a police officer had threatened the applicant with dire punishment to induce him to reveal the whereabouts of a kidnapped child. The ban on cruel treatment applies without exception and irrespective of the suspect's actions or the motives of the authorities, even when an individual's life is in danger. The immediate threat of severe punishment is serious enough to be classed as inhuman treatment.

A balance has to be struck between the violations of rights and freedoms alleged by the applicant and the other provisions of the Convention.

Members of a religious order who supported corporal punishment complained that the law restricted their rights. They argued that the law in question was intended to protect weaker members of society against domestic violence and should not limit their own right to privacy and family life, their religious freedom or their right to educate their children in the way they wished—*Seven people v Sweden, 13 May 1982*. The same conclusion was reached as in the *Opuz* case—the State's duty to legislate should not be seen as denying the right to privacy and family life. A case involving the international abduction of children—*Neulinger and Schuruk v Switzerland, 6 July 2010*—recognised that, in finding the appropriate balance, the best interests of the child are paramount.

[5] The case was subsequently referred to the Grand Chamber. The hearing took place on 30 June 2010 and the decision will be announced later.

The State should establish positive requirements for the avoidance of cruel treatment. The obligation to protect concerns means rather than ends.

The State must respect the right of parents to an education in line with their religious beliefs and philosophical outlook—*Campbell and Cosans v United Kingdom, 25 February 2002*. The State must refrain from causing death and must take the steps necessary to protect people's lives—*Opuz*, above. The criminal law had not afforded the applicant protection against the acts complained of, because the relevant provisions had been ignored—*Siliardin*. The State must not do anything that would expose an individual to cruelty. It must not deport anyone at risk of death, torture or forcible conversion of religious beliefs. Similarly, it must provide effective remedies when allegations are made that a right guaranteed by the Convention has been violated (article 13); and it must undertake proper enquiries to get to the bottom of any allegation of an attack on a fundamental right—*Falcoianu v Romania, 9 July 2002*. When breaches of articles 2 or 3 are involved, it should be possible in principle for compensation to be provided for the resulting psychological suffering—*Bubbins v United Kingdom, 17 March 2005*.

Developments in human rights

The essential principle of the Convention is respect for human dignity and freedom. Everyone has the right not to be subjected to harm and to be compensated if they are. The Convention and the ECHR provide firm and effective protection for these rights. It is becoming clear that there are a variety of ways of upholding and developing human rights. To look simply at the Council of Europe, several bodies are working to counter harmful practices—the Commissioner for Human Rights[6], the Council of Europe's Parliament[7], the Committee for the Prevention of Torture[8], and the European Commission against Racism and Intolerance[9]. The forging of agreements helps to support the judiciary in upholding human rights. Indeed the Court's judgements now refer much more often than in the past to information which NGOs and other organisations have been able to supply. Better knowledge of the situation in each State helps towards a better understanding of the context in which proceedings before the Court take place.

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This article is an edited version of a talk given in October 2010 at the IDE seminar in Sion, Switzerland on Harmful Traditional Practices. The opinions expressed are those of the author and not necessarily those of the ECHR.

6 Responsible for promoting human rights and respect for them.

7 The Parliament puts forward recommendations and policies to strengthen human rights. For example, a recommendation of 5 October 2010 on cruelty in young people's institutions reminded States that they must take firmer action to back up laws against the abuse of children and provide legal protection against the maltreatment of children through external controls on these institutions.

8 The Committee's field of operation is mainly in prisons. After each visit a report is sent to the relevant State with findings, recommendations and the State's response to questions raised.

9 The Commission studies relevant information and makes visits. Relationships are developed with the society concerned and a dialogue takes place with the authorities, leading to an analysis of the situation in the country and the shaping of recommendations.

Harmful Traditional Practices— UN Committee on the Rights of the Child

Dra Marta Maurás Pérez
Chile

Approach of the Committee

The Committee's main approach to Harmful Traditional Practices (HTPs) is through the article of the Convention on the Rights of the Child (CRC) relating to health.

Article 24(3):

> *States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children*.

This concerns in particular

- female genital mutilation (FGM), with reference to the injuries caused to girls/women; and
- early or forced marriages, in view of the negative impacts on health (physical violence, rape, development problems, mental health).

The Convention, being a holistic treaty, offers other possibilities:

Article 6(1)

> *States Parties recognize that every child has the inherent right to life.*
> This applies, for example, to 'honour killings'.

Article 6(2)

> *States Parties shall ensure to the maximum extent possible the survival and development of the child.*
> Many forms of HTP can be considered prejudicial to the development of children, e.g. nutritional taboos and detrimental feeding practices.

Article 34

> *States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse*
> for example. through forced marriages and temporary or "pleasure" marriages.

Article 2 (non-discrimination)

> *States Parties shall respect and ensure the rights in the present Convention to each child within their jurisdiction without discrimination of any kind…*

Article 2(1)

> *.....on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

Article 2(2)

> *…..on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*

Article 2 is generally used in relation to unequal and detrimental treatment of girls (e.g. dowry, property, inheritance) which could be considered as HTPs.

General Comments by the Committee

The Committee's approach has been further elucidated by General Comments.

For example, in General Comment No. 4 on Adolescent Health and Development 2003[1], the Committee requests States Parties:

- to take all effective measures to eliminate all acts and activities which threaten the right to life of adolescents, including honour killings.
- to develop and implement awareness-raising campaigns, education programmes and legislation aimed at changing prevailing attitudes, and address gender roles and stereotypes that contribute to harmful traditional practices.
- to facilitate the establishment of multidisciplinary information and advice centres regarding the harmful aspects of some traditional practices, including early marriage and female genital mutilation.

[1] CRC/C/GC/2003/4 para. 24

And, in dealing with early marriage[2]:

- the Committee is concerned at the number of early marriages and pregnancies and that both the legal minimum age and actual age of marriage, particularly for girls, are still very low in several States Parties. This has negative health consequences and, furthermore, children who marry, especially girls, are often obliged to leave the education system and are marginalized from social activities.
- the Committee strongly recommends that States Parties review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys.
- the Committee also makes reference to a similar recommendation from the Committee on the Elimination of Discrimination against Women (CEDAW)[3]).

The 2005 General Comment on Implementing Child Rights in Early Childhood[4] states:

- discrimination against girl children is a serious violation of rights, affecting their survival and all areas of their young lives…
- ...as well as restricting their capacity to contribute positively to society;
- girls may be victims of selective abortion, genital mutilation, neglect and infanticide, possibly through inadequate feeding in infancy.

The following paragraph from the Committee's Day of General Discussion on the Girl Child[5] is also important:

> States had identified persistent traditions and prejudices as a main difficulty affecting the enjoyment of girls' fundamental rights and mentioned early and forced marriages and female circumcision and identified consequences—the risks of violence, sexual abuse within the family and early pregnancies.

Concluding Observations by the Committee

Over the last decade, the Committee's concluding observations on States Parties' reports [6] that are relevant to HTPs have indicated that:

- the practices have a very strong cultural basis;
- there is a belief that the practice is « *in the interest* » of the child;
- there is strong social pressure (parents, community...);
- the justifications advanced for FGM are that it ensures a girl's chastity, beauty or proper marriage;
- justifications put forward for early marriage are that it protects the honour of the family, protects the girl, releases the family from an economic burden and ensures the girl and her family's economic future;
- there is lack of knowledge/understanding of human rights and child rights;
- there is little research or knowledge on the consequences of FGM, early marriages and other HTPs; and
- the measures taken by States are mostly legislative.

The Committee made corresponding recommendations to these countries[7].

UN study on violence against children

Chapter 3 of the 2006 UN World Study on Violence against Children states:

- FGM is a form of violence against girls—a table[8] describes the prevalence of FGM among women and their daughters;
- bringing an end to FGM requires clear prohibition, education and awareness-raising within families and communities, and community mobilisation;
- early marriage of girls ….has significant negative consequences on girls' health, development and rights. Girls under 18 face significant risk of physical, sexual and psychological violence at the hands of their husbands.

The study also mentions other forms of HTP—son preference, sorcery, etc.

The Committee and the UN Special Representative on Violence against Children, Marta Santos Pais *[a member of our Association—Ed]*, are working in close collaboration to move this agenda forward. All recent Concluding Observations of the Committee have included a specific section on follow-up to the Study's recommendations and on cooperation with the Special Representative.

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2 ibid para. 20

3 General recommendation No. 21 of 1994

4 CRC/c/GC/2005/7, Para 10 (b[i])

5 CRC /C/38 para 286, 23 January 1995

6 Niger, 2002 (CRC/C/15/Add.l79) Niger 2009 (CRC/C/NER/CO/2)
Pakistan 2003 (CRC/C/l5/Add.2l7) Pakistan 2009 (CRC/C/PAK/CO/3-4)
Pakistan 2009 (CRC/C/PAK/CO/S-A)
Ireland 2006 (CRC/c/IRL/co/2)
Angola 2010 (CRC/C/ANG/CO/)

7 Niger 2002 (CRC/C/15/Add.l79)
Pakistan 2009 (CRC/C/PAK/CO/3-4)
Ireland 2006 (CRC/C/IRL/CO/2)
Angola 2010 (CRC/C/ANG/CO/)

8 on p.62 of the English version

Summary
The Committee's approach to HTPs is based on their negative impact:

- on life, development and health in general;
- on discrimination;
- on education; and
- on social activities.

The Committee takes HTP to cover female genital mutilation, early and forced marriages, gender selection abortion, discrimination and violence related to dowry, property or inheritance, detrimental feeding practices, honour killings and other inhumane and cruel customs and rituals—burning, acid attacks, breast ironing, etc. It does not include corporal punishment.

The Committee also identifies risks—violence, sexual abuse, infanticide, HIV/AIDS and other sexual diseases, and lack of education. While it points to girls as the main victims, the Committee has not explicitly used a gender approach.

Over recent years one can see that the approach of the Committee has evolved:

- from urging States to pass laws to urging States to implement and apply legislation, including prosecution of victimizers;
- to placing strong emphasis on awareness-raising and sensitisation;
- to continue working with traditional leaders;
- to appealing to best practices and for better education;
- to giving a clearer gender focus, empowering girls to decide and protecting both girls and boys;
- to finding ways of targeting specific regions and groups; and
- to promoting better data collection which could lead to more research and the design of evidence-based policies and programmes.

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This is an edited version of a power point presentation given in October 2010 at the IDE conference 'Harmful Practices and Human Rights'. The two main bodies concerned with HTPs are the **Committee on the Rights of the Child** and the **Committee on the Elimination of Discrimination against Women (CEDAW)**.

High Court judgement—South Africa

Justice Belinda van Heerden

This is an edited version of a judgment delivered on 26 April 2000 by Justice Belinda Van Heerden (Justice Van Reenen concurring) in the Cape Provincial Division of the High Court of South Africa in the case S v Kwalase 2000 (2) SACR 135 (C).

The accused was charged in the magistrate's court for the district of Cape Town with the crime of robbery. He was correctly convicted by the magistrate, on a plea of guilty, and was sentenced to three years' imprisonment, 18 months of which were suspended for three years on condition that the accused was not convicted of housebreaking, attempted robbery or robbery committed during the period of suspension.

When this matter was placed before me on automatic review[1], I queried the sentence. The magistrate subsequently furnished me with her reasons for the sentence imposed.

It appears from the record that, although the accused was arrested on 21 October 1998, his trial only took place on 13 October 1999 and he was only sentenced on 12 January 2000. The delay between the date of the accused's arrest and the date of his trial was due to the accused's failure to appear before the Court, despite due warning, on the day after his arrest.

Thereupon, a warrant for his arrest was issued. It also appears from the record that, whilst the accused was 'at large', he committed a further crime of robbery during March 1999, for which crime he was sentenced to three months' direct imprisonment on 20 September 1999.

On the date of his trial in the matter currently under review, the accused was convicted of a contravention of s 72(2)(a) of the Act and sentenced to a fine of R200 or, in default of payment, one month's imprisonment. The accused was apparently unable to pay this fine and was therefore serving his second period of imprisonment at the time when he was convicted in the matter now on review before this Court[2].

At the time of the commission of the offence, the accused was only 15 years and 11 months old. He had, at that time, one previous conviction (dated 30 March 1998) of housebreaking with the intent to steal and theft. In respect of the latter offence, the magistrate concerned had postponed the imposition of sentence for a period of three years[3], on condition that the accused perform 120 hours of community service. From the accused's statement in mitigation of sentence, it appears that he left school in June 1999, at which time he was either in standard three or had already passed standard three. The accused stated that he wished to return to school in order to enable him ultimately to support his mother.

It is not clear from the record whether the accused was, or had ever been, employed, or where and with whom he was living at the time of the commission of the offence and thereafter. Despite this paucity of information concerning the personal circumstances of the accused, the magistrate failed to elicit any further details in this regard, even though the accused was unrepresented. The magistrate also did not obtain a pre-sentence report in respect of the accused from a probation officer and/or a correctional officer.

[1] in terms of the provisions of s 302, read together with s 304, of the Criminal Procedure Act 51 of 1977 ('the Act').

[2] the offence under s 72(2) of the Criminal Procedure Act 51 of 1997 was that of failing to appear before the court on the day after his arrest, despite having been warned to do so upon his release on police bail. As this offence was committed before the commencement of the trial, he had to serve this sentence after the completion of his sentence for the first crime of robbery (imposed on 20 September 1999), in respect of which he was sentenced to three months' imprisonment. This meant, that at the time he was convicted and sentenced for the robbery that formed the basis of the review, on 12 January 2000, he was serving his second term of imprisonment.

[3] in terms of s 297(1) *(a)* (i) *(cc)* of the Act (read together with s 297(1A)),

The importance of a pre-sentence report in the process of sentencing young offenders has been repeatedly emphasised by our courts[4].

The post-1994 constitutional and international legal dispensation in South Africa must of necessity also be borne in mind by South African courts in the determination of appropriate sentences for youthful offenders. The Constitution of the Republic of South Africa[5], provides that every child has the right ' *not to be detained except as a measure of last resort* ' and then only for ' *the shortest appropriate period of time* '. This constitutional provision applies to all persons under the age of 18 years[6].

Furthermore, on 16 June 1995, South Africa ratified the United Nations *Convention on the Rights of the Child* (1989) ('CRC') and, by so doing, assumed an international legal obligation to put into effect in its domestic law the provisions of this Convention (see article 4). Various provisions in CRC ' *underline the policy that children under the age of 18 years who are accused of committing offences should, as far as possible, be dealt with by the criminal justice system in a manner that takes into account their age and special needs* '[7]. Thus, article 40(1) embodies the right of a child in conflict with the penal law '*to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.* 'In terms of article 37*(b)*, children must be arrested, detained or imprisoned '*only as a measure of last resort and for the shortest appropriate period of time* '.

The Committee on the Rights of the Child (the supervisory body provided for by CRC for the international implementation of its provisions) has stated categorically that the provisions of CRC relating to juvenile justice have to be considered in conjunction with other relevant international instruments[8], for example the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (1985) (' *the Beijing Rules* '), the United Nations *Rules for the Protection of Juveniles Deprived of their Liberty* (1990), and the United Nations *Guidelines for the Prevention of Juvenile Delinquency* (1990) (‘*the Riyadh Guidelines* ')

The approach to the treatment of juvenile offenders set out in s 28(1) *(g)* of the South African Constitution and in the above-mentioned articles of CRC is echoed in, *inter alia*, the Beijing Rules. For the purposes of the case presently under review, the provisions of rules 5 and 16 are particularly significant. In terms of rule 5(1), the aims of a juvenile justice system are to ‘*emphasise the well-being of the juvenile and [to] ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.*' Rule 16 requires that, in *all* cases except those involving minor offences, ' *the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated (*prior to sentencing) *so as to facilitate judicious adjudication of the case by the competent authority'.* The Commentary to this rule indicates that these so-called ' *social enquiry reports* ' (ie what would be known as a pre-sentence report in South Africa) are ' *an indispensable aid* ' in legal proceedings involving juveniles.

Proportionality in sentencing juvenile offenders (indeed, all offenders), as also the limited use of deprivation of liberty particularly as regards juvenile offenders, are clearly required by the South African Constitution[9]. Furthermore, s 39(1) of the Constitution provides that a court, when interpreting the Bill of Rights[10] '(b) **must** consider international law; and (c) **may** consider foreign law '. (Emphasis added.) Thus, the provisions of the South African Constitution governing the treatment of children in conflict with the penal law[11] should be interpreted having due regard to the provisions of the above-mentioned international instruments relating to juvenile justice.

The judicial approach towards the sentencing of juvenile offenders must therefore be re-appraised and developed in order to promote an *individualised* response which is not only in proportion to the nature and gravity of the offence and the needs of society, but which is also appropriate to the needs and interests of the juvenile offender.

If at all possible, the sentencing judicial officer must structure the punishment in such a way so as to promote the reintegration of the juvenile concerned into his or her family and community.

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4 For example in Terblanche *The Guide to Sentencing in South Africa* (1999) at 378; in the case of *S v Jansen and Another* 1975 (1) SA 425 (A) at 427H-428A (Botha JA); and Erasmus J in *S v Z en Vier Ander Sake* (and Four Other Cases) 1999 (1) SACR 427 (E) .

5 Act 108 of 1996, section 28(1) *(g)*.

6 see s 28(3).

7 see Van Heerden *et al Boberg's Law of Persons and the Family* 2nd ed (1999) 865 *in notis*.

8 See, in this regard, Hodgkin & Newell *Implementation Handbook for the Convention on the Rights of the Child* (1998) 490-1, 540, 542-4.

9 see, for example, Chaskalson *et al Constitutional Law of South Africa* (1996, with looseleaf updates) 28-5–28-6.

10 Chapter 2 of the Constitution.

11 namely, s 28(1) *(g)* , read together with ss 12 and 35.

Against the background of the above-mentioned constitutional and international legal provisions concerning juvenile offenders, the South African Law Commission is presently engaged in the process of preparing draft legislation aimed at dealing comprehensively with juvenile offenders and creating a new structure to govern criminal proceedings against such offenders. In December 1998, the South African Law Commission (SALRC) Project Committee on Juvenile Justice (Project No 106) released Discussion Paper 79, with a draft Child Justice Bill annexed[12]

In line with the constitutional and international law relating to youthful offenders, the Discussion Paper recommended that custodial sentences should be the last resort in children's matters and, where such sentences are passed, they should be for a minimum period and should be conducive to the return of children to society. Non-custodial measures should be explored and used as much as possible, in line with the policy of the Inter - Ministerial Committee on Young People at Risk concerning residential care[13]. It was also recommended that the consideration by the court of a pre-sentence report prior to the imposition of sentence upon a juvenile offender should be mandatory[14].

The above-mentioned recommendations of the Project Committee relating to mandatory pre-sentence reports and the imposition of sentences involving a custodial (residential) element have been widely supported, and it seems likely that these recommendations will be repeated in the final Report and the final draft of the Child Justice Bill which will probably be released later this year.

In the light of the above, the magistrate failed, in my view, to use the mechanisms at her disposal to elicit sufficient information concerning the personal circumstances of the accused before the imposition of sentence, thereby under-emphasising one of the elementary criteria for punishment. This is particularly so in view of the fact that, as indicated above, the accused was unrepresented[15]. I certainly do not underestimate the practical problems encountered by magistrates in this country.

These problems include a shortage of probation officers, correctional officers and social workers, often leading to delays in obtaining pre-sentence reports. However, as has been pointed out by the Constitutional Court[16],

> 'to the extent that facilities and physical resources may not always be adequate, it seems to me that the new dynamic should be regarded as a timely challenge to the State to ensure the provision and execution of an effective juvenile justice system'.

Moreover, it would appear from the record in the matter presently under review that the magistrate did not even consider obtaining a pre-sentence report prior to the imposition of sentence. To my mind, this is clearly unsatisfactory[17].

It appears from the reasons furnished by the magistrate for sentence that, in determining an appropriate sentence, the magistrate took into account the accused's previous convictions for housebreaking and theft *and* for robbery. I have no problem with this approach - even though the accused committed the robbery in question *after* the robbery forming the subject of the case now under review, the magistrate could properly take the accused's conviction for this '*second* ' robbery into account in the sense that it was indicative of the character of the accused[18]. However, one of the reasons given by the magistrate for the sentence imposed was that the accused was no longer living the life of a juvenile. In this, I think the magistrate misdirected herself. There was no real evidence to support any such finding. The mere fact that a teenager has not been at school for several months (or even years) does not show that he or she is living the life of an adult, particularly when it is entirely unclear where or with whom the teenager is living, whether he or she is or has been employed and so on[19]. It is these and other material aspects relating to the accused's personal circumstances which should have been clarified by the magistrate, preferably by obtaining a pre-sentence report.

I am also of the view that the sentence imposed is too severe. In addition to the youth of the accused (who is currently 17 years and four months old), it must be borne in mind that the accused pleaded guilty and that the stolen property was immediately recovered by the police. Robbery is clearly a serious offence.

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12 see, in this regard, Sloth - Nielsen 'Towards a New Child Justice System' (1999) 1 *Article 40* 4-5 and NICRO (National Institute for Crime Prevention and Re-integration of Offenders) *The Draft Child Justice Bill: 'What the children said'* (Community Law Centre, University of the Western Cape, 1999).

13 see paras 11.63-11.66 of the Discussion Paper and clauses 77 and 78 of the draft Child Justice Bill.

14 see paras 11.90-11.95 and clause 70 of the draft Bill.

15 cf *S v Dlulani* 1991 (1) SACR 158 (Tk) at 160 *c-d*.

16 in *S v Williams and Others* 1995 (2) SACR 251 (CC) , 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at 883.

17 see, in this regard, *S v Quandu en Andere* 1989 (1) SA 517 (A) at 522J-524D.

18 see Du Toit *et al Commentary on the Criminal Procedure Act* (1987, with looseleaf updates) B 27-2A and the authorities there cited.

19 see *S v T* 1993 (1) SACR 468 (C) at 469 *g-h*.

However, while it is true that serious offences merit severe punishment, the Court must guard against an over-eager imposition of exemplary sentences and must not overemphasise the gravity of the offence and the interests of the community at the expense of the interests and the personal circumstances of the particular offender[20]. Every individual case must be judged on its own particular facts. The community expects that serious crimes will be punished, but also expects at the same time that mitigating circumstances will be taken into account and that the accused's particular position will be given thorough consideration, as has been cogently argued by Hoexter JA[21].

It is also important to note that, as indicated above, the accused was only 15 years and 11 months old at the time of commission of the offence. The youthfulness of the accused at *that* time is clearly one of the factors which must be taken into consideration by the court in determining an appropriate sentence. The moral culpability of the accused is judged by having regard to, *inter alia*, his or her age and level of maturity at the time when the offence is committed[22]. On the other hand, the age and maturity of the accused at the time of imposition of sentence is also a relevant factor in the determination of a sentence which will, *inter alia*, suit the needs of the individual accused. Thus, when a court has regard to the 'middle leg' of 'the triad consisting of the crime, the offender and the interests of society'[23], the personal circumstances (including the age and level of maturity) of the accused at *both* the above-mentioned times must form part of the balancing exercise. This is particularly important in a case like the present, where a lengthy period of time has elapsed between the date of commission of the crime and the date of imposition of sentence. In view hereof, I reiterate that it is difficult to see how the magistrate could in this case properly determine the most appropriate form of punishment and the adaptation of that punishment to suit the needs of the accused without the consideration of a pre-sentence report.

Applying the above-mentioned principles of sentencing juvenile offenders to the case presently before the Court, it must be noted that, at the time of imposition of sentence, the accused was already serving his second sentence of imprisonment.

He had thus regrettably already been exposed to the many detrimental effects of incarceration in a South African prison[24].

Moreover, the non-custodial sentencing option previously applied to the accused (viz the postponement of the imposition of sentence, on condition that the accused perform 120 hours of community service) does not appear to have had the desired effect upon the accused. In the light of these facts, and having careful regard to the above-mentioned 'triad' of relevant factors, I am of the view that an appropriate sentence in the case of this accused would be a period of imprisonment in terms of s 276(1)*(i)* of the Act. This means that the prison authorities will have the power to convert the accused's imprisonment to correctional supervision if the accused appears to be someone who will benefit from correctional supervision and who should have the opportunity of avoiding further incarceration. As pointed out by Marais J,[25] *'this will give the accused the opportunity of persuading the prison authorities, if he can, that he should be subjected to correctional supervision rather than incarceration*.' Moreover, if the accused is indeed later placed under correctional supervision, this will fulfil the important purposes of monitoring and 'follow up' in respect of youthful offenders stressed by Erasmus J[26] and will, it is to be hoped, assist in the reintegration of the accused into his community.

In all the circumstances, I would confirm the conviction, but would set the sentence aside and replace it with the following sentence:

Twelve (12) months' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977.

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20 see, for example, *Terblanche op cit* at 219-20.

21 in *S v Quandu en Andere (supra)* at 522D - F).

22 see, for example, *Terblanche op cit* at 224-5, Du Toit *Straf in Suid - Afrika* (Punishment in South Africa) (1991) at 55-6 and the authorities there cited.

23 see *S v Zinn* 1969 (2) SA 537 (A) at 540G.

24 see, in this regard, *Terblanche op cit* at 244-6. The particularly prejudicial effects of imprisonment on juvenile offenders are graphically illustrated in De Villiers *(ed)* ' *Children in Prison in South Africa - A Situational Analysis* (Community Law Centre, University of the Western Cape, 1998), as also by Erasmus J in *S v Z en Vier Ander Sake* (*supra*) at 430 *j*- 434 *h* .

25 in *S v T* (*supra* at 470 *d-e*).

26 in *S v Z en Vier Ander Sake* (*supra*) at 438 *j* -439 *b*.

Update

In July 2008, the *Report on Juvenile Justice*, with a further draft Child Justice Bill annexed, was released by the South African Law Reform Commission. Like its predecessor, the Report recommended that pre-sentence reports should be mandatory before the imposition of sentence upon a child in all but petty cases[27]. Furthermore, the SALRC recommended that such a report should be prepared and placed before the court within one month after it has been requested[28].

It was also recommended that no sentence involving a compulsory residential requirement (including a term of imprisonment) may be imposed upon a child unless the presiding office is satisfied that such a sentence is justified by (a) the seriousness of the offence, the protection of the community and the severity of the impact of the offence upon the victim; or (b) the previous failure of the child to respond to non-residential alternatives[29].

As regards imprisonment, the Report recommended that such a sentence should not be imposed unless the child is 14 years of age or above at the time of commission of the offence; and substantial and compelling circumstances exist for imposing a sentence of imprisonment because the child has been convicted of an offence which is serious or violent or because the child has previously failed to respond to alternative sentences, including available sentences with a residential element other than imprisonment[30]. Life imprisonment for offences committed by a child should be excluded as a sentence[31].

Most of these recommendations were accepted by Parliament and form part of the Child Justice Act 75 of 2008, which came into operation on 1 April 2010[32].

Justice Belinda van Heerden* is a Justice of the Supreme Court of Appeal of South Africa.

27 see para 10.47-10.51 of the Report and clauses 85(1) and (2) of the draft Bill.

28 see paras 10.47-10.51 of the Report and clause 85(6) of the draft Bill.

29 see clause 90 of the draft Bill.

30 see paras 10.29-10.34 of the Report and clause 92 of the draft Bill.

31 see para 10.27-10.28 of the Report and clause 95 of the draft Bill.

32 see s 71 (Pre-sentence reports), in terms of which the probation officer must complete the report as soon as possible but **no later than 6 weeks following the date upon which the report was requested.** See also s 77 (Sentence of imprisonment) – it is important to note that, in terms of s 77, a child justice court may not impose a sentence of imprisonment on a child who is under the age of 14 years **at the time of being sentenced** for the offence. Furthermore, s 77(1) provides that a child justice court, when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time. The maximum period of imprisonment of a child is 25 years (s 77(4)).

High Court judgement—Bangladesh

Mr Justice M. Imman Ali

An abridged judgement of the High Court, Bangladesh: *State vs Secretary, Ministry of Law, Justice and Parliamentary Affairs and others*: judgement handed down on 3 September 2009 by Mr Justice Md. Imman Ali.

[1] The facts of this case are briefly as follows. A seven year old girl was allegedly raped by her neighbour and distant relative. The parents of the girl, after taking her for treatment, took her to a local police station in order to report the alleged offence. After the police had recorded the case, they sent the girl to the court of a local magistrate who then ordered her to be kept in safe custody at a Safe Home managed by the Department of Social Welfare. The child was so young that she could not sleep without her mother and her parents were not permitted to stay with her in the safe home.

[2] The facts of the case were brought to the attention of the High Court Division through a news item which was broadcast on national television on 10 April 2009. Since it appeared to the court that the little girl was being held in safe custody without lawful authority while her parents, who were willing and capable of caring for her, were denied her custody, the court issued a Suo Motu Rule upon the Respondents to show cause as to why the child should not be released from the Safe Home and that the issue of her care be dealt with in accordance with the applicable law.

The court further ordered that, pending hearing of the Rule, the child was to be released from safe custody forthwith into the custody of her father

The court further ordered that the Metropolitan Police Commissioner was to ascertain and report to the court within seven days on the events leading up to the confinement of the girl in safe custody, and that the Chief Judicial Magistrate was to give an explanation within the same time period as to under what authority the Magistrate concerned had passed the order of safe custody for a child victim of seven years, refusing custody to her parents.

[3] The police commissioner reported that on the date on which the child was brought before the magistrate to record her statement, the magistrate did not have time to record the statement and sent the child to the Safe Home overnight. Her statement was recorded on the following day and thereafter the magistrate again sent her back to the Safe Home. The officer in charge of the local police station had requested the court to allow the child's mother to stay in the Safe Home with her. The magistrate refused this request on the plea that it was not permitted by law, and it was only after the intervention of the Prime Minister that she was released into her father's custody on 12 April 2009.

[4] The explanation of the magistrate was that on the date when the child was brought before him to have her statement recorded, neither the parents of the child, nor the police officer who was in attendance, either in writing or verbally, made any request that the child be placed in the custody of her parents. The application to allow the child's mother to remain with her in the Safe Home was rejected by the magistrate on the ground that such a request was beyond his jurisdiction.

[5] The court referred to Section 58 of the Children Act, 1974, which provides that in circumstances such as those in the present matter, the court has a discretion to order that the child be placed in a Safe Home *or* be committed to the care of a relative or other fit person on such terms and conditions as the court may require, *provided that*, if the child has a parent or guardian fit and capable, in the opinion of the court, to exercise proper care, control and protection, the court *may* allow the child to remain in such person's custody on such terms and conditions as the court may require.

[6] The court thus found that the magistrate concerned has misinterpreted the provisions of Section 58 of the Children Act and that he misdirected himself in ordering that the child be placed in a Safe Home on the ground that he had not received any request that the child be released into the custody of her parents. The court further found that, upon a careful reading of Section 58 of the Children Act, the proviso has an overriding effect, in that if a child has a parent(s)

fit and capable in the opinion of the court of exercising proper care, control and protection, then the custody of the child is to be given to her parents and that would obviate the need for the court even to consider the other two alternatives, namely committing her to certified institute or approved home or committing her to the care of a relative or other fit person. There is no requirement for an application to be made by the parents for this proviso to have this effect. On the contrary, in view of the age of the victim girl, and her brutal rape, the court felt that the magistrate should have realised that it would be "*inhuman to separate such a tender-aged girl from her parents and send her to a Safe Home*".

[7] The court noted that although Bangladesh became a signatory to the Convention on the Rights of the Child in 1990, the authorities concerned and the agencies involved in dealing with children are still unfortunately unaware of the relevant provisions of the law and international instruments which are binding upon them. The court further found that the neglect of the Bangladesh government to implement the provisions of the CRC has led to numerous anomalies in the Bangladesh judicial system in dealing with cases where an offender and/or the victim are children. The court also noted that successive reports of the UN Committee on the Rights of the Child have raised concerns at the lack of progress by Bangladesh in harmonizing domestic legislation with the provisions of the Convention, "ensuring that the Convention can be invoked as a legal basis by individuals and judges at all levels of administrative and judicial proceedings"[1] The court thus strongly recommended that immediate steps must be taken by the government to enact laws or to amend the existing law in order to ensure implementation of all of the provisions of the CRC, which are beneficial to children and also to minimise the anomalous situations which arise when dealing with children.

[8] The court found that the lack of knowledge of the law and the failure to properly appreciate the needs of a child victim in this case by the officials concerned had led to immense and unnecessary suffering of a seven year old child and took the opportunity to make 34 recommendations, *inter alia*, that:

8.1 All persons charged with dealing with children, including government officials and the judiciary must be made aware of and sensitised to the needs of children in contact with the law;

8.2 Child-specific courts should be established in each district, dedicated to cases relating to children in order to dispose of those on a priority basis, and other cases would be heard only if there were no child related cases to be dealt with at any given time;

8.3 A specific set of rules should be formulated and incorporated into the Children Act, specifically to determine the duties and responsibilities of policy officers, probation officers, the court and others concerned in dealing with children;

8.4 When a child is brought before the police station or the court, it shall be the duty of the police officer or the court to determine whether it is safe for the child to return with the parent or guardian. If required, the child shall be asked about these matters confidentially and not in the presence of his/her parent or guardian;

8.5 A child shall not be separated from his/her parent or guardian save in exceptional cases, and in the absence of a parent or guardian, a relative or other fit person may be entrusted to keep the child in safety;

8.6 The Bangladesh government should take positive steps for dissemination of material regarding child rights in order to ensure awareness of all concerned with children in contact with the law through the print media as well as electronic media, including television and radio.

[9] Having made the above observations and recommendations, the court disposed of the Rule and directed that a copy of its judgement be communicated to the Ministry of Law, Justice and Parliamentary Affairs, Ministry of Home Affairs, Ministry of Women and Children Affairs, Ministry of Social Welfare, office of the Principal Secretary to the Prime Minister, Chairman of the Law Commission, Director General, Judicial Administration Training Institute and Chairman, Bar Council for information and necessary action. The court further directed that a copy of its judgement be circulated to all judicial officers in the service of the Republic of Bangladesh.

Mr Justice Md. Imman Ali* sits in the High Court Division of the Supreme Court of Bangladesh. He Is a Council Member of IAYFJM and also serves on the Ethics Committee

Mr Justice Ali's book,
'Towards a Justice Delivery System for Children in Bangladesh—A Guide and Case Law on Children in Conflict with the Law' was launched on 29 January 2011. It is a UNICEF publication ISBN 984-70292-0011-7-

Editor's note: I am most grateful to **Judy Cloete*,** Barrister, South Africa, who kindly abridged this judgement for publication. The full judgement is available from the Editor.

[1] Concluding observations on the third and fourth periodic reports of the People's Republic of Bangladesh—UN Committee on the Rights of the Child, June 2009.

European Convention—no presumption against children testifying : Supreme Court, UK

Times Law Report

In re W (Children), (Family proceedings Evidence)

Before Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Mance and Lord Kerr of Tonagnmore—Judgment March 3, 2010

A presumption that a child should not be called to give evidence in family proceedings could not be reconciled with the rights of all concerned in those proceedings under articles 6 and 8 of the European Convention on Human Rights and accordingly would no longer be regarded as appropriate. The Supreme Court so held when allowing the stepfather's appeal from the Court of Appeal (Lord Justice Wall, Lord Justice Wilson and Lord Justice Rimer) which, on February 9, 2010, [which] affirmed the refusal of a judge, in care proceedings relating to five children, of his [the step-father's] application for child C to give evidence following her complaint of sexual abuse against him.

Mr Charles Geekie, QC and Mr Michael Liebrecht for the stepfather; **Ms Luanda Davis** and Ms **Sarah Barley** for the local authority; Ms **Kate Branigan, QC and Ms Maggie Jones** for the children's guardian.

LADY HALE, giving the judgment of the court, referred to the approach described in *LM v Medway Council, RM and YM* ([2007] 1FLR1698, paragraphs 44 and 45), that the correct starting point was that a child should not have to give evidence in care proceedings; particular justification would be required before such a course was taken, and although there would be such cases, they would be rare.

Historically, in criminal and civil procedure facts had to be proved by oral evidence on oath in court and tested by cross-examination. Hearsay, except in wardship proceedings, was mostly inadmissible and was so in proceedings about the future of children in other courts.

Her Ladyship referred to the resulting statutory developments which made admissible the unsworn evidence of children in any civil proceedings and hearsay in relation to their upbringing, maintenance or welfare; and to developments in criminal proceedings to reduce harm to children in giving evidence: see *Report of the* Advisory Group *on Video Evidence* (the Pigot Report 1989), the Government's *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings* (1992), replaced in 2002 and 2007 by *Achieving Best Evidence in Criminal Proceedings* containing guidance for vulnerable or intimidated witnesses including children, and the Youth Justice and Criminal Evidence Act 1999.

Family proceedings were typically different from criminal proceedings. There was often a mass of documentary evidence, much of it hearsay, from which a picture could be built up. A child might reveal what happened in different ways. Video-recordings of "achieving best evidence" interviews were routinely used, if available, in care proceedings.

The near-contemporaneous account, given in response to open-ended questioning, in relaxed surroundings, was inherently more likely to be reliable than an account elicited by formal questioning in the stressful surroundings of a court room long after the event. But unlike criminal proceedings, it was rare for the child to be called for cross-examination.

The existing law erected a presumption against a child giving evidence which had to be rebutted by anyone seeking to question the child. That could not be reconciled with the approach of the European Court of Human Rights, which always aimed to strike a fair balance between Convention rights.

Article 6 required that the overall proceedings were fair, normally entailing an opportunity to challenge the evidence of the other side. Even in criminal proceedings the article 8 family rights of the perceived victim had to be taken into account.

Striking that balance in care proceedings might mean that the child should not be called to give evidence in most cases, but that was a result, not a presumption or even a starting point. The object of the proceedings was to achieve a fair trial in determining the rights of all involved.

The court had to admit all evidence bearing on the relevant questions: whether the threshold criteria justifying state intervention had been proved; if they had, what action if any would be in the child's best interests?

The court could not ignore relevant evidence just because other evidence might have been better. It had to do the best it could on what it had.

In considering whether a particular child should be called as a witness the court would weigh two considerations: the advantages that that would bring to the determination of the truth and the damage it might do to the welfare of that or any other child.

A fair trial was one that was fair in the light of the issues to be decided. The child's welfare was a relevant but not the paramount consideration; the object of the proceedings was to promote the welfare of that and other children; the hearing could not be fair to them unless their interests were given great weight.

In weighing the advantages of calling the child, the court would consider such factors, in particular, as the quality of any achieving best evidence interview, the nature of any challenge a party might make; the child's age and maturity and the length of time since the relevant events.

Those latter factors were also relevant to consideration of the risk of harm to the child, as were specific factors relating to support from family or others and the child's own views. An unwilling child should rarely, if ever, be obliged to give evidence.

The risk of further delay was also a factor, as were specific risks of harm to the particular child and the court could have regard to the general evidence of the harm which giving evidence might do to children.

The risk of harm, and the weight to be attached to it, might vary from case to case. The court always had to take it into account and did not need expert evidence to do so.

On both sides of the equation, the court had to factor in what steps could be taken to improve the quality of the child's evidence and at the same time to decrease the risk of harm.

In principle, the approach in private family proceedings between parents should be the same as that in care proceedings although there would be different risks to which the court should be alive.

The essential test was whether justice could be done to all the parties without further questioning of the child. *The consequence of the balancing exercise, if the court had to do it, would usually be that the additional benefits to its task in calling the child did not outweigh the additional harm to the child.*

A wise parent would understand that. But rarity should be a consequence of the exercise rather than a threshold test.

The issue should be addressed at the case management conference in care proceedings or the earliest directions hearing in private law proceedings. It should not be left to the party to raise.

The question whether C should give evidence at the hearing would be remitted to the judge to determine.

Solicitors: ***Dutton Gregory LLP; County Council Legal Department; Larcomes LLP***

Child friendly justice

Edo Korljan
Council of Europe

On 17 November 2010, the Committee of Ministers of the Council of Europe adopted Guidelines on child friendly justice intended to enhance children's access to and treatment in justice.

The idea to draft such Guidelines was first put forward during the 28th Conference of European Ministers of Justice, which took place in Lanzarote, Spain, in October 2007. The Guidelines were drafted using a transversal approach, involving several important Council of Europe steering committees and in close co-operation with the Programme "Building a Europe with and for Children", which was launched at the Warsaw Summit of the Council of Europe (2005). It was important too that the Guidelines took into account the case law of the European Court of Human Rights.

The aim was to produce comprehensive Guidelines on child-friendly justice, which would assist member states in ensuring that children enjoy facilitated access to justice. The Guidelines effectively enhance the treatment of the child by building on the plethora of existing national, European and international standards. The intention is to give children the right to have their voice heard at all stages of judicial as well as non-judicial procedures. The Guidelines also promote the right of children to be informed, to be represented and to participate as well as presenting good practices and proposing practical solutions.

Consultation of children

In spring 2010, to ensure that these Guidelines reflected children's views and opinions, the Council of Europe decided to organise a Europe-wide consultation with children and young people. This was done with the assistance of approximately 30 partner organisations, including the Children's Rights Alliance for England (CRAE), the European Network of Ombudsman for Children (ENOC) and UNICEF. Dr Ursula Kilkelly, a children's rights expert, collated the material returned and reported to the group of specialists on what the children had said and how this should be taken into account in the drafting of the Guidelines. Her full report and its child-friendly version, are available online[1]. The consultation was carried out with the generous financial support of the Government of Finland.

During the consultation, national organisations were asked to distribute a questionnaire on child-friendly justice as widely as possible while also being encouraged to use other methodologies, such as meeting the children themselves and having discussions with them. In this way the views of children, especially young children, hard-to-reach and specific groups, such as those in conflict with the law, in detention and in residential care, were gathered. These partners reported back to the group of specialists voicing the views of children and making recommendations on how the draft guidelines could be strengthened.

It was the first time the Council of Europe had carried out such an exercise, and its success proved that this method should be used again. It has been recommended that the Council of Europe should adopt guidelines on how this type of consultation with children should be carried out in the future.

In total, almost 3,800 questionnaires were returned from 25 countries reflecting experiences or views of children who have had direct contact with the justice system in various contexts and those who have had no such contact.

This pioneering process produced rich results on the views and experiences of children in the justice system. Children who responded to the questionnaire ranged in age from a small number of children between 5 and 10 years to the majority who were between 11 and 17 years. It is worth mentioning that almost an equal number of girls and boys replied.

Most of the children who answered the questionnaire had had some contact with the justice system in either its civil (usually education or family) or its criminal context. 2094 children reported having attended at a police station, whereas 1,480 children said that they had been in court. Relatively even numbers reported having been in a lawyer's office (895), a care home (876) and a detention centre (746). At the same time, many young people who had not had such formal involvement had nonetheless come into contact with the police.

[1] Guidelines are available at www.coe.int/childjustice and www..coe.int/family

A vast majority of children wanted to know more about their rights and when asked who should provide them with this information, they chose their parents or others in a position of trust, while youth workers, and lawyers and teachers were also mentioned (although to a lesser extent).

The Internet was the leader among the sources by which the children wanted to be informed about their rights. Then followed television and community-based services, including advertisements in health and social service offices or police stations. Schools were also identified as a good place to obtain information. Surprisingly, telephone help lines, did not feature strongly. This may indicate that children want to search for information by themselves and only then ask for assistance.

When asked if they would tell someone if they were unhappy with how they were being treated, the majority answered they would tell (in order) parents, friends and siblings about it. Other categories – including health workers, teachers, youth/social workers, police officers and lawyers were not reflected in their answers to this question. Therefore, there is a real need for children to be listened to by people they trust.

Children were asked to identify what decisions had been made about them. They reported they had been made by a judge, police officer or teacher in the areas of family law, criminal law and education. Only a slim majority of children were present when decisions had been taken about them, and less than half indicated that they had been offered an explanation as to what was about to happen. Just over a third said they had been asked for their views, and less than a third felt these views had been taken seriously. In another field of the consultation, a disturbing fact, a third felt they had not been treated fairly. They clearly understood when they are not taken seriously by the competent authorities and when they do not have the right to express themselves.

A significant majority said they had support through the process, and about half said that the decision had been made in a safe and comfortable environment. The vast majority answered that having someone that they trust present would help them during the process. Almost two thirds said that they understood the decision made about them and a similar number mentioned that it had been explained to them. Children were asked who they would prefer to explain this decision to them, and in response they overwhelmingly chose family. They were against receiving explanations indirectly such as in a written form.

A huge majority of children considered it important that they have their say and an overwhelming number wanted to speak directly to the person making the decision, for example the judge, rather than having their views conveyed by others.

To sum up, children expressed their wish to be treated respectfully; they wanted their views to be considered by the competent authorities, and to receive explanations and details of the decisions made about them.

The results of the survey and consultation with children revealed some other important aspects that should be considered. The importance of family in the lives of children was stressed in almost every case. Each time they were given a choice as to who they wanted to be present, who they would trust, who they wanted to receive information and explanations from, children identified parents, siblings and friends as a priority. By contrast, the analysis also showed that there is a clear mistrust in those in positions of authority. They were critical of many officials – the police, lawyers, social workers and others (judges), claiming they showed them little respect and that they did not take into consideration their special needs.

The group of specialists drafting the Guidelines made numerous changes to the document in order to take into account the requests and views of children. In this way, the consultation of children influenced the text of the guidelines in a very practical manner.

In particular, the views of children have been used to support the extent and manner in which the Guidelines recognise the right of children to be heard, to receive information about their rights, to enjoy independent representation and to participate effectively in decisions made about them. By way of example, the Guidelines now require judges to respect the right of all children to be heard in all matters, and require that the methods used shall be adapted to the child's understanding and ability to communicate and take into account the circumstances of the case. The Guidelines also ensure that adequate provision is made for children to understand and receive feedback on how much weight is attached to their views.

The Guidelines recognise an unequivocal right of children to access independent and effective complaints mechanisms in all parts of the justice system; they support specialisation among all professionals and call for comprehensive and ongoing training for all professionals who have contact with children in the justice system. These factors are central in addressing the lack of trust in authority.

The use of such a consultation process is now being extended to other similar activities within the Council of Europe (recommendations on the legal status of children and parental responsibilities, as well as on child-friendly health care and social care services) with a view to ensuring the meaningful participation of children and young people in the normal work of the organisation. This ambitious and innovative project has illustrated how such a process can be used to

strengthen children's rights standards throughout the Council of Europe member states, and possibly elsewhere.

Substantive issues

The Group of Specialists on Child-Friendly Justice responsible for drafting the Guidelines was a multidisciplinary group including judges, attorneys, prosecutors, academics, psychologists, police officers and social workers, as well as representatives of the governments of member states. Furthermore, a wide range of observers, including leading international intergovernmental—such as UNICEF or UNCHR— and non-governmental organisations, also contributed to its work.

The Guidelines are a non-binding instrument which aspires to be a practical guide to the implementation of internationally agreed and binding standards. Many of their standards come directly from the European Court of Human Rights or good practices found in member states. They are not intended to affect issues of substantive law or the material rights of children. Most of the guidelines will only necessitate a change in approach in addressing the views and needs of children.

The Guidelines are aimed at all professionals dealing with children in and outside judicial proceedings. Sectors such as the police and social and mental health services are also responsible for making justice more child-friendly. The guidelines strive to ensure that children's rights are known and scrupulously respected by all these professionals.

In line with children's rights law, the essential message is that children are bearers of rights. As the Chronicle of the IAYFJM is read mostly by magistrates, and judges sitting in youth court criminal jurisdictions, family judges, magistrates and lawyers, the following text deals with issues of interest to them.

In family law cases, children should be included in the discussions prior to any decision which affects their present and/or future well-being.

In several family law cases, the European Court of Human Rights has stated that domestic courts (civil family courts) should assess the difficult question of the child's best interests on the basis of a reasoned, independent and up-to-date psychology report of the child. In addition the child, if possible and according to his or her maturity and age, should be heard by the psychology expert and by the court in access (contact), residence and custody matters, in order to confirm that he or she can give his or her opinion and to attest that the child can make a clear choice and understand the consequences.

In the case of cross-border civil law and family disputes, depending on his or her maturity and understanding, the child should be provided with professional information relating to access to justice in the various jurisdictions and the implications of the proceedings on his or her life.

However, little use is made of the "best interests" principle in cases of children in conflict with law, unlike in family law matters. An important issue was that of the minimum age of criminal responsibility, which ranges among the Council of Europe member states from as young as eight to the age of majority. The United Nations' Convention on the Rights of the Child does not set any age, but General Comment No. 10 on Children's Rights in Juvenile Justice advises member states not to set this minimum age too low. This provision has been re-iterated, and strengthened by adding that such age should be determined by laws.

Guidelines (24)-(26) recall that in several member states attention has been focused on the provision of conflict settlements outside courts, by *inter alia* family mediation, diversion or restorative justice. Member states are encouraged to ensure that children can benefit from these procedures, providing that they are not used as an obstacle to the child's access to justice.

To sum up, the text of the Guidelines encourages access to national courts for children as bearers of rights, in accordance with the case law of the European Court of Human Rights, which they can access on their motion. However, there should be a balance between such access and alternatives to judicial proceedings.

Concluding remarks

Member states are encouraged to carry out a number of measures to implement these Guidelines. They should ensure their wide dissemination among all authorities responsible for or otherwise involved with children's rights in justice.

A review of domestic legislation, policies and practice in keeping with these Guidelines, as well as a periodic review of working methods in this area should be ensured by member States. States are also invited to prescribe specific measures for complying with the letter and spirit of these Guidelines. In this respect, the maintenance or establishment of a framework, including one or more independent mechanisms (such as ombudsperson, children's ombudspersons) is of paramount importance for the implementation of the Guidelines.

Edo Korljan is Secretary of the Family Law Committee, Council of Europe

Child- and adolescent-friendly justice—the Mercosur perspective

Judge Eduardo Rezende Melo and colleagues

The debate in Europe on guidelines for child- and adolescent-friendly justice has prompted the rest of the world to consider their own policies in this area.

Although MERCOSUR countries (Argentina, Brazil, Paraguay, Uruguay and Venezuela) plus Associates (Bolivia and Chile) do not yet have a political-administrative structure like the European Union, they are trying to build common reference points for action and coordination.

On the subject of childhood and adolescence, two initiatives that are now coming together in the region are worthy of note.

In the field of government, the *Niñ@south* initiative—like a number of others in the field of social rights—was set up in 2006 with action plans aiming to achieve better government coordination between countries.

The judicial sphere still lacks cooperative structures. The International Association of Judges for Children and Youth within MERCOSUR has realised the need for progress and has decided to refocus its activities to achieve more structured political and institutional change in the region.

The Association was founded in 1997 and is composed of judges, prosecutors, advocates, and administrators of the judicial systems for children and adolescents in the MERCOSUR countries and the Associates.

The aims and objectives are the promotion and dissemination of the rights of children and adolescents; the creation of interdisciplinary academic sources of study to look in depth at such rights; and the improvement of the effectiveness and efficiency of the corresponding judicial systems in the region.

The Association wants to develop a work plan to look in depth at common themes in all countries of the region with comparative studies to develop model legislation, resolutions or international conventions. From this perspective, the question of guidelines for child- and adolescent-friendly justice appeared to be the top priority.

Indeed, it seemed essential to the Association that MERCOSUR considers the specific challenges of child, youth and family justice and creates joint mechanisms that would guarantee the rights of children and adolescents.

Like Latin America in general, the region still faces intense challenges in ensuring the social rights of children and adolescents. Legal systems in the region—especially in Brazil—have experience of successful collective or class actions which have compelled authorities to implement public policies that guarantee rights to education, health, welfare, and housing etc, with sanctions if they fail to do so.

It would be unthinkable, therefore, that a child- and adolescent- friendly justice system in the region would not consider its ability to enforce Article 4 of the Convention on the Rights of the Child to give effect to their rights to the maximum available resources.

The structure of justice systems also affects the guarantee of individual rights, especially that of participation.

For these reasons, the MERCOSUR Association has reached agreement with the Ministries of Human Rights in the countries of the region that it will develop guidelines for proper justice for children and adolescents by means of decentralised discussions, country by country, continuing until May2011.

Next, the proposal is to establish the common ground in a regional meeting, which will take place in Montevideo in June 2011 and which will begin construction of common references on the subject. The goal is that in the MERCOSUR Association conference in November 2011 in Asuncion, Paraguay, will undertake the development of regional guidelines.

In this way, in their regular meetings or conferences the MERCOSUR Association will combine theoretical and practical discussions of regional political action to improve the lives of children and adolescents.

Moreover, in close cooperation with the IAYFJM, the MERCOSUR Association seeks to contribute to global issues. Regional contributions can help improve systems in other parts of the world and achieve even more significant global guidelines for children and adolescents

An effort is also being made to sensitise and mobilise the judges of the region and the world to look internationally in order to achieve a transformation of our working conditions, local and regional, and at the same time, the conditions of life for children and adolescents.

The vision that moves the MERCOSUR Association is participatory and democratic. We want to share your experience at the various national, regional and international levels and promote a more intensive international debate.

- **Irma Alfonso de Bogarín—**Judge, Paraguay
- **Ricardo Pérez Manrique**—Judge, Uruguay
- **Eduardo Rezende Melo***—Judge, Brazil
- **Elbio Ramos***—Judge, Argentina
- **Helen Correa Sanches**—Prosecutor, Brazil

Irma Alfonso de Bogarín—Judge, Paraguay, MERCOSUR President of the Association of Judges of Children and Youth and of the Paraguayan Association.

Eduardo Rezende Melo*—a Judge in Brazil, MERCOSUR Association Vice President and Secretary General of the International Association of Magistrates and Youth and Family Judges

Ricardo Pérez Manrique—Judge, Uruguay, MERCOSUR Co-Chairman of the Association of Judges of the Children and Youth and of the Uruguayan Association

Elbio Ramos*—a Judge in Argentina, MERCOSUR Association Vice President and President of the Argentina Association

Helen Correa Sanches—Prosecutor in Brazil and President of the Brazilian Association of Judges, Prosecutors and Public Defenders of Children and Youth

Let's stop trivialising imprisonment

Judge Benoit van Keirsbilck
Belgium

As the international community celebrates twenty years of implementation of the CRC, it is more than ever urgent that countries bring their laws in line with human rights standards and ensure that no child is subjected to these forms of punishment [imprisonment]. Article 40 of the CRC provides inspiring guidance for the treatment of children involved with the juvenile justice system, "to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Paulo Sergio Pinheiro[1]

In Belgium, there has been an exponential rise in cases where a whole raft of different structures resort to imprisonment of juveniles[2], whether they be new prisons or closed institutions for juveniles or new specialised institutions for juveniles suffering from psychiatric problems, drug addiction or even for instances of sexual abuse against juveniles[3]. This increase in detention spaces is occurring without there being an established link with developments in official juvenile delinquency statistics.

This trend, which can also be seen in a number of other countries, gives us all the more reason to remind ourselves that international law is very clear, that deprivation of liberty should be a measure of last resort and may only be imposed for as short a time period as possible. Across the world, despite difficulties in gathering entirely reliable statistics, it is estimated that there are more than one million children in detention, often in appalling conditions[4].

How can it be that governments who claim to want to respect international conventions[5] can develop policies that run counter to their declarations to such an extent? This article endeavours to understand the mechanisms which have been implemented in order to subsequently outline the ways in which this trend can be reversed.

Exponential increase in imprisonment

Firstly, we must remember that nature abhors a vacuum. The more we create structures for deprivation of liberty, the more they will be used. In Belgium, as in numerous other countries, we are witnessing a constant escalation. People repeatedly denounce a 'lack of places' for juvenile offenders and this inevitably leads to an increase in places in detention which are filled almost immediately. Supply thus creates demand and

[1] Commissioner and Rapporteur on the rights of the child for the Inter-American Human Rights Commission, Organisation of American States; extract from a speech given at the launch of the campaign against inhumane sentences for children, October 2010: www.crin.org/violence/search/closeup.asp?infoID=23420#lp

[2] Please see Sharon Detrick, Gilles Abel, Maartje Berger, Aurore Delon, Rosie Meek: Violence against children in conflict with the law: A study on indicators and data collection in Belgium, England and Wales, France and the Netherlands; Defence for Children International - The Netherlands, 2008. See also: Saint-Hubert, prison or closed centre? And the children inside it?, Open letter published by *Commission Jeunesse de la Ligue des droits de l'Homme (Alice Jaspart, Sophie de Biolley), Centre for Criminological Research at the Université Libre de Bruxelles (Sarah Van Praet)* in Le Soir, 25 June 2009

[3] *See* C. ADAM, *Imprisonment of juveniles taken to court for 'sexual assault on a minor'; A cross analysis of knowledge modes in treatment of an emerging category*, *in* Déviance et Société, 2009/1 (Vol. 33).

[4] See Paulo Sérgio Pinheiro, *World Report on Violence against Children,* United Nations Secretary General's Study on Violence against Children, Geneva, 2006, p. 217. www.violencestudy.org, p. 217. See also: Cappelaere, G., Grandjean, A., Naqvi, Y., Children deprived of their liberty, rights and realities, Éditions Jeunesse et droit, Defence for Children International, 2000, p. 34-35.

[5] We here cite the principal international texts:

- UN Convention on the Rights of the Child of 20 November 1989 (CRC)
- All the United Nations standard minimum rules for the administration of juvenile justice: The Beijing Rules, 1985.
- United Nations Guidelines for the prevention of juvenile delinquency: Riyadh Guidlines; 1990.
- United Nations rules for the protection of juveniles deprived of their liberty: Havana Rules, 1990.
- United Nations Standard Minimum Rules for Non-custodial Measures: Tokyo rules; 1990.
- UN Economic and Social Council Resolution 1997/30, Administration of juvenile justice: Vienna guidelines
- Committee on the rights of the child, General Observation no. 10 (2007): The rights of the child in the juvenile justice system

imprisonment thereby becomes a routine which provokes a snowball effect. In this respect, as long as there are places immediately available, this measure will always be the easy option for judges in juvenile courts as it relieves them from having to look for alternatives and really asking themselves if deprivation of liberty is appropriate in each case.

The evolution of the number of places in closed institutions in Belgium is illuminating. There were already about one hundred places in Public Institutions for Youth Protection (IPPJ), institutions with an educational purpose, when, in 2002, the Federal Government decided to create a new federal closed centre (prison for juveniles) with 10 places in Everberg (close to Brussels)., Many people raised their voices to denounce this. It was remarkable that these reactions did not only emanate from rights of the child organisations, but also from juvenile judges who considered that the nature of these new places was too security-based to the detriment of the provision of education. However, it only took a few months (and the media coverage on one news item or another, admittedly fairly dramatic at times) to bring the capacity of this centre to 50 places which have hardly ever been vacant. Those judges who criticised this centre often resort to sending juvenile offenders there seemingly without qualms. Today it forms part of the institutional landscape and few people still dare to challenge its existence. Worse still, before the paint on the walls of the Everberg centre had even had a chance to dry, the creation of a centre with 50 places in Wallonia and another 126-place centre in Flanders was announced. The latest centre to be announced is due to open in 2012 in the south of the country which will be able to house 120 young people! If the latter does indeed come into being, 330 new places for juvenile detention will have been created in Belgium since 1st January 2002. This is without counting those centres for young people with psychiatric problems created in psychiatric hospital structures.

Admittedly, a proportion of these new places in specialist centres for juveniles is to make sure that they are no longer sent to prisons, as is still the case in Belgium and in various countries in the world. Separating children and adults is indeed a requirement of international law and we can be thankful that Belgium is finally seeking to conform with this, even if this is still just partially. Yet there is no denying that as regards juvenile imprisonment, the monster seems to be insatiable!

However, according to the National Crime and Criminology Institute (INCC), the number of minors reported to youth prosecutors due to delinquency offences seems to have fallen if we compare today with the 1980s[6]. Extremely grave cases are rare[7], there is nothing to suggest that juvenile criminality is becoming more serious and figures do not point to those committing crimes starting at an increasingly early age either.[8,9] In comparison, delinquency attributed to adults is eight times higher than that committed by minors.[10]

The same can be observed in England and Wales, France and the Netherlands: public opinion denounces a significant rise in criminal offences committed by young people, with greater violence and the offenders starting to commit crimes at younger ages. Nevertheless, in these countries, as in the majority of European countries, juvenile crime rates have remained stable over the last decade. Yet the premise of an increase in this type of crime has given rise to reforms in juvenile justice in each of these countries[11].

Imprisonment is the cornerstone of the juvenile justice system (as is the case for adult justice as well). Even when it is not applied, it is regularly evoked as a threat: 'if you start that up again I'll send you to prison'. It is as if all intervention has to lead inevitably to imprisonment.

Juvenile justice, a particular type of justice

For more than a century a number of countries have decided to implement justice specific to juveniles drawn up on a premise: that punishment can be imposed in conjunction with educational or rehabilitative work. Faced with the mess in the traditional penal system, the notion of juvenile justice thus began to emerge little by little (in Belgium, this notion comes under youth protection which covers both young people considered to be 'at risk' as well as juvenile offenders). Even if they are 'offenders' we are talking about children whose capacity for judgement is not thought to be 'mature', that their actions are also linked to the shortcomings of adults— and sometimes to society itself— and that it is therefore possible to

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6 VANNESTE CH., The 'new' statistics from youth prosecutors in the light of other types of indicators. Contextualisation exercise, in VANNESTE CH., GOEDSEELS E. ET DETRY I. (éd.), *The 'new' statistics from youth prosecutors: perspectives on first analysis,* proceedings of the study day on 23 October 2007, Academia Press, 2008.

7 In total, for 2005, cases where a killing, murder or attempted murder were reported represented 0.08 % of all offences reported.

8 L. WALGRAVE, *Juvenile delinquency and policy statistics*, in the framework of a conference on the 'new' statistics from youth prosecutors: perspectives on first analysis, 23 October 2007.

9 Ch. VANNESTE, Figures? Yes, but still…, speech given at the Juvenile Delinquency Congress 'Seeking out suitable responses', 23 March 2009.

10 *Op.Cit.*

11 S. DETRICK, G. ABEL, M. BERGER, A. DELON, R. MEEK, *Violence against children in conflict with the law: A study on indicators and data collection in Belgium, England and Wales, France and the Netherlands;* Defence for children International, 2008, p.35.

get them back on the straight and narrow. This social evolution has become more solid because of the adoption of various international standards in the field of juvenile justice and in particular articles 37 and 40 of the international Convention on the Rights of the Child.

The principal characteristics of juvenile justice are henceforward to be based on a specialised jurisdiction, distinct from that of adults, with the job of applying educational measures for an indefinite period rather than punitive sentences or sanctions. This needs to involve the definition of an age of penal majority (and in principle a minimum age for penal responsibility, which covers two different notions[12]), whatever the nature of the offence may be. Juvenile justice aims to take the living conditions and character of the juvenile into account and calls on experts and qualified stakeholders to a great extent. It entails a separation between the nature of the crime committed and the measures or punishments prescribed and a move away from a strictly proportionate response. It is also based on shared responsibility towards juvenile delinquency, involving the young person, their family and society and not making the responsibility for the act solely that of the young person.

Admittedly, these criteria are also criticised by those who support plain speaking because juveniles who would appear to be infantilised if they are exempted from all responsibility as a result of this overly paternalistic approach. The call for greater legal safeguards also has the paradoxical effect of bringing the juvenile system closer to that for adults.

Nevertheless, it cannot be denied that juvenile justice is carried out by adults and it imposes an adult viewpoint on the situations that occur, combining comprehension and a reminder of limits. The youth court reacts to an offence that is committed and chooses to sanction the juvenile with a sentence that will be productive for the victims, where this is possible, and especially for the young offender him or herself. The sentence given is always an act of justice but a justice that is different from that of adults as it looks more towards the future and takes a gamble on reinsertion rather than exclusion.

In the same vein, the criticism that can be expressed about imprisonment is well-known: it generates more adverse effects not just on the young person concerned and their family but also on society as a whole; it is nothing but a temporary measure to get the young person out of the way and often gives the illusion that public security has improved. These young people will one day leave these centres with an attitude that may be difficult to bear and which renders their reinsertion ever more difficult. They are often put back into their old environment, without the situation really having improved: as the context in which they committed the offences remains the same there is a huge risk that they will re-offend.

The stigmatisation which these young people fall victim to is another significant problem as they are labelled as 'dangerous youth' and thus must face rejection from society, in their neighbourhood, at school, sometimes in their own family, by the police or potential employers.

Reconsideration of the specificity of juvenile justice

Voices are repeatedly raised concerning offences involving minors that attract media attention denouncing judicial treatment which gives 'preferential treatment' to minors. 'Too lax', 'not harsh enough', 'not fair enough', juvenile justice is supposedly not 'real' justice. Indeed for twenty years, blame has been cast on the functioning of juvenile justice under the 'welfare' regime. Legislative reforms in a growing number of countries are tending to move further away from principles which allow them to construct a specific system for dealing with juvenile delinquency.

These positions and legislative modifications often rest on a comparison with the adult penal system and on the idea that the severity of an offence is measured and recognised by the severity of a sentence imposed. Although this idea has directed our system and our conception of justice for more than two centuries, it is clear today that it is based on fiction. Despite sentences becoming more severe, despite a multiplication in the number of prisons, despite very difficult conditions in prisons, despite reinforcement of the judicial framework and a series of control measures, adult delinquency has remained at a relatively stable level. We also especially realise that the penal system, and certainly the prison system, maintains or even accentuates factors which can generate crime: family isolation, social exclusion, exclusion from the world of work, etc. [13]

This reconsideration of the principles of juvenile justice takes as its foundation the increased expression of a feeling of insecurity (we indeed mean 'feeling' along with the subjectivity that this involves), without a doubt the changes we see in new forms of delinquency (if we look at attacks on

[12] *Age of penal majority*, this is the age from which a person will be treated as an adult by the justice system. *Minimum age of penal responsibility* is the age from which a juvenile can be brought to answer for their acts in front of a specialised jurisdiction, juvenile justice. This therefore means that there are children who commit offence below this age, who cannot be subject to any measure or sanction; they should be considered as not possessing enough judgement to be able to be legally accountable for their acts. It is undoubtedly desirable for them to benefit from socio-educational support, especially if they are accused or serious offences. This question alone is really worth expanding on.

[13] See the open letter from Y. HACHEM SAMII and A. JASPART, Are juveniles adults? published in *La libre Belgium*, 19 September 2008 during a trial covered by the media in September 2008 of a young juvenile suspected of murdering another minor in the middle of the Gare Centrale in Brussels.

people and to offences linked to drug addiction), on the greater position accorded to victims and the weakening of community solidarity in a capitalist and individualist society. These elements are combined with a degradation of conditions for access to work for those young people with fewest qualifications, an increasing dualism in society, a questioning of integration of young people with a migrant background, a weakening of social ties and so on. All in all the structure of the social state – a social state with juvenile justice with an educational and non-retributive purpose– is becoming ever more fragile. There is criticism of pooling social risks and primacy is given to individual responsibility for coping with what life deals you. The state is investing less in public welfare yet has developed greater control of certain risks resulting from population groups targeted as being 'at risk'.

For those who support this approach, everyone is responsible for their own path in life and it is counterproductive to want to reduce social inequalities. A society should manage (with the least cost possible?) the harmful effects of deviation and try to reduce the social risks and nuisances which are associated with these without seeking to take on board the collective causes of each individual case. In its most categorical form, this criticism of the juvenile justice system leads to a society of control and management of the risks associated with the most vulnerable population groups, of which young offenders are symbolic[14].

Alternatives that aren't really alternatives (or don't go far enough!)

As a whole, society finds it difficult to imagine and make a reality of measures other than imprisonment for adolescents who have committed or who are suspected of having committed offences. Yet real alternatives do exist. They go from keeping the young person in their family environment alongside intensive educational monitoring to community work as well as mediation and other educational approaches. We can see that there are a number of new initiatives aimed at responding to the difficulties faced by these juveniles and to the crimes they commit.

In some cases these measures are not well enough known. Sometimes juvenile judges are far too often reluctant to utilize them instead of custodial measures because they do not have faith in these measures or because public pressure pushes them towards the more severe solutions. Moreover, in practice, instead of being alternatives to detention, they may sometimes be applied when the prosecutor would eventually have dropped the case (nolle prosequi) and the young person would have gone free. In these cases the number of young people subject to a judicial procedure increases. .

Those promoting these new responses undoubtedly publicise their results and the value of their actions far too little. They thus play a part in the lack of recognition of the relevance of their work. It is also true that these are not activities likely to attract a lot of media attention but instead day-to-day work requiring patience, willpower and support. It is not easy to make comparisons either, as the effects of measures must be able to be measured into the medium or long term. Therefore, it is extremely difficult to measure the short-term effectiveness of these activities whose effect is not quantifiable and immediately visible. Yet there is research that has shown that at a far lower cost, measures which keep juveniles in their own environment provide better results than deprivation of liberty.

The role of the media

In our society of media frenzies, offences which have existed since time immemorial take on excessive proportions giving the impression that crime is on the up in a frightening way. The media play the role here of not only a magnifying glass but also a distorting mirror.

Some of the media demonstrate a lack of critical distance in relationship to events and the discourse of the authorities. They assert and maintain clichés, and *a priori* regarding a section of juveniles, dedicate far too little newsprint or time to analysing the causes and solutions and all too often present imprisonment as the only way society can react to juvenile delinquency. Overexposure of certain stories, of course often dramatic, paints a very negative picture of youth and accentuates the trend towards greater repression.

They occasionally forget their professional ethics in the interests of heightened sensationalism, yet above all to sell.

It is certainly true that explaining how alternatives to custody bring about better results and, in the long term, better guarantee public security, takes some time. A huge pedagogical effort is required, citing examples and especially allaying the concerns of the public who have the impression that public authorities do nothing[15]. Such an approach takes time, a great deal more time than simply announcing that the juvenile offender has been deprived of their liberty (and so citizens can sleep peacefully at night). Such a period of time is not compatible with the way the media works, with the time dedicated to a particular issue in the televised news or with the space given to an

[14] See the work of the 16th symposium of the International Association for Research into Juvenile Criminology, Paris, 8-11 March 2006: Rupture ou Continuité? La justice des mineurs en question »
www.liens-socio.org/article.php3?id_article=1097

[15] Reading newspaper forums is enlightening in this sense: those who express their opinion there develop extremely radical and intolerant positions, regularly calling for the reintroduction of the death penalty or prison for children.

article in a daily newspaper. Yet small sound bites, often gratuitous, careless and far from reality, hit the bull's-eye because they reinforce public opinion often destabilised by the economic climate. This is the case for instance with the declaration of someone in politics who proposed entrusting the education of child offenders to the military (thereby implying that a strong response and the return of strict discipline and harsh living conditions is worth more than educational qualifications and the involvement of education specialists). The reference to boot camps was of course not fortuitous! Juvenile delinquency has always been a matter of Poujadist political declarations which a certain section of the press devours.

The role of society

This climate, exacerbated by the economic crisis and therefore by the number of families living in extremely precarious situations, pushes public authorities to adopt increasingly repressive measures, especially vis-à-vis youth. Zero tolerance policies, curfew measures, a ban on groups assembling in public areas and a rise in the use of tasers and the mosquito[16] all play a part in this repressive climate. A society which puts more and more of its adolescents behind bars is a society going in the wrong direction, which affords little to those who are in need of particular social assistance and is not fulfilling its fundamental financial obligation which should aim to achieve equal opportunities for all young people.

We see that the picture painted of young people by society is negative. Similarly, a substantial number of young people are becoming increasingly disillusioned about the poor and uncertain future society offers them. These images obscure and scale down the reality for today's youth which is complex. However, the adolescents concerned, as well as those close to them, can find solutions that bring about change in measures and instruments devoted to developing social links. It is these links, and not isolation, which foster maturity and sets them up for their adult lives as positive members of society. The reactions of adults to juveniles should take their developmental dimension into account as well as the right of each young person to an education.

Social inequality, injustice, the isolated patches of cultural integration, boredom and poverty are the main causes of delinquency and all that we call juvenile maladjustment[17].

What purpose does imprisonment serve?

As Christian Mormont states '*In general, imprisonment responds to various intentions: punishment, setting an example, security for society, education. However, we know that time in prison rarely improves the individual who is imprisoned. We know that the threat of such a punishment is not a deterrent. We know that for education and reinsertion, this is often instead more likely to be education in delinquency and greater insertion into the criminal world than civic education and reinsertion into the community. We can see that increasing the severity of sentences tends to increase the severity of offences. We can only see good reasons why we should stay clear of this experience for anyone, whether they be adult or juvenile, to the greatest extent possible. Yet we are imprisoning an increasing number of people for increasingly longer sentences. What a paradox!*'[18].

Certain young people should be stopped from drifting off course, this being in their own interest but additionally in the interest of the community. Nevertheless, if placing them in a closed environment does indeed respond, in the short term, to the imperative of protecting society, it does not necessarily prove to be effective in its educational objectives. Even from the educational perspective, it is not an adequate response to this concern. This is especially because prison only ever rarely improves the character of those who are subjected to it. It does not heal, it does not provide care and it does not deter.

Uberto Gatti, an Italian criminologist who works on juvenile delinquency goes even further as he shows that judicial intervention is counterproductive for minors.[19]. With the same profile, that is to say the same social background, the same family dynamic, same schooling, same type of offence, juveniles who have not been subject to any form of judicial intervention fare better than those who have. Furthermore, if a young person comes up against such juvenile justice, the risk of them ending up in the adult penal system is eight times as high.

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16 Sound equipment which emits a high-pitched sound only audible to those under 25, with a view to chasing young people away from public areas.

17 S. TOMKIEWICZ, & J. FINDER, How can you turn your child into a delinquent?, JDJ-RAJS n°276 – June 2008.

18 C. MORMONT, Child Imprisonment, Journal droit des jeunes, n° 271, January 2008, p. 13.

19 Speech byU. GATTI on 'the theory of labelling and juvenile delinquency: the long-term effects of the penal justice system on young people in Canada, workshop no.3: institutional reforms: paradoxes, dead ends and compromises, 16th conference of International Association for Research into Juvenile Criminology, Paris, 8-11 March 2006.

It is therefore clear that that which precedes the imprisonment of juveniles seems to fail in its objective to educate young people. Numerous young people explain that once they are released nothing has really changed for them (and various people involved in education in the closed centres for juveniles are under no illusion as to the future prison life of a significant proportion of the young people under their charge). The gap between the missions announced and what young people experience is often particularly striking.

The issue of cost

Imprisonment security policies cost a great deal of money, in exchange for a very unpredictable level of effectiveness. A prison for juveniles brings with it, at least in the western world (but also, to a lesser extent, in other lesser developed countries) considerable expenditure. The cost of placing a young person in a public institution for youth protection in Belgium can be from 200€ to 300€ per day; this cost rises to up to 500€ for the federal closed centres (which have even more of a secure nature). The budget foreseen for the construction of the 120-place secure centre in Achènes is 35 million euros (experience has shown that these budgets are largely underestimates) and its annual running costs will be close to 22 million euros[20].

This investment is made at the end of the chain and in fact, if everything is kept in proportion, affects a very small number of young people (even if we complain that it is too high). It is a whole lot of money that could be invested in a more useful way elsewhere: education, culture, prevention, social assistance or supporting parenthood. More and more families are living in precarious economic and social situations. The same amount invested in prevention would allow an incomparable number of young people to be reached, with most probably far better results.

These are of course political choices and it is these choices that we must question and reconsider.

Potential solutions

'*Making imprisonment a stage of reinsertion is something of a utopia. Prison has a short-term effectiveness, as it neutralises the person, but it does not reinsert, and it does not prevent reoffending. It is thus necessary to consider something else'* says magistrate Jean-Yves Monfort. Yet what does this 'something else' go back to? What is it based on exactly? For Jean-François Cauchie, a Canadian sociologist and criminologist, we must abandon '*the idea that we need to have the bad to get the good'* and cease to *'oppose protection of society and protection of its criminal members'*. We therefore need to set out to ensure a penal policy emerges that bears witness to the will to *'punish without humiliating, place blame without excluding and disapprove whilst talking about it all'*. [21]

The sentence (punishment) so desired by society should not be considered equivalent to 'sentenced to imprisonment'. A shift in mentality towards the penal system and therefore towards the judicial response must take place. The punishment must no longer be measured quantitatively (in number of years imprisoned), but instead qualitatively (through alternatives and a personal and customized management of situations). This must occur by means of awareness-raising and adequate training among judges.

Imprisoning people has never been a solution, not for adults and even less for juveniles, just as they develop. This measure is counterproductive. If you imprison a young person at 16 for 4 or 5 years, you are building a time bomb and turning their reinsertion into an obstacle course.

Getting out of the punitive and focusing on the future and making the young offender and the victim into active resources with a view to resolving the conflict whilst re-establishing the social link are ambitious objectives. These are the premises of a non-judicial approach to juvenile delinquency.

A *sine qua non* condition of a change of course is the necessary political will, the conviction that there needs to be a new way forward built upon measures for the medium to long term. Now, this vision is weakened by election campaigns because it gives immediate, visible and therefore media-friendly results on very few occasions. Political will depends on power struggles within society. Today the voices calling for increased repression make themselves heard most. We need to ensure that other voices, those which put forward the dangers of repression and imprisonment, can be heard too. In this respect, we cannot cut back on increasing the awareness of journalists and a partnership with the press so that solutions which are working also have the right to be showcased. It is noted that those who defend a more social and educational approach to delinquency are often treated as naive or even irresponsible even though it is not a matter of a laisser faire attitude and absolute tolerance towards transgressions from the norm, particularly for juveniles. We should not make sacrifices on public security, but instead guarantee it in other ways, ways which are far more socially fair and more optimistic.

Then a clear strategy is necessary. This must look to an immediate moratorium on the creation of new imprisonment places and lead to the progressive closing of existing places and them being replaced by services which develop preventive or social approaches or measures which can be real alternatives to imprisonment.

[20] If we count €500 per day for 120 juveniles for 365 days per year.

[21] P. MAREST, Alternatives come out of the shadows, in Dedans dehors, no. 60, March April 2007.

Nonetheless, as we have seen, we cannot simply wait for a substantial decrease in judges resorting to imprisonment as a result of merely developing alternatives or implementation of social policies. What is necessary is a proactive policy which aims to reduce the supply side of imprisonment. In other words, closed centres must be closed as well as other prisons for minors. In parallel, once funds are then freed up they must be allocated to social policies and accompanying young people in their own environment and supporting their families and so on.

Many studies, notably those from the United Kingdom, have shown that the least punitive interventions provide the best results. When young people are confronted with the direct consequences of their actions they are more likely not to commit another offence.

In conclusion

It is essential and a matter of urgency to fight the trend of resorting to imprisoning juveniles as rigorously as possible. This must be done in Belgium, in Western countries, but also across the world, no country is completely spared the matters denounced in this article.

No one is able to close their eyes to the extremely harmful consequences of the deprivation of liberty of children, as much as on the young people themselves as on their family, society as a whole and social inclusion of young people in general.

It is necessary for:

- priority to be given to alternatives to imprisonment;
- public authorities to respect international standards that they have subscribed to and consequently commit to limit imprisonment measures;
- public authorities commit to reduce the number of cases in which imprisonment is resorted to by working both on the demand for this type of punishment as well as other types of measures on offer giving priority to working with the young person in their usual environment;
- services mandated to educate, supervise or help adolescents to be able to pass on difficulties encountered and benefit from the necessary tools to respond to these in a coherent manner with a model for an inclusive society;
- relevant judicial actors, in a sufficient number, to be trained and informed in order to award real and effective priority to measures which do avoid using deprivation of liberty for adolescents; and for them to place confidence in the whole range of measures at their disposal that do not include deprivation of liberty;
- juvenile policy to be based on reliable data rather than on fear and clichés;
- scientific research in the legal, psychological, sociological and criminological fields to study all aspects linked to deprivation of the liberty of adolescents and different types of measures addressing juvenile delinquency in more depth; for, in addition to this, the results of research to be brought into the public domain and widely published, both to relevant professionals and the wider public in order to bring about a change in mentality;
- the press to provide itself with the means, space and time to analyse the trend of juvenile delinquency in a different way, as well as the social reaction to crime, in order to inform the public and avoid simply transmitting stereotypical images;

In Belgium, in order to curb the rise of resorting to imprisonment and reverse this trend and give priority to alternative measures, various actors from the youth sector, those supporting youth, academics and those addressing the rights of the child, French-speaking and Flemish-speaking, formed a group in order to reflect upon common action and strategies to tackle the abuse of the use of deprivation of liberty for juveniles. They have named this group 'Article 40', in reference to the article in the International Convention on the rights of the child that covers juvenile justice.

It is essential to continue to think hard about why, on the one hand some, of our societies continue to lock up more and more minors in conflict with the law while international law says the contrary and, on the other hand, which strategies can contribute to effectively reverse this trend to build a more inclusive and democratic society.

Benoît van Keirsbilck* is President of Defence for Children International (DCI) Belgium and Member of the International Executive Committee of DCI

International Juvenile Justice Observatory IV International Conference

Dra Maria Cristina Calle
Italy

Rome 9th–10th November 2010

The subject of the Fourth Conference of the International Juvenile Justice Observatory (IJJO) was: *"Building integrative juvenile justice systems".* The Conference dealt particularly with the problems of mental disorder and drug abuse, "often neglected or at least underestimated in European juvenile justice systems", as Prof. Dr. Frieder Dunkel said during the opening ceremony.

The aim of the conference was to bring together experts and practitioners working in the different fields of justice, welfare and health care.

About 400 experts from many parts of the world worked over two days in order to gain a better understanding of the numerous, but somehow common problems of difficult juvenile offenders and to develop net-working and coherent rehabilitative systems of treatment and care in the best interest of the young persons and society to prevent further reoffending and victimization.

Many countries brought their experiences in this field: Hungary, Canada, Belgium, England and others.

The Conference counted on the participation of Dr. Elias Carranza, director of the UN Latin American Institute for the Prevention of Crime and Treatment of Offenders (ILANUD). He showed the statistics and the outcomes in various Latin American countries according to the different policies and strategies for treatment.

From the psychological point of view - as Prof. Thomas Grisso from the University of Massachusetts said - "there is growing evidence - from scientific research and juvenile justice professionals - that many young offenders in juvenile justice systems throughout the world present symptoms of mental disorders and serious drug use problems. Reliable research in several countries has found that one-half to two-thirds of youth entering pre-trial detention centres meet criteria for one or more mental disorders. As this evidence mounts, juvenile justice systems are looking for guidance on how to respond".

Following this goal many countries wish to develop policies and practices to improve treatment for young people with mental disorders when their offences place them in juvenile justice custody.

They nevertheless have to consider the warning expressed by Mr. Luigi Citarella from the Committee on the Rights of the Child (Switzerland) regarding the necessity for planners to proceed cautiously, in order to manage our limited resources for treating youth's mental disorders and to avoid unintended negative consequences.

He emphasised five guiding principles:

- the importance of intake screening and assessment;
- the need for emergency mental health services;
- commitment to employing evidence-based practices;
- the importance of evaluating practices once they are implemented;and
- the development of policies that avoid "net-widening", in the sense of avoiding the creation of a "treatment-based culture" that might actually draw more youth into the juvenile justice system.

This approach confirms the need to evaluate a young persons' mental health in the first stage of their encounter with the juvenile justice system.

A particular matter was indicated by the Spanish experts. They pointed out that: "the medical treatment of young offenders with psychiatric disorders presents new problems and challenges because the legal system has established the principle of free will in the doctor-patient relationship. Law 41/2002 - patient's autonomy - gives minors with sufficient maturity and capacity the opportunity to decide upon medical treatment.

This means that in the specific area of psychiatric treatment of minor offenders, if the minor has full capacity, he can reject treatment. Moreover the The Spanish legal system does not offer any specific solution to solve such cases in which the mature young offender rejects ambulant psychiatric treatment while the professional is completely aware that the young person will re-offend".

In Italy the system of evaluation MAYSIS-II has been adapted to anticipate, without excessive cost, the presence of mental disorders in the young offenders' population. Nonetheless, the experts recognized that it is highly advisable to take into account the mental state of the child at every step of the juvenile criminal proceedings (charge, sentencing, custody).

The European Council Recommendation 2003 *"New ways of dealing with juvenile offenders and the role of juvenile justice"* stated that "to address serious, violent and persistent juvenile offending, member states should develop a broader spectrum of innovative and more effective (but still proportional) community sanctions and measures."

The activities of the 2010 Rome Conference were in line with the Recommendation of the Council of Europe which underlines the need "to directly address offending behaviour as well as the needs of the offender", including those of the juvenile offenders with psychological disturbances and psychiatric problems.

Dra Maria Cristina Calle* is a psychotherapist, criminologist, author on juvenile antisocial behaviour and consultant to the court of Milan where she sits as an Honorary Judge.

New Zealand government extends the jurisdiction of the Youth Court

Linda Mc Iver
New Zealand

On 1 October this year, legislation[1] came into force in New Zealand which—

- Permitted the prosecution in the Youth Court of some children aged 12 and 13 years old charged with very serious offences ;
- Doubled the maximum length of some Youth Court sentencing orders; and
- Created a series of new orders for the Youth Court.

12 and 13 year olds within the Youth Court

Traditionally, 12 and 13 year olds (along with 10 and 11 year olds) who committed offences were dealt with in the Family Court on the basis that their offending resulted from care and protection issues in their home environment. The New Zealand government believed that this system was failing for a small but significant group of these children.

From 1 October 2010 the Police have the discretion to bring charges in the Youth Court against a 12 or 13 year old if they are charged with a very serious offence. Police estimate that this may bring 60 – 100 12 or 13 year olds before the Youth Court each year.

However, it should be noted that the Children Young Persons and Their Families Act 1989 (CYPF Act) also provides several mechanisms to keep 12 and 13 year olds out of the criminal justice system –

- Section 208(a) CYPF Act requires Police to be guided by the principle that unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter;
- Section 258(ba) CYPF Act requires the family group conference convened in respect of a 12 or 13 year old to consider whether the public interest requires that criminal proceedings should be instituted against the child. A family group conference decision is not binding on the Youth Court, but is highly persuasive;
- Section 280A CYPF Act empowers the Youth Court to refer any charges brought against a 12 or 13 year old (other than murder or manslaughter) back to the Police if it appears to the Court that the child may be in need of care and protection due to their offending, and proceeding in the Family Court would serve the public interest better than continuing the criminal proceedings.

Extended length of some Youth Court sentencing orders

From 1 October 2010 the maximum length of the Youth Court's high-end residential order was doubled from 3 months to a maximum of 6 months, and the accompanying supervision order (which comes into force at the end of the residential order) was doubled from 6 months to a maximum of 12 months. Likewise, the length of an activity order (under which a young person is required to attend a therapeutic programme in the community) was doubled from 3 months to a maximum of 6 months.

It is thought that the longer maximum length of orders does not indicate a legislative intention that the Youth Court should automatically increase the length of orders. Rather, it indicates the Youth Court's increased jurisdiction and scope to tailor programmes to address a young person's criminogenic needs.

[1] The Children Young Persons and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010

New orders

Four new orders have been added to the range of responses available to the Youth Court –

- A parenting education programme order (s283(ja)) – Under this order, a young person who is a parent or who is about to become a parent must attend a parenting education programme for a period of up to six months. Interestingly, the Youth Court may also order the parent of a young person to attend a parenting education programme.
- A mentoring programme order (s283(jb)) – Under this order, a young person must attend a mentoring programme for a period of up to 12 months.
- An alcohol or drug rehabilitation programme (s283(jc)) – Under this order, a young person must attend an alcohol or drug rehabilitation programme for a period of up to 12 months. If the programme cannot be undertaken while living at home, the Court may make a custody order in favour of the Child, Youth and Family Service.
- An intensive supervision order (s296G) – Under this order, a young person is placed in the custody of the Child, Youth and Family Service for a specified period of up to 12 months. He or she may be subject to strict curfew conditions which may also be electronically monitored. This order may only be made if a young person has failed to satisfactorily comply with an earlier imposed, judicially monitored condition of a supervision order, or supervision with activity order.
- Under an intensive supervision order, the young person must comply with the requirements of the plan written by the social worker and designed to address the young person's needs. The Youth Court must review the young person's progress on that plan every three months.

While there is still debate in New Zealand's youth justice community about the potential for the legislation to criminalise children, it is becoming apparent that other aspects of the legislation give the Youth Court greater jurisdiction and flexibility to tailor plans for young offenders to meet their criminogenic needs. Ultimately, it is hoped that this will see greater numbers of young people retained within the youth justice system, rather than being convicted and transferred to the adult system, and fewer young people who go on to offend as adults.

The core philosophy of the Children, Young Persons and Their Families Act 1989 remains intact. The youth justice community in New Zealand remains strongly committed to the principle of addressing the needs and the deeds of young offenders. In the words of section 4(f) of the CYPF Act, the object when dealing with children and young persons who commit offence is to ensure that "they are held accountable and encouraged to accept responsibility for their behaviour", and that "they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways".

Linda McIver is Research Counsel to the Principal Youth Court Judge, New Zealand Youth Court.

Thoughts on the youth justice system—England & Wales

Avril Calder, Magistrate
England & Wales

Recent history—England and Wales

The last decade has seen the establishment in E&W of the Youth Justice Board and Youth Offending Teams, and the introduction of rehabilitative/restorative orders for first-time offenders and of orders requiring parents to take an active role in preventing offending.

These orders and other community penalties for frequent offenders, often with reparative/restorative elements, have been backed with resources.

At the same time, however, there has been an increase in the numbers of children and young people sentenced to custody. For this we were censured by the Committee for the Convention on the Rights of the Child.

I should say that the problems we face in Inner London, such as knife crime, gang-related crime and violence are very serious and extremely challenging. Deaths of teenagers in London stand at very high levels and have done so for the last few years.

A fact you may not know is that the age of criminal responsibility in England and Wales is 10 years, one of the lowest in Europe. This sets some of the context in which the Youth Justice System operates.

So I have set out below one or two aspects of the Youth Justice System that I see as strengths and weaknesses.

Strengths

Youth Offending Teams (YOTs) —structural

Youth Justice Board (YJB) —structural

Referral Orders—sentence

Parenting Orders—disposal

Diversion—structural

Weaknesses

High custody numbers

High remands in custody numbers

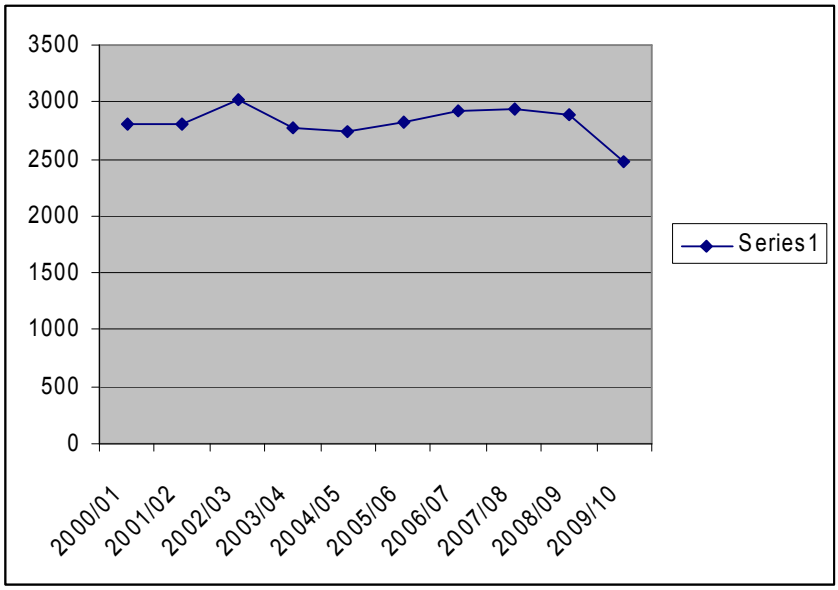
Delays—structural

Overlap between young people in care and offending

Weaknesses

I shall begin with weaknesses. What do the **custody** figures look like?

Average under 18 custody population—2000/01 - 2009/10 England & Wales



Source: *Youth Justice Board and Ministry of Justice*

Notes:

1) years are to end March, ie 2000/01 ends on 31 March 2001; and
2) these are 'stock' figures—the average number under 18 held in custody at any one time, not figures of those entering custody during the course of the year (which are higher).

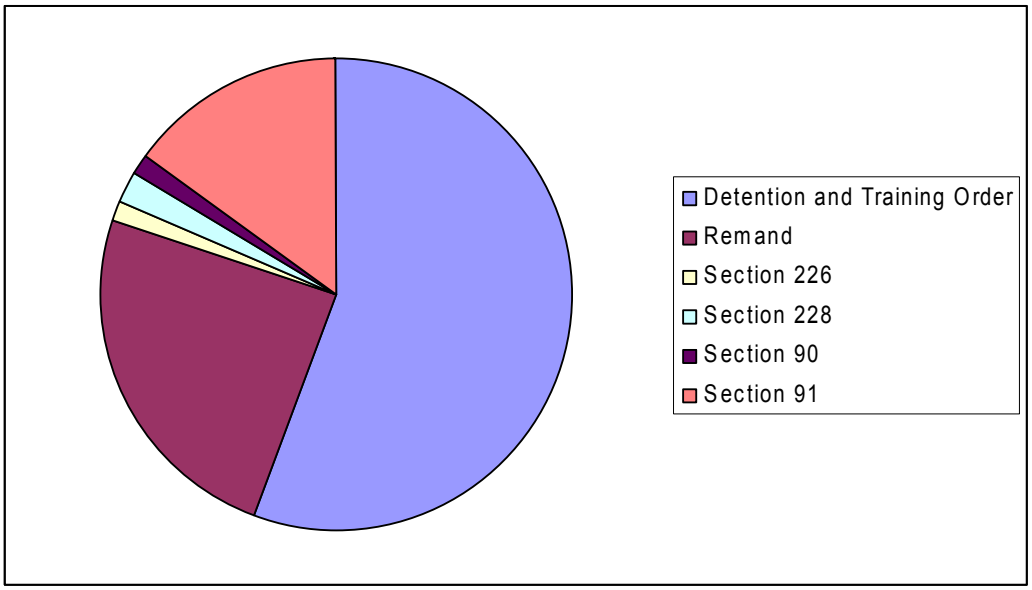
As you can see the numbers in custody started to fall in 2008/09. It may be that measures which came into effect on April 1st 2010 will further bring the figures down for 2010/11. It may also be that recent proposals in the Government's Green Paper[1] (a consultation document) will bring the figures down even more. Here is one quote from the Paper 'it [custody] is an expensive option which does not offer the best outcomes for young people'.

Annex 3 shows the **age distribution** of those held in custody in July 2008. Half were aged 17 and a further 30% were aged 16. One-fifth therefore were between the ages of 12 and 15.

The totals in the previous graph include young people in custody being held on remand awaiting trial.

What do the **remand in custody** figures look like?

Average numbers in custody aged under 18 by basis of detention
England & Wales 2009/10



Source: Youth Justice Board and Ministry of Justice

Note: The four sections—226, 228, 90 and 91—are sentences to long-term custody for extremely serious offences.

[1] *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*

In 2009/10 the average number held on remand at any one time was 587—almost a quarter of the total 2481. This represents a large fraction of those in custody at any one time. The Green Paper has something to say on this too, especially since 57% of young people remanded in custody do not subsequently receive a custodial sentence. The proposal is to amend the Bail Act—probably reducing judicial options—and to transfer the full costs of all remands to Local Authorities. Questions arise here about funding for the local authorities—how long would Government provide the funds and would they be ring fenced?

I shall follow with a quick look at **delays**. A few years ago there was a concerted effort to reduce the number of days between charge and sentence for persistent young offenders. The time was reduced by half to 70 days. This was a triumph, but it is an area where it is easy for delays to creep back in. And, without much evidence (except for the increase in the average number of days spent on remand in custody—see Annex 2), I believe that the time is now lengthening. In our system, the Police are the investigators and the Crown Prosecution Service brings cases to court. So, you will understand that there is space for a falling off in performance.

There are about 80,000 children and young people in the **care system**. Many thousands are below the age of criminal responsibility (10 years). For those over 10 years, there is a disproportionate number[1] of children and young people involved in offending and in the custody numbers. Half of youngsters in Young Offenders Institutes have been in care. When asked about criminal behaviour, 23 per cent of looked-after children reported attacking someone with the intention of hurting them in the previous 12 months and a similar number admitted to carrying a knife. The figures for children generally were 14 per cent and 15 per cent respectively.

Strengths

Structurally the two most important pillars of the YJS are the **Youth Offending Teams** (YOTs) and the **Youth Justice Board** (YJB).

For those of you who are unfamiliar with our system, I would like to explain that in every Local Authority there is a YOT made up of representatives from the Police, Social Services, Probation Service, health, education, drugs and alcohol misuse and housing officers. Each YOT has a coordinating manager. The YOT can respond to the needs of young offenders in a comprehensive way, measuring the risk they pose to others and putting in place and overseeing programmes with the intention of reducing offending.

I should also explain that the YJB is an executive non-departmental public body which monitors the operation of all Youth Justice Services—custody, good practice for YOTs, working for young people at risk etc.

Both of these pillars will be undergoing change, the YOTs because there are several proposals in the Green Paper which would mean their work load will increase substantially[2] as fewer young people are sent to custody—it could be said that they are victims of their own success; the YJB because it is being subsumed into the Ministry of Justice.

Two **orders** of the court have been successful over the last few years, one for offenders and one for parents.

The **Referral Order (2002**) was introduced for first time for offenders who plead guilty[3]. It requires a young person (and parent) to attend a Youth Offender Panel[4]. Professional input eg psychologist is available. The Panel and young person together decide on the punishment and a contract is signed to reflect their decision. If it is not carried out, the young person is returned to court for resentencing. The RO is recorded by the Police, but if successfully completed does not have to be disclosed to most employers.

The Green Paper is 'looking for more ways to make the order flexible'. It also says that presently orders have 'onerous requirements'. So what is planned for them? Will there be less professional involvement, thus freeing up resources for those sentenced to a community punishment rather than custody?

It would be sad if they were weakened, reducing their rehabilitative and restorative values.

A **Parenting Order[5]** is considered in all cases. Where a convicted young person is under 16 years old the court is **required** to make an order unless it is of the opinion that it is not necessary. The order is seen as a support to parents giving them the chance to develop skills to deal with their child. The order may be made for up to 12 months. Three months of parenting classes may be included.

[1] Official figures show that looked-after children are twice as likely to be involved in crime as children brought up in their own families.

[2] At least in the short term. If offending rates eventually drop, their workload would decrease

[3] 3 to 12 months

[4] two local people and a YOT officer

[5] Crime and Disorder Act 1998 and Anti social Behaviour Act 2003

There is evidence to show they are of value in preventing offending. I usually explain to parents that the order is not a punishment but is to help them. Mostly parents can see this, but not all are happy about the call on their time and that if they don't keep to the terms of the order they may be fined in the adult court.

There are voices that say the order is an infringement of human rights not least because of its compulsory nature and for breach an appearance in the adult court.

The Green Paper says that YOTs are to 'make full use of Parenting Orders'.

Diversionary systems are effective. After a Reprimand and a Final Warning a third offence brings a minor to court. The Green Paper proposes to change the out of court diversionary framework to give the Police and Prosecutors **more** discretion. Fifteen years ago, an offender could be given five cautions, some for major offences, without a judicial input. Have we been here before?

Conclusion

In summary, apart from the high use of custody, the Youth Justice System has been taking a more restorative, reparative and rehabilitative approach, largely backed by resources. The introduction of an overarching body for the Youth Justice System, the Youth Justice Board, set off a train of improved management and innovation. Similarly, the YOTs are sources of knowledge about the young people at community level (the Local Authority) where work is done not only with those who offend, but also with those who are risk of offending. A good YOT is well-informed about the young people they work with and this shows in the reports they write for the magistrates and district judges.

I cannot be certain, but it is possible that with fewer young people in prison, community resources will be directed away from those who commit fewer or less serious offences. There is a tight squeeze on public resources, which will not abate for the foreseeable future—a future which may see more, rather than fewer children and young people entering the Criminal Justice System.

Avril Calder
Magistrate in the Youth and Family Courts, London.

This is an edited version of a talk given to a seminar of Defence for Children International in Brussels on 26 January 2011. The views expressed are those of the author.

Annex 1
Average custody population aged under 18
England & Wales

Year	
2000/01	2807
2001/02	2801
2002/03	3029
2003/04	2771
2004/05	2745
2005/06	2830
2006/07	2914
2007/08	2932
2008/09	2881
2009/10	2481

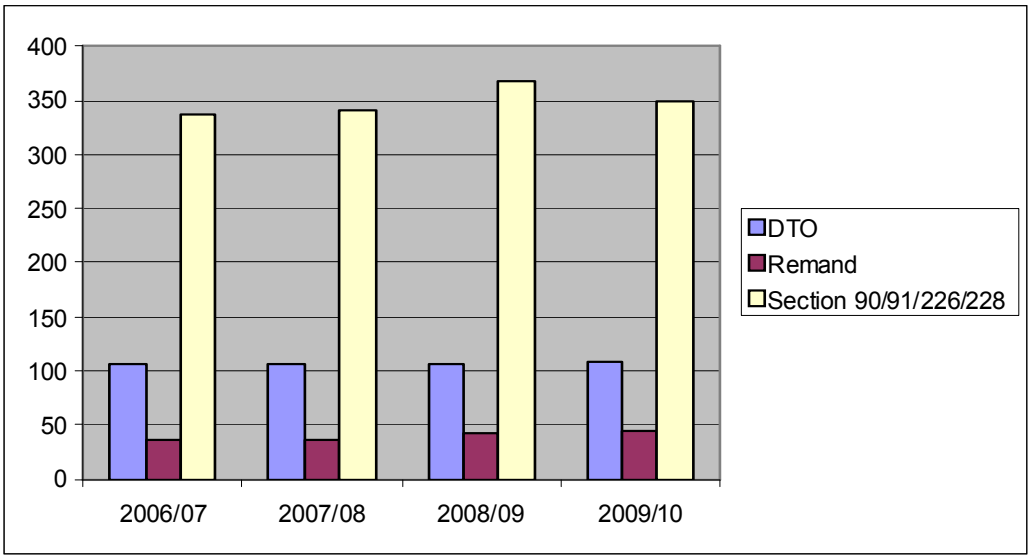
Source: Youth Justice Board and Ministry of Justice
Note: includes those held on remand.

Annex 2
Average number of days in custody—aged under 18 by legal basis of detention—table
England & Wales

	2006/07	**2007/08**	**2008/09**	**2009/10**
DTO	107	107	106	109
Remand	37	36	42	44
Sections 90/91/226/228	336	341	367	349

Source: Youth Justice Board and Ministry of Justice
Note: DTO: Detention and Training Order. The four sections—226, 228, 90 and 91—are sentences to long-term custody for extremely serious offences.

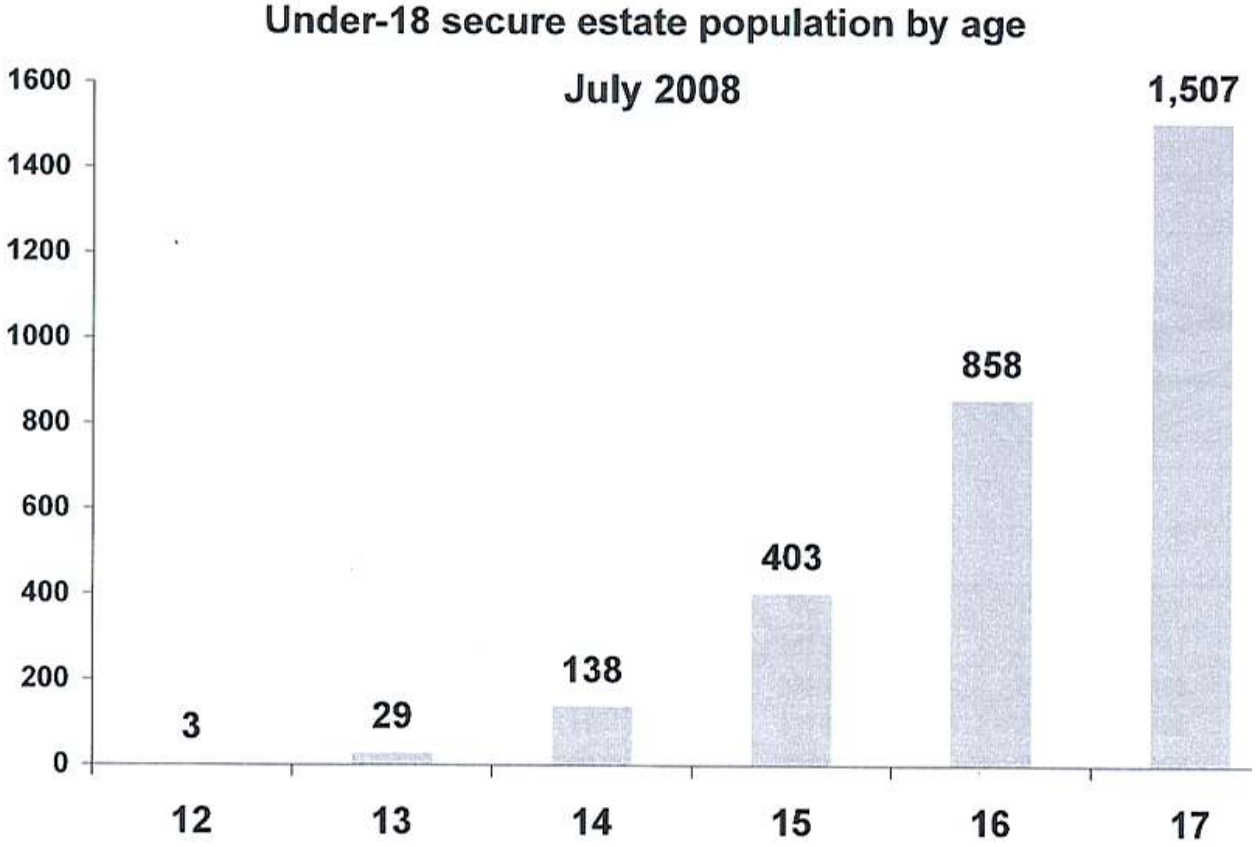
Average number of days in custody—aged under 18 by legal basis of detention—chart
England & Wales



Source: Youth Justice Board and Ministry of Justice
Note: DTO: Detention and Training Order. The four sections—226, 228, 90 and 91—are sentences to long-term custody for extremely serious offences.

Annex 3

England & Wales



Source: Youth Justice Board and Ministry of Justice

Restorative practices—moving into education

Judge Sir David Carruthers
New Zealand

Restorative justice is a different way of dealing with crime. The traditional criminal justice system asks three questions and provides three answers. The questions are: what law was broken; who is to blame; what punishment is deserved?

The traditional system is all about the offender; it is about his or her rights, obligations and protections. Over the centuries very delicate balances have been built up largely based on the liberty of the individual and protections for him or her against arbitrary and disproportionate consequences and the tyranny of the state (or king).

Restorative justice takes a different stance. At its best and its most effective it is victim-based.

Professor Howard Zehr, (often described as the father of restorative justice) says that in theory and in practice restorative justice must start with the victims and that restorative justice addresses the offenders' needs but by focusing on victims.

Restorative justice asks different questions. It is a way of responding to offending and the effects of crime that makes the people affected by the crime the focus of the process. It seeks to repair the harm caused by the offending, to allocate responsibility for repairing the harm and to involve those who have been affected by the harm including the community in the resolution.

It is a process which is now to be found throughout the world. It is encapsulated in the New Zealand children and young persons legislation which was passed in 1989 although not then seen as a restorative justice process. Recent studies in the United Kingdom have shown that restorative justice processes in the criminal justice system have the ability to reduce reoffending and recidivism by nearly a third.

Because it personalises the crime; because victims are at the centre; because it can be seen as a victim's rights process and because of the established effectiveness in bringing home to offenders the personal consequences of their offending, it has gained a universal credibility as a process usually as an addition to ordinary criminal justice processes rather than a process of its own.

What is exciting is the way that this way of working, to a large extent pioneered in New Zealand, has now moved into other areas of our national life.

Utilising restorative practices in school procedures is now becoming well recognised throughout the country and of course, in Australia, the United Kingdom, the United States of America and elsewhere.

Historically, there are clear similarities between the ways behaviour in the wider community using criminal justice processes and behaviour in the school community have been regulated. Traditionally school disciplinary procedures were similar to those followed by the courts – the questions were the same. What rule was broken, who is to blame, which punishment is to be deserved? The belief that a tariff-based deterrent sentence would prevent further offending has been a mainstream focus.

But if we measure success as preventing further offending both systems have traditionally been found lacking.

Both systems have tended to neglect the victims and the affected community.

What is impressive is the way that educationalists have now fastened onto this new way of working and are achieving astonishing results from it.

There is a hierarchy of possible approaches. In some cases the process can inform personal conversations between staff members and students based on a restorative approach that aims to explore the events, their consequences and how any harm can be repaired. Or it can involve a full restorative conference loosely based on the youth justice family group conference used in some schools for the most serious conflict issues. Or it can include a larger number of participants – can include, of course, both of victims and perpetrators and the whole school or representatives of it and can take a considerable time.

There is an example of a restorative process approach in a school, example which I owe to Mark Corrigan, Ministry of Education, Wanganui:-

Harley was a year 9 student in a mathematics class and having a bad day. He had a disagreement with another kid, who called him "gay". Some other kids laughed. Harley pulled his jacket over his head and turned his desk away, but he did not do his maths. His teacher asked him to get on with his work… three times… with no response. Then the teacher lifted the jacket back off Harley's head. Harley jumped up, swinging punches at his teacher and swearing. The chair he threw into the class hit a classmate. He picked up a table and threw it at his teacher, then stormed out of the class. His teacher needed medical attention for bruised ribs. Everybody—from the teacher to the principal, from his classmates to his parents were upset by the incident.

So if we ask the questions about what rules have been broken, who is to blame, and what punishment is deserved, then we would take care to balance the rights of the "offender" with the well-being and safety of the community. And it is likely to be the end of this boy's education. (this secondary school is the only one in the town).

But the school asked questions about the harm that had been done, and who had been affected. The teacher was devastated. He had been teaching 16 years and had never had this happen before. He felt like a bad teacher.

Harley's classmates were not impressed. They wanted Harley to deal with his anger problem, and he had their support in dealing with it.

Harley's parents felt the shame. Harley had not had an episode like this for a while and they hoped he had grown out of it.

The school did some careful preparation and convened a restorative conference. Harley began by telling the story of what happened… what he was thinking, what he was hoping would happen. And he had thought about who had been harmed. The teacher told the story of how this had affected him, his family, and his feelings about teaching. His classmates told the story of what it was like for them and their class. The principal told of her shock that this would happen to the teacher, because he was "such a magnificent person". Harley's mother spoke of her shock and embarrassment and then talked about her hopes for her son.

Then they made a plan to put right the damage done, and to prevent it happening again. There was some work with harley, with the class, and with the student that called him gay. The family enrolled in the non-violence programme being run through the local marae (tribal maori meeting place).

At the end of the conference, Harley summed up and spoke directly to his teacher. He said he knew it would be easy for the teacher to think his apology was just words, but he wanted his teacher to know that he really was sorry and that he really did have respect for his teacher. He pulled a little velvet pouch out of his pocket, and took out a greenstone taonga (treasure). He walked over to his teacher and said 'I want you to have this as a sign of your mana (authority) and of the respect I have for you."

It is now a year down the track from the conference. The plan has worked. The teacher felt supported by his colleagues and is still teaching. The work done with the class has seen their behaviour improve. Harley is achieving well and has not got into any more trouble. The school community saw a fair, respectful, and effective way of dealing with a really difficult situation. These are outcomes you cannot get from control and compliance; from blame and punishment.

A final and full vision of restorative processes in schools envisages a fully restorative approach to the entire way the school orders itself in all its relationships and in every aspect to its functioning —thus becoming a fully restorative caring and inclusive community.

In clusters of New Zealand secondary schools using restorative processes, suspensions have reduced by almost 50% in four years. Exclusions (expulsions) have reduced by more than 50%. There are some schools that have moved to a fully restorative approach. Others are on the pathway. It is exciting and valuable. These schools are finding they can prevent bad behaviour as well as deal with it when it does occur. Teachers and students can get on with teaching and learning. It is valuable from a number of respects not the least of which is that continuing involvement in education is shown by international research to be a protective factor against criminal offending. This is crime prevention at its best.

It is a process which also assists new Zealand as a country to comply with its international obligations to children as contained in the united nations convention on the rights of the child 1989 ratified by new Zealand in 1993 and, of course, the international covenant on civil and political rights (articles 23 and 24) and the international covenant on economic social and cultural rights (article 10). In national law the right to education is protected by section 3 of the education act 1989.

What has become clear is that there is a difference between control and compliance imposed by schools and genuine community.

Students' cell-phones can be seen as providing a good example of restorative process at work!.

Most schools have policies that ban possession of cell-phones at school. Teachers do not want them disrupting learning and do not want to waste time dealing with lost of stolen cell-phones. Even though students may get detentions for cell-phone rule violations, almost 100% of secondary school students carry a cell-phone in their pocket or bag.

At one college near Wellington, staff involved students in a restorative approach to this issue. Students are now free to use their phones outdoors at break times, but as soon as they go into a school building, they turn the phones off and put them away. On wet days the hall is opened and students are free to use their phones there. Staff and students think the rule is fair; compliance is very high, and time is not wasted in confrontations.

I recently attended a conference in the United Kingdom run by Cambridge University educationalists who have been watching the way in which these processes have been advancing in schools and are now trying to put a philosophic and scholarly context around it all.

It was an occasion when people from a number of different countries spoke about the way in which this process is advancing and the benefits they were receiving.

New Zealand is one of the leaders in this regard. It is very hard to estimate how many schools are now involved as it is not something which is generally reported upon but the numbers are advancing rapidly. One estimate in the Canterbury region is that over 50% of secondary schools were all adopting a restorative processes approach to problems of discipline and performance.

The ministry of education is encouraging this process in its student engagement initiative work as the key way for reducing suspensions from school.

An early criticism was that the process took longer than traditional processes and that therefore in a strained and over-burdened profession it simply added an extra task to those who were already pressed. That has not been the experience of those who take part in it. Their experience has been is that the process is worthwhile because it deals effectively with the issue rather than leaving it to re-emerge in another way. It is, in short, worth the effort.

So the successes are enormous; the commitment is huge; the leadership must be able, strong and clear sighted; and the support and training for teachers and others who take part in the process has to be clever, professional and focused but the results are there to be seized. A new world based on ancient values awaits us. These are exciting times.

Judge Sir David Carruthers* was Principal Youth Court and Chief District Judge for New Zealand. Appointed a Distinguished Companion of the New Zealand Order of Merit in 2005 and knighted in 2010, Judge Carruthers is currently Chairman of the New Zealand Parole Board.

Early intervention process— a new case flow management model

Judge Peter Boshier
New Zealand

On 12 April 2010 the Family Court of New Zealand introduced the Early Intervention Process – one of the most significant reforms in our family law since the inception of the Court as a specialist jurisdiction in 1981. This new process offers a clear, co-ordinated and efficient case flow management process for all applications brought under the Care of Children Act 2004;[1] and, quite simply, radically changes how those seeking access to justice in the Family Court will receive it.

Historical Case flow Management Practices

Case flow management in the New Zealand Family Court is nothing new; there have been Practice Notes dealing with how cases are to be conducted since at least 1998.[2] Since that time the landscape has changed. Work coming into the Family Court has increased and there is, justifiably, greater emphasis on identifying what is actually needed in each case. Some cases will need very little Court intervention while others will need a great deal more. We have to get it right at the outset, and use the breadth of tools available to ensure that we provide prompt access to justice.

Unfortunately, a uniform approach to caseflow management has not necessarily served us well in the past. While it has certainly stopped cases from disappearing into "black holes", it has also resulted in the construction of a quite cumbersome event based system. For those cases which are not difficult at all, caseflow management has seen the creation of an extraordinary number of conferences and reviews before a decision has actually been made. In some cases this has created unnecessary delay, something which we have long wanted to overcome.

This wish, coupled with a long held favour for a more inquisitorial style of justice in the Family Court, drove us to consider what alternative systems might reduce delay; and a number of initiatives were piloted with this goal in mind.

Previous Family Court Initiatives

Between March 2005 and June 2006 the Family Mediation Pilot was undertaken in four Family Courts with the aim of trialling mediation led by specialist mediators rather than judges. Although the pilot courts adopted different practices with respect to referral,[3] 540 cases were offered family mediation during the pilot,[4] of which 380 were subsequently referred to a mediator.[5] The evaluation noted that 61% of the mediations were convened within five weeks and another 15% within six weeks.[6] Of the 257 completed mediations, agreement was reached on all matters in 59% of mediations, and on some matters in another 27%.[7] Following the mediation, completed survey forms were received from 109 parties to mediation and these were supplemented by 26 interviews,[8] with most responses positive about the experience of mediation. The process was seen to be faster than judge-led mediation[9] and skilled mediators were seen as able to keep the process focused on the child's interests and not allow the parents' interpersonal issues to take over.

Non-judge led mediation had proven to be a useful tool, but it was felt that this alone would not result in an early intervention model that suited the New Zealand Family Court.

At the same time as the mediation pilot was running, further thought was being given to how to reduce delay, especially in child law cases. The result was the Parenting Hearings Programme ('PHP') Pilot which attempted to use a 'preliminary hearing' to create a less adversarial process with tighter timeframes. When the final evaluation of the PHP came to hand in September 2009 the Family Court Bench considered it carefully and decided that this model, by itself, was not ideal. While it had benefits in giving judges greater

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1 New Zealand's primary private child law legislation

2 See for example The Family Court Caseflow Management Practice Note 1998 available at http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes

3 Helena Barwick and Alison Gray *Family Mediation – Evaluation of the Pilot* (prepared for the Ministry of Justice 2007) at 11

4 Ibid at 28

5 Ibid at 31

6 Ibid at 32

7 Ibid at 75

8 Ibid at 65

9 Paul von Dadelszen "Judicial Reforms in the Family Court of New Zealand" (2007) 5 NZFLJ 268 at 272

control over the case[10] and providing parties with early direct access to judges,[11] the concept of a 'preliminary hearing' was not as robust as had been hoped for. Many judges began making interim orders and entry into the programme was not uniform.

However, in 2009 the Christchurch Family Court commenced its own Early Intervention Programme, and by last September it was clear that the Christchurch model had much to commend it. Last year, 469 cases entered the Programme, approximately 75% of which proceeded to mediation. Of those that went to mediation, an astonishing 81.4% were settled. After that, the vast majority of those remaining were settled at the judge-led conference. Only 11 of the 469 cases, just over 2%, required a hearing. We accordingly decided to combine the best elements of the Christchurch Early Intervention Programme and the Parenting Hearings Programme into a new process.

The National Early Intervention Process

The result has been the development of the Early Intervention Process. Triaging at the outset is designed to ensure that a case which has all the indicators of complexity or intractability is identified and referred for prompt judicial oversight. Demonstrable family violence falls into this category,[12] and statutory time requirements are the essential drivers in ensuring that such cases are dealt with speedily at the outset and through to conclusion. This emphasis on urgent, robust judicial intervention is vital for those parents who separate and have immediate, serious issues; for without it they may proceed through counselling and mediation with the defaulting or abusive parent gaining an advantage to the detriment of the child.

While a small proportion of cases enter this Urgent Track, the majority head down the Standard Track where we ensure that dispute resolving steps are undertaken more speedily and more meaningfully. Upon entry into the Standard Track, parties are referred to a '*Parenting Through Separation*' course to learn more about the effects of separation on their children.[13] This course comprises of two, two-hour modules; the first dealing with psychological consequences and the second with legal ones. The overarching aim of the course is to better equip parents in terms of the pathway they might take towards arriving at a solution to the best care arrangements for their children.

Parties are also referred to counselling, preferably together. This counselling involves close oversight by the Court to ascertain whether it is achieving the desired outcomes. If it is not, rather than simply waiting until all counselling sessions have been completed, the case is reviewed and moved along the standard track to mediation before a specialist mediator – lawyers who have had specialist mediation training and are appointed as counsel to assist the Court. If cases have not been resolved through either counselling or mediation, a forty-five minute judicial conference then occurs.

If a judicial conference is convened, lawyers file a memorandum setting out the facts and issues prior to the conference, and detail points of agreement and disagreement so that the judge is fully briefed. Lawyers and parties are expected to attend this conference and the merits of respective positions are closely tested. The Christchurch experience has been that such a conference, held before a judge for three quarters of an hour, often instils reality into positions allowing an agreement to be reached. Ultimately, however, a few cases still need to proceed to hearing after this conference, and, when they do, a hearing is held promptly to prevent a party obtaining the advantage of delay. If psychological issues for children need to be reported on the Court may also order a brief, focused report from a psychologist.

The Early Intervention Process is intended to resolve the vast majority of private law cases involving children, whether by direct judicial intervention in the urgent track or by concerted alternative dispute resolution in the standard track. Nevertheless there will always be some cases (such as disputed violence, sexual abuse, relocation and alienation cases) that will require hearings in the usual fashion

There remains a place in our system for the adversarial approach to dispute resolution which requires evidence to be called and tested. What we need to ensure in such cases is that both the evidence which is assembled and the questions which are asked under cross examination are relevant. Where they are not, judges will be much more robust in ruling such lines of inquiry out of line.

Conclusion

I hope that the end result of this exciting and important development is that there is better access to justice for children and parents who need to come to the Family Court. I hope that our resources can be used more efficiently and more meaningfully, and that from intake right through to resolution we have the correct people doing the correct tasks.

Peter Boshier*, Principal Family Court Judge of New Zealand

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[10] Trish Knaggs and Anne Harland *The Parenting Hearings Programme Pilot: Evaluation Report* (prepared for the Ministry of Justice 2009) at 17-18

[11] Ibid at 16

[12] As does reduction of time granted, enforcement proceedings (warrants, admonishment), repeat proceedings, unilateral relocation and suspension of contract

[13] For more on the 'Parenting Through Separation' Course please see http://www.justice.govt.nz/courts/family-court/documents/pdf-pamphlets/parenting-through-separation.pdf/view?searchterm=parenting%20through%20separation

The business of surrogacy — Anil Malhotra, India

Mythological surrogate mothers in India are well known. Yashoda played mother to Krishna though Devki and Vasudava were biological parents. Gandhari made Dhritarashtra the proud father of 100 children though she had no biological relation with them. The primordial urge to have a biological child of one's own flesh, blood and DNA, aided with technology and the purchasing power of money coupled with the Indian entrepreneurial spirit has generated this "reproductive tourism industry" which in medical parlance today is called "Assisted Reproductive Technology"(ART).

In the UK no contract or surrogacy agreement is legally binding. In most States in the US, compensated surrogacy arrangements are either illegal or unenforceable. In some States in Australia arranging commercial surrogacy is a criminal offence and any surrogacy agreement giving custody to others is void. In Canada and New Zealand, commercial surrogacy has been illegal since 2004, although altruistic surrogacy is allowed. In France, Germany and Italy surrogacy whether commercial or not is unlawful. In Israel, the law only accepts the surrogate mother as the real mother and commercial surrogacy is illegal. What then prompts India to enact a proposed law to make surrogacy agreements legally enforceable to protect the genetic parents, surrogate mother and the child.

India's surrogacy boom began in January 2004 with a grand mother being delivered of her daughter's twins. The success, flashed over the world, literally spawned a virtual cottage industry in Gujarat. Today, while Iceland has the first openly gay lady politician as its Prime Minister, India boasts of being the first country intending to legalise commercial surrogacy to legitimize both intra and inter-country surrogacy which rampantly abound.

Would be parents from the Indian Diaspora in the US, UK and Canada and foreigners from Malaysia, United Arab Emirates, Afghanistan, Indonesia, Uzbekistan, Pakistan besides Nepal are descending on sperm banks and In-Vitro Fertilisation (IVF) centres in India looking for South Asian genetic traits of perfect sperm donors.

Equally, renting wombs is another easy and cheap option in India. The relatively low cost of medical services, easy availability of surrogate wombs, abundant choices of donors with similar racial attributes and lack of any law to regulate these practices is attracting both foreigners and Non-resident Indians (NRIs) to sperm banks and surrogate mothers in India.

India, surreptitiously, has become a booming centre of a fertility market with its "reproductive tourism" industry reportedly estimated at Rs.25,000 crores (US dollars 5 billion) today. Clinically called ART, it has been in vogue in India since 1978 and today an estimated 200,000 clinics across the country offer artificial insemination, IVF and surrogacy.

So much so, in the decision of the Supreme Court in 2008 in Baby Manji Yamada's case, that it was observed: "commercial surrogacy" reaching "industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms". It is presumably considered legitimate because no Indian law prohibits surrogacy. But then, as a retort, no law permits surrogacy either. However, the changing face of the law is now going to usher in a new rent-a-womb law as India is set to be the only country in the world to legalise commercial surrogacy.

In the absence of any law to govern surrogacy, the Indian Council of Medical Research (ICMR) issued Guidelines in 2005 to check the malpractices of Assisted Reproductive Technology (ART). These national guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005 are non statutory, have no legal sanctity and are not binding. Silent on major issues, they lack teeth and are often violated. Exploitation, extortion, and ethical abuses in surrogacy trafficking are rampant, go undeterred and surrogate mothers are misused with impunity. Surrogacy in the UK, USA and Australia costs more than U$50,000 whereas advertisements on websites in India give varying costs in the range of U$10,000 and offer egg donors and surrogate mothers. It is a free trading market, flourishing and thriving in the business of babies.

In a phenomenal repeat exercise to legalise commercial surrogacy, The Assisted Reproductive Technology (Regulation) Bill & Rules—2010, a draft bill prepared by a 12 member committee including experts from ICMR, medical specialists and other experts from the Ministry of Health and Family Welfare, Government of India has been posted online recently for feedback. This Bill, also floated in 2008, is stated to be an Act to provide for a national frame work or the Regulation and Supervision of Assisted Reproductive Technology and matters connected therewith or incidental thereto as a unique proposed law to be put before the Indian Parliament. Abetting surrogacy, it legalizes commercial surrogacy for single persons, married or unmarried couples stating that the surrogate mother shall enter into a legally enforceable surrogacy agreement. She may receive monetary compensation and will relinquish all parental rights.

The 2010 Draft Bill states that foreigners or NRIs coming to India to rent a womb will have to submit documentation confirming that their country of residence recognises surrogacy as legal and that it will give citizenship to the child born through the surrogacy agreement from an Indian mother. This, perhaps is in view of the two year legal battle of the surrogate sons, Nikolas and Leonard, born to German couple Jan Balaz and Susan Lohlad, who born to an Indian surrogate mother in January 2008 were rendered stateless with neither German nor Indian citizenship. The Supreme Court intervention got them exit permits in May 2010.

Likewise, after being stranded in Mumbai, a gay Israeli couple were granted Israeli passports only after a DNA paternity established in May 2010 that gay Dan Goldberg was the father of Itai and Liron born to a surrogate mother in Mumbai. This was after the matter was debated in the Knesset (Israeli Parliament) and the Jerusalem District Court ruled on appeal that it was in the children's best interest to hold the DNA test to establish their paternity.

Before the law is put on the anvil, it needs a serious debate. Ethically, should women be paid for being surrogates? Can the rights of women and children be bartered? If the arrangements fall foul, will it amount to adultery? Is the new law a compromise in surpassing complicated Indian adoption procedures? Is the new law compromising with reality in legitimising existing surrogacy rackets? Is India promoting "reproductive tourism"? Does the law protect the surrogate mother? Should India take the lead in adopting a new law not fostered in most countries? These are only some questions which need to be answered before we pass the new law. Let us look into our hearts and with introspection decide carefully. Are we looking at a bane or a boon? We should not wait for time to test it. We should decide now. The surrogacy bill needs to be discussed until it is threadbare.

Despite the legal, moral and social complexities that shroud surrogacy, there is no stopping people from exploring the possibility of becoming a parent. Women who rent their womb for surrogate pregnancy are slowly shaking off their inhibition and fear of social ostracism to bring joy to childless couples. However, the Draft Bill has legal lacunae, lacks the creation of a specialist legal authority for adjudication and determination of legal rights of parties by a judicial verdict and falls into conflict with existing laws. These pitfalls may be the graveyard of this proposed new law.

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Engaging fathers in child protection — Judge Leonard Edwards (ret)

Non-custodial fathers infrequently appear in child protection proceedings. Some fathers cannot be found; others do not want to participate; some state laws make it difficult for the father to know about the proceedings or participate; some mothers do not want the father to know of the proceedings, and social workers sometimes are ambivalent about engaging the father. Many observers consider juvenile dependency court a "Mother's Court", focusing on reuniting children with their mothers while fathers remain on the periphery. In spite of all of these barriers, from a judicial perspective and from a child's perspective, fathers should be involved in the child protection process.

There are many reasons for this. A father's involvement may result in better outcomes for the child. The father may provide placement for the child; he may be able to develop a positive relationship with the child; he may be able to provide resources for the child; and his relatives may be available for placement if neither parent is able to do so. Children need to know who their father's are, and, if possible, have a meaningful connection with him. His engagement in the child protection process will enable this to happen.

Unfortunately, our history and law seem to devalue and punish unmarried parents and their children. Children of unmarried parents have been given names such as "bastard", "son of a bitch", and illegitimate, while their mothers are called "whores". These terms come from medieval times when marriage was important for purposes of inheritance, and the Christian religion emphasized marriage as the proper and exclusive setting for having children. Our laws still reflect a prejudice against unmarried parents. In modern child protection proceedings, however, the child's best interests are the focus of the proceedings. The child does not know or care (at least early in life) whether his parents are married. The child wants to know his family, the entire family, and that includes the father and his relatives.

If courts are truly going to serve the best interests of children, fathers and their families need to be identified and engaged early in the proceedings. Judges have a significant role to play in the identification of fathers and can greatly influence whether a father will participate in child protection proceedings.

The judge can do the following:

I. Identify all possible fathers as soon as possible. While this enquiry can begin with the social worker or other state official who brings the child's case to the court, the judge should also question the mother and other relatives about the identity of the father.

II. Question the mother **under oath** regarding the identity of the father. By asking questions in a formal court setting and stressing the importance of the enquiry, the judge is more likely to gain information than anyone else in the court system.

III. Determine where the father or potential fathers are located. This enquiry will place responsibility on the social worker to investigate jails, prisons, motor vehicle records, child support records, and many other places where the father may be located or where information about his location may be obtained. The degree of success in such a search will be related to the standards that the judge sets for the investigating social worker and the emphasis the judge makes on addressing this issue.

IV. Order the social worker to follow up on any information regarding the father that is produced at court hearings. The social worker should be taking notes when the judge is questioning the mother (or other family members) concerning the identity and location of the father. The social worker should also be ordered to report back to the court on the results of any search.

V. Order the social worker to personally serve all possible fathers with notice of the court proceedings and take reasonable steps to make it possible for these men to attend the court hearings.

VI. Insist that caseworkers use good faith efforts to identify, locate, and support the father throughout the child protection process. In the

United States the judge should be prepared to use the "no reasonable efforts" finding should the social worker not carry out these judicial orders.

VII. Revisit the questions of identity and location of the father at all subsequent court hearings.

VIII. When a potential father comes to court, let him know that the court is pleased that he has appeared because he is an important person in the child's life. Inform the father that once his paternity is established that he will be treated as a parent in all subsequent court proceedings.

IX. Order that paternity testing be completed as soon as possible at state expense. The payment for the testing should be provided by the children's services agency, the child support agency, or other appropriate state agency.

X. Appoint counsel for the father at state expense immediately or at least as soon as paternity has been established with the possibility of reimbursement considering his financial means.

XI. Order visitation between father and the child. Make it clear to the father and all participants in the court process that the father will be considered for placement. If the father is incarcerated, consider alternative means of contact such as telephone calls and letters.

XII. Take steps to identify the father's extended family and ensure that they know about the legal proceedings and know that they will be considered as possible placement if placement is necessary.

XIII. Permit the extended family to participate in group decision-making processes, visitation, and court hearings.

XIV. Determine if the father is a danger to the mother or to the child and make appropriate protective orders.

XV. Encourage the development in the community of services that will meet the needs of fathers. These could include parenting classes for fathers, parent coaching, fathers mentoring fathers, and other gender-based programs.

Children need to know who their fathers are. They need to know who all of their relatives are, not just those on the mother's side of the family. Children will fare better in life when they are connected to their entire family. These statements are particularly true in child protection proceedings when the state has to intervene on behalf of a child. The identification and engagement of fathers and their families can be greatly enhanced by the leadership and actions of the juvenile court judge.

Judge Leonard Edwards* (retired)

This is an edited version of a longer paper which can be obtained from the author or the Editor in Chief.

Tribute to Mary Mentaberry—a working life dedicated to Youth and Family Courts in the USA

I am very pleased to be able to publish here a tribute to Mary Mentaberry, Executive Director National Council of Juvenile and Family Court Judges (NCJFCJ), Reno, Nevada, USA. It was first published in the American Press.

NCJFCJ Executive Director Mary Mentaberry announced that she is retiring effective September 30. Mentaberry, who has been with the Council for 37 years, the past 6 as Executive Director, is stepping down to pursue other interests. "Mentaberry's contributions to the Council over the past four decades have been exemplary" says President Michael Key and "her dedication to the Council's mission and her efforts on behalf of juvenile courts around the country will be missed."

For the past two years, with Mentaberry at the Council's helm, NCJFCJ has been voted a finalist for the best place to work award in Reno, Nevada.

Mentaberry has received numerous awards individually and on behalf of the Council, including the December 1998 Award for Achievement for Service to Families and Children presented by Shay Bilchik, former Administrator of the Office of Juvenile Justice and Delinquency Prevention, US. Department of Justice; and the 2008 Distinguished Service Award from the National Center for State Courts presented by NCSC President Mary McQueen. Also in 2008 Mentaberry was honored for long-term commitment to children along with US. Congressman Patrick Kennedy (D-RI) at the National Association for Children of Alcoholics 25th Anniversary Gala in Washington, D.C. In March 2001 Mentaberry accepted an award on behalf of NCJFCJ's Permanency Planning for Children Department for Extraordinary Contributions to Systemic Reform in the Area of Adoption presented by the Dave Thomas Foundation for Adoption.

Mentaberry has been recognized for her ground-breaking work in guiding the Council's nationally-recognized Victims Act Model Courts Project from its inception until 2004 when she became Executive Director of NCJFCJ. The project focuses on improving court practice in handling of child abuse and neglect cases and is working in jurisdictions nationwide including Los Angeles, Chicago and New York City.

The Council is a non-profit organization focused on improving court practice and enhancing juvenile and family courts to provide better outcomes for children and families nationwide. Located on the University of Nevada, Reno campus, the NCJFCJ has been providing key resources to judges and court systems nationally since 1937.

European Section—inaugural meeting

Joseph Moyersoen

On 27 November 2010 during the Congress of the Italian Association of Magistrates for Youth and Families in Bologna, the European Section of IAYFJM was officially born. A project of Save the Children, funded by the European Commission, in which IAYFJM members took part—the issue of unaccompanied foreign children—enabled a meeting of the European Section to take place.

The meeting was attended by Beate Matschnig (Austria), Francine Biron (Belgium), Daniel Pical, Herve Hamon, Geneviève Lefebvre and Robert Bidart (France), Joseph Moyersoen (Italy), Ewa Waszkiewicz (Poland), Beatriz Borges Marques (Portugal) , Avril Calder (United Kingdom) and Anne Catherine Hatt (Switzerland). The meeting was attended by Marilyn Fontemachi Brandi and Eduardo Brandi (Argentina) and by a dozen Italian colleagues as observers. The mandate of the European Section, already discussed at the Executive Committee and the Council of IAYFJM in Sion on 10th October 2010, was approved and signed in its final version. **Judge Daniel Pical** was elected **President**, and **Judge Anne Catherine Hatt, Vice-President** (pictured above).

Unaccompanied foreign children

The topic for the meeting was unaccompanied foreign children and participants collected a wealth of information on the basis of a questionnaire focused on six areas: definition, statistical data, identification, welcome, integration and repatriation.

The situation that emerges from the discussion is highly diversified across countries, but in common with all national situations addressed, with the exception of Portugal, is the presence of a large number of unaccompanied foreign children, particularly in France and Italy.

Among the most important information emerging from the discussion was the agreement between Romania and France for the repatriation of unaccompanied children. This had been ruled unconstitutional by the French Constitutional Council and was therefore nullified. The issue is currently under consideration by the Italian Constitutional Court with regard to a similar agreement adopted between Romania and Italy. Another interesting aspect was the fact that some countries (eg Belgium) distinguish between unaccompanied foreign children seeking asylum and those not seeking asylum, other countries do not make this distinction and all unaccompanied foreign children are considered seeking asylum (eg. Austria).

Results of the discussion on this topic (with other documents) will be published on the IAYFJM website **www.aimjf.org** which will soon be available (as the on-line forum already is).

Next meeting of the European Section

The next meeting of the European Section is being organized by the French Association of Youth and Family Magistrates (AFMJF) and will be held in Paris on 19th March 2011, on the occasion of the AFMJF Assembly. The planned title is: "Focus on Juvenile justice: a shared ambition for Europe" and the event will include three panel discussions:

1. the framework of international and European standards—Safeguards and resources;
2. problems facing Juvenile Justice—regressive legislative developments, resource and financial constraints etc;
3. future prospects and ambitions—innovative measures etc.

All IAYFJM members are invited to attend this meeting. The AFMJF can handle travel and hotel expenses for one representative from each of the countries forming the IAYFJM European Section. Colleagues wishing to attend should contact **daniel.pical@orange.fr** as soon as possible indicating which roundtable (1st, 2nd or 3rd) they wish to participate in to describe the position in their country.

Treasurer's column — Avril Calder

Subscriptions 2011

In February 2011 I will send out e-mail requests for subscriptions to individual members (GBP 30; Euros 35; CHF 55 for the year 2011 as agreed at the General Assembly in Tunis in April 2010) and to National Associations.

May I take this opportunity to remind you of the ways in which you may pay:

1. by going to the website at www.judgesandmagistrates.org, clicking on subscription and paying online, using PayPal. This has two stages to it, and is both the simplest and cheapest way to pay; any currency is acceptable. PayPal will do the conversion to GBP;

2. through the banking system. I am happy to send bank details to you of either the account held in GBP (£) or CHF (Swiss Francs) or Euros. My e-mail address is ac.iayfjm@btinternet.com; or

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.

Avril Calder

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
European Commission	Towards an EU strategy on the Rights of the Child IP/10/1653: EU Justice Ministers back new rules to bring legal certainty to couples in cross-border divorces	http://ec.europa.eu/justice/policies/children/policies_children_intro_en.htm http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1653&format=HTML&aged=0&language=EN&guiLanguage=en
United Nations **UNODC** Handbook	Justice in Matters Involving Child Victims and Witnesses of Crime NB This handbook is available in Arabic	http://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf
Bernard Boeton* Fondation Terre des Hommes (TdH)	Working Group on an Optional Protocol to the Convention on the Rights of the Child – for an individual **complaint mechanism**	http://www.terredeshommes.org/index.php?lang=en&page=res#optionalprotocolrc10
Jean Zermatten* Institut international des Droits de l'Enfant **(IDE),** Vice Chair UN Committee on Rights of Child	**Complaints Mechanism for the CRC** is Vital for Enforcement of Rights for all Children	http://www.childsrights.org/html/site_en/index.php?subaction=showfull&id=1295608841
IDE Seminar	"Climate Change and Its Impact on Children's Rights" October 24th to 28th, 2011 Sion – Switzerland	www.childsrights.org
The Child Rights Information Network **(CRIN)**	**Extracts from the Committee on the Rights of the Child Concluding Observations Jan. 2011** CRIN's website offers child rights resources which include information in four languages (Arabic, English, French and Spanish).	Email: info@crin.org www.crin.org
Interagency Panel on Juvenile Justice **(IPJJ)**	Newsletter	newsletter@juvenilejusticepanel.org
England and Wales Green Paper (Consultation Document**)**	Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders	http://www.justice.gov.uk/consultations/breaking-cycle-071210.htm
International Juvenile Justice Observatory **(IJJO)**	9th-10th November 2010 IV International Conference, Rome	http://www.ijjo.org/home.php?idioma=en

Council Meeting Sion, Switzerland, October 12th 2010

Avril Calder, Joseph Moyersoen, Françoise Mainil, Sophie Ballestrem, Anne-Catherine Hatt, Laura Laera, Renate Winter, Petra Guder(inset)

Present at meeting, but not in photograph: Ridha Khemakhem

Present via 'skype' Oscar d'Amours, Eduardo Rezende Melo,

Bureau/Executive/Consejo Ejecutivo 2010-2014

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Council—2010-2014

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Hervé Hamon (France)
Daniel Pical (France)
Sophie Ballestrem (Germany)
Petra Guder (Germany)
Sonja de Pauw Gerlings Döhrn (Netherlands)
Andrew Becroft (New-Zealand)
Judy de Cloete (South Africa)
Anne-Catherine Hatt (Switzerland)
Len Edwards (USA)

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

Chronicle Chronique Crónica — Voice of the Association

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

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

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

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

Contributions from all readers are welcome. Articles for publication must be submitted in English, French or Spanish. The Editorial Board undertakes to have articles translated into all three languages—it would obviously be a great help if contributors could supply translations. Articles should, preferably, be 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 e-mail addresses listed below.

Articles for the Chronicle should be sent directly to:

Avril Calder, Editor-in-Chief,

e-mail : acchroniclelayfjm@btinternet.com

or : chronicle@aimjf.org

Editorial Board